TEXAS REGISTER

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This month's front cover artwork:

Artist: *Tereena Woods*
9th Grade
Jefferson 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.

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

The artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*. The artwork does not add additional pages to each issue and does not increase the cost of the *Texas Register*.

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TABLES AND GRAPHICS

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IN ADDITION

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Comptroller of Public Accounts

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Texas Department of Criminal Justice

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Finance Commission of Texas

Texas Health and Human Services Commission

Texas Department of Housing and Community Affairs

Texas Department of Human Services

Texas Department of Insurance

Texas Lottery Commission

Texas Natural Resource Conservation Commission

Open Meetings

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

Notices are published in the electronic *Texas Register* and available on-line.
http://www.sos.state.tx.us/texreg

To request a copy of a meeting notice by telephone, please call 463-5561 if calling in Austin. For out-of-town callers our toll-free number is (800) 226-7199. Or fax your request to (512) 463-5569.

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

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

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

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.

Withdrawal of Open Records Request

NOTICE: The following issue for decision has been withdrawn by the Office of the Attorney General. Therefore, no formal open records decision will be rendered on the following issue:

ORQ-42 (ID# 131599).

Regarding construction of the law enforcement exception of the Public Information Act, section 552.108 of the Government Code, as amended by the 75th Legislature; the factors that a governmental body must establish to show that section 552.108(a)(1) or (a)(2) applies; and related questions.

For more information, please contact Michael Garbarino at (512) 936-6736.

TRD-200107708
Susan Gusky
Assistant Attorney General
Office of the Attorney General
Filed: December 10, 2001

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PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 74. CREDIT SERVICES ORGANIZATIONS

1 TAC §74.21, §74.22

The Office of the Secretary of State proposes amendments to §74.21 and §74.22, concerning the registration of credit services organizations. The amendment to §74.21 is proposed in order to clarify that the filing fee for the renewal of a credit service organization's registration is the same as the filing fee for the initial registration. The amendment to §74.22 is proposed to correct the statutory reference concerning the filing of a security deposit and to clarify that, if required, security deposits must be filed for each of the credit service organization's locations. The amendment also clarifies that a credit services organization must use the form promulgated by the secretary of state. The form is readily available from the Office of the Secretary of State, and may also be downloaded from the Secretary of State's Internet site.

Guy Joyner, Chief, Legal Support Unit, Statutory Documents Section has determined that for the first five year period that the proposed amendments are in effect there will be no fiscal implications for state or local government or small business as a result of enforcing the amendments.

Mr. Joyner also has determined that for each year of the first five years that the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be the clarification of the requirements for initiating and renewing a credit services organization's registration, and a clarification of the statutory basis for requiring the filing of a security deposit for each of a credit services organization's locations. The amendments will also streamline the processing of registration and renewal applications by requiring the use of a standard form. There will be no effect on large businesses, small businesses or micro-businesses. There will be no additional economic cost to individuals. There is no anticipated impact on local employment.

Comments on the proposed amendments may be submitted to Guy Joyner, Chief, Legal Support Unit, Statutory Documents Section, P.O. Box 12887, Austin, Texas 78711-2887.

The amendments are proposed under the Texas Government Code, §2001.004(1) which provides the Secretary of State with the authority to prescribe and adopt rules. The amendments affect the Texas Finance Code, §393.101 and §393.302.

§74.21. Fee.

The filing fee for registering or renewing the registration of a credit services organization is $100.

§74.22. Registration of a Credit Services Organization.

(a) The Office of the Secretary of State hereby adopts by reference the form, Registration Statement of a Credit Services Organization. All persons registering shall use the form promulgated by the secretary of state. The form may be obtained from the Statutory Documents Section of the Office of the Secretary of State, P.O. Box 12887, Austin, Texas 78711-2887, (512) 463-6906. It is also available on the Internet at http://www.sos.state.tx.us. The credit services organization must provide[~~, or a document which shall contain~~] the following information:

(1) the name and address of the credit services organization;

(2) the name and address of any person who directly or indirectly owns or controls 10% or more of the outstanding shares of stock in the credit services organization;

(3) a copy of the surety bond or[~~,~~] surety account notice for each of the credit services organization's locations, or a statement explaining why the Texas Finance Code, §393.302 [~~§393.301~~], is not applicable;

(4) a full and complete disclosure of any litigation or unresolved complaint filed with a governmental authority of this state relating to the operation of the credit services organization, or a sworn statement that states that there has been no litigation or unresolved complaint with a governmental authority of this state relating to the operation of the credit services organization. [~~Copies of the form may be obtained by contacting the Office of the Secretary of State, Statutory Documents, P.O. Box 12887, Austin, Texas 78711-2887.~~]

(b) The registration will be effective as of the date of receipt by the secretary of state of a complete registration form and the receipt of the filing fee provided in §74.21 of this title (relating to Fee).

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

Filed with the Office of the Secretary of State, on December 4, 2001.

TRD-200107571
Geoffrey S. Connor
Assistant Secretary of State
Office of the Secretary of State
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 475-0775

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CHAPTER 81. ELECTIONS
SUBCHAPTER A. VOTER REGISTRATION

1 TAC §81.10

The Office of the Secretary of State, Elections Division, proposes a new rule, §81.10, concerning the distribution of any surplus computer equipment to eligible counties in order to comply with §18.063 of the Texas Election Code.

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

Ms. Nickless has also determined that for each year of the first five years that the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be for the Secretary of State to give surplus computer equipment to certain counties for the purpose of improving voter registration technology and complying with §18.063 of the Texas Election Code. There will be no effect on small businesses. The only anticipated economic costs to persons who are required to comply with the rule as proposed is the minimal costs of obtaining the surplus equipment.

Comments on the proposal will be accepted through December 31, 2001 and may be submitted to Melinda Nickless, Assistant Director of Elections, Office of the Secretary of State, P.O. Box 12060, Austin, Texas 78711-2060.

The rule is proposed under Texas Election Code, Chapter 31, Subchapter A, §31.003, which authorizes the Office of the Secretary of State to promulgate rules to obtain uniformity in the interpretation and application of the Code, and Chapter 18, §18.063 of the Code, which requires the Secretary of State to give surplus computer equipment to certain counties for the purpose of improving voter registration technology and complying with §18.063 of the Texas Election Code.

Texas Election Code, Chapter 18, §18.063 is affected by this proposed rule.

§81.10. Distribution of Surplus Computer Equipment to Eligible Counties Under §18.063 of the Texas Election Code.

Distribution of surplus computer equipment after January 1, 2002

(1) During the months of January and August, the Secretary of State will determine if any computer equipment is available to eligible counties.

(2) During the months of June and December, the Secretary of State will identify which counties, with a population of 60,000 or less based on the 2000 United States Census figures, may have insufficient resources to acquire the new technology that is required for counties to comply with §18.063 of the Texas Election Code. The Secretary of State will use the following formula to identify these potential counties, which is based on the most recent data available from the Comptroller of Public Accounts for a county's property and sales tax (if applicable) worth for the same calendar year, and the total number of registered voters most recently compiled by the Secretary of State. The formula for disbursement of surplus computer equipment is: County Property Sales Tax Estimated Amount Collected + County Sales Tax Actual Amount Collected (if applicable) (Number of County's Registered Voters = Tax Collected per Voter

(3) Once a county has been identified, and the number of computers available for disbursement has been ascertained, the Secretary of State will inform during the months of January and August, the eligible counties and the amount of computer equipment available and how to submit a request for the computer equipment. The county's request has to be completed and sworn by the county judge in order for the county to be considered for receipt of the surplus computer equipment. The county judge will swear in an affidavit that:

(A) the county does not have the necessary resources to comply with the provisions of §18.063 of the Texas Election Code;

(B) the county will need this computer equipment to comply with this section;

(C) the county has the minimum resources necessary to support this computer equipment; and

(D) the county will bear the cost of transporting this computer equipment if request is approved.

(4) The county must submit their affidavit to the Secretary of State by the 20th day after the date of the request.

(5) The Secretary of State will review the completed affidavits, and will notify the counties who have qualified to receive surplus computer equipment by the 5th after the completed request has been received by the Secretary.

(6) Any surplus computer equipment not requested by an eligible county identified pursuant to paragraphs (1) and (2) of this section will lapse back to the Secretary of State's general inventory of computer equipment.

(7) Surplus computer equipment will be available for disbursement to the counties during the months of February and September pursuant to this Subchapter of the Texas Administrative Code and the applicable provisions of the Texas Election Code. As sworn to in the request completed pursuant to paragraph (2) of this section, the counties are responsible for the expense of having the computer equipment transported to them. If a county has not accepted delivery of their allocated computer equipment within 60 days of notification by the Secretary of State, the computer equipment will lapse back to the Secretary of State's general inventory of computer equipment.

(8) Secretary of State's computer equipment provided to approved counties pursuant to paragraph (4) of this section will be "as is." The Secretary of State will not provide any technical support, repair services, operating systems or software for this computer equipment.

(9) There is no appeal process for this section.

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

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

TRD-200107835
Geoffrey S. Connor
Assistant Secretary of State
Office of the Secretary of State
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 463-5701

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SUBCHAPTER I. CAMPAIGN REPORTING AND DISCLOSURE

1 TAC §§81.200 - 81.202, 81.210

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the Office of the Secretary of State, Texas Register Division, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Office of the Secretary of State, Elections Division, proposes the repeal of the contents of Subchapter I, §§81.200 - 81.202 and 81.210, concerning campaign reporting and disclosure administrative rules. The repeal is proposed to remove these rules since they are no longer under the jurisdiction of the Elections Division. This area of Texas law is now under the jurisdiction of the Texas Ethics Commission.

Melinda Nickless, Assistant Director of Elections, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Ms. Nickless has determined also that for each year of the first five years the repeals are in effect, the public benefit anticipated as a result of the repeal is to provide a clean-up of the administrative rules which are no longer under the Elections Division's jurisdiction. There will be no effect on small businesses. There will be no anticipated economic cost to the state or local governments.

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

The repeal is proposed under the Code, Chapter 31, Subchapter A, §31.003, which provides the Secretary of State with authority to promulgate rules to obtain uniformity in the interpretation and application of the Code.

The Code, Title 7, is affected by this proposed repeal.

§81.200. Definition of "Significant Noncompliance" for Purposes of the Texas Election Code, §251.034.

§81.201. Submission of an Amended Report in Response to a Periodic Review Notice by the Secretary of State.

§81.202. Instances of "Significant Noncompliance" Which Are Not Correctable.

§81.210. Disclosure of the Purpose of Expenditures.

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

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

TRD-200107836
Geoffrey S. Connor
Assistant Secretary of State
Office of the Secretary of State
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For further information, please call: (512) 463-5701

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TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 303. GENERAL PROVISIONS

SUBCHAPTER D. TEXAS BRED INCENTIVE PROGRAMS

DIVISION 2. PROGRAM FOR HORSES

16 TAC §303.99

The Texas Racing Commission proposes an amendment to §303.99, relating to stakes and other prepayment races, breed registries. The amendment deletes an incorrect cross-reference and inserts the proper reference.

Judith L. Kennison, General Counsel for the Texas Racing Commission, has determined that for the first five-year period the amendment is in effect there are no fiscal implications for state or local government as a result of enforcing the proposals.

Ms. Kennison has also determined that for each of the first five years the amendment is in effect the public benefit anticipated will be greater reliability in the accuracy of the Commission rules. There will be no fiscal implications for small or micro-businesses. There is no anticipated economic cost to an individual required to comply with the amendment as proposed. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Written comments must be submitted within 30 days after publication of the proposed amendment in the *Texas Register* to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, fax (512) 833-6907.

The amendment is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas and §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks.

The proposed amendment implements Texas Civil Statutes, Article 179e.

§303.99. Stakes and Other Prepayment Races--Breed Registries.

If an official breed registry sponsors or accepts payments for a stakes or other prepayment race, the breed registry shall follow the procedures set forth in §309.298 [~~§309.200~~] of this title (relating to Stakes and Other Prepayment Races).

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

Filed with the Office of the Secretary of State, on December 4, 2001.

TRD-200107558
Judith L. Kennison
General Counsel
Texas Racing Commission
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 833-6699

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CHAPTER 309. RACETRACK LICENSES AND OPERATIONS
SUBCHAPTER D. GREYHOUND RACETRACKS
DIVISION 2. OPERATIONS

16 TAC §309.361

The Texas Racing Commission proposes an amendment to §309.361. The purpose of this amendment is to hold purses in greyhound stakes races until all drug testing has been completed and cleared in all trial races and finals before the distribution of purse money to affected persons. In affect, the amendment provides an exception to the 10-day payout requirement of greyhound purses. The amendment is necessary to avoid financial difficulty to those affected persons who may be required to reimburse a share of the purse due to a positive test found in qualifying rounds or in the finals.

Judith L. Kennison, General Counsel for the Texas Racing Commission, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government.

Ms. Kennison has also determined that for each of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the proposal will be that the public is assured that rules affecting the integrity of racing and pari-mutuel wagering are strictly enforced. There will be a slight economic impact to small or micro businesses in that there will be some delay of payment to affected persons during the testing phase. There is no anticipated economic cost to an individual required to comply with the amendment as proposed. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Written comments must be submitted within 30 days after publication of the proposed amendment in the *Texas Register* to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, fax (512) 833-6907.

The amendment is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas, and §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks.

The proposed amendment implements Texas Civil Statutes, Article 179e.

§309.361. Greyhound Purse Account and Kennel Account.

(a) (No change.)

(b) Kennel Account.

(1) An association shall maintain a separate bank account known as the "kennel account". The association shall maintain in the account at all times a sufficient amount to pay all money owed to kennel owners for purses, stakes, rewards, and deposits.

~~[(2) Purse money for a completed race shall be transferred from the greyhound purse account to the kennel account on or before the tenth day after the week's races have run.]~~

(2) ~~[(3)]~~ Except as otherwise provided by these rules, an association shall pay the purse money owed from a purse race to those who are entitled to the money not later than 10 days after the date of the race and from a stakes race to those who are entitled to the money immediately after the executive secretary advises the association that all of the qualifying rounds and the final race have been cleared for payment.

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

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

Filed with the Office of the Secretary of State, on December 4, 2001.

TRD-200107559
Judith L. Kennison
General Counsel
Texas Racing Commission
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 833-6699

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CHAPTER 315. OFFICIALS AND RULES FOR GREYHOUND RACING
SUBCHAPTER D. GREYHOUND BREEDING FARMS

16 TAC §315.250

The Texas Racing Commission proposes new §315.250, pertaining to standards for greyhound breeding farms. The new section provides for minimum standards for greyhound breeding farms as required by §10.04(b) of the Racing Act.

Judith L. Kennison, General Counsel for the Texas Racing Commission, 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 government as a result of enforcing the proposal because the Commission will not conduct the actual inspections but will rely on the reports of the National Greyhound Association.

Ms. Kennison has also determined that for each of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the proposal will be that the public can be assured that the Commission will be monitoring the condition of greyhounds that race in Texas to ensure the health of the animals. In addition, the public can also be assured that the greyhounds participating in pari-mutuel racing in Texas are whelped from inspected farms. There will be no fiscal implications for small businesses or micro-businesses. There is no anticipated economic cost to an individual required to comply with

the section as proposed. The proposal will have no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries, unless a greyhound breeding farm expends funds to upgrade its facilities.

Written comments must be submitted within 30 days after publication of the proposed new section in the *Texas Register* to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, fax (512) 833-6907.

The new section is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas, §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks, and §10.04, which authorizes the Commission to adopt standards relating to the operation of greyhound farms.

The new section implements Texas Civil Statutes, Article 179e.

§315.250. Standards for Greyhound Breeding Farms.

The Commission adopts by reference the standards for inspection of greyhound breeding farms of the National Greyhound Association dated October, 1993, amended October, 2000 and October, 2001. Copies of these standards are available at the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711 or at the Commission office at 8505 Cross Park Drive, Suite 110, Austin, Texas 78754-4594.

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

Filed with the Office of the Secretary of State, on December 4, 2001.

TRD-200107560
Judith L. Kennison
General Counsel
Texas Racing Commission
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 833-6699

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CHAPTER 319. VETERINARY PRACTICES AND DRUG TESTING
SUBCHAPTER D. DRUG TESTING
DIVISION 2. TESTING PROCEDURES

16 TAC §319.338

The Texas Racing Commission proposes new §319.338, relating to the storage of split samples. This section was formally known as §319.363. It is proposed that rule be moved into the testing procedures subsection of the rulebook. By creating this new section in its current placement, the storage procedure will apply to both horses and greyhounds without unnecessary repetition.

Judith L. Kennison, General Counsel for the Texas Racing Commission, 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 government as a result of enforcing the proposal.

Ms. Kennison has also determined that for each of the first five years the new section is in effect the public benefit anticipated will be increased ease of use when referring to the Commission rules and assurance that the Commission's testing procedures are held to the highest standards. There will be no fiscal implications for small businesses or micro-businesses. There is no anticipated economic cost to an individual required to comply with the section as proposed. The proposal will have no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Written comments must be submitted within 30 days after publication of the proposed new section in the *Texas Register* to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, fax (512) 833-6907.

The new section is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas, and §3.16 which authorizes the Commission to adopt rules relating to split testing procedures.

The new section implements Texas Civil Statutes, Article 179e.

§319.338. Storage of Splits.

(a) The commission veterinarian shall store the retained part of a specimen at a site approved by the Commission for the period required by this section. The split specimen shall be stored in a manner that ensures the safety and integrity of the part.

(b) If the result of the initial test on a specimen is negative, the commission veterinarian may discard the retained part of the specimen on receipt of the negative result. If the result of the initial test on a specimen is positive, the commission veterinarian may discard the split specimen of the specimen after all appeals are exhausted and the disposition of the matter is final.

(c) The association at which a specimen is obtained shall pay all the costs of storage incurred under this section.

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

Filed with the Office of the Secretary of State, on December 4, 2001.

TRD-200107561
Judith L. Kennison
General Counsel
Texas Racing Commission
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 833-6699

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DIVISION 3. PROVISIONS FOR HORSES

16 TAC §319.362

The Texas Racing Commission proposes an amendment to §319.362, relating to split specimen. The amendment modifies the rule to reflect the current practice of handling split samples for horses.

Judith L. Kennison, General Counsel for the Texas Racing Commission, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the proposal.

Ms. Kennison has also determined that for each of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the proposal will be that the Commission's rules will be internally consistent. There will be no fiscal implications for small businesses or micro-businesses. There is no anticipated economic cost to an individual required to comply with the amendment as proposed. The proposal will have no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Written comments must be submitted within 30 days after publication of the proposed amendment in the *Texas Register* to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, fax (512) 833-6907.

The amendment is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas, and §3.16 which authorizes the Commission to adopt rules relating to split testing procedures.

The proposal implement Texas Civil Statutes, Article 179e.

§319.362. Split Specimen.

(a) Before sending a specimen from a horse to a testing laboratory, the commission veterinarian shall determine whether the specimen is of sufficient quantity to be split. If there is sufficient quantity, the commission veterinarian or the commission veterinarian's designee shall divide the specimen into two parts. If the specimen is of insufficient quantity to be split, the commission veterinarian may require the horse to be detained until an adequate amount of urine can be obtained. If the commission veterinarian ultimately determines the quantity of the specimen obtained is insufficient to be split, the commission veterinarian shall certify that fact in writing and submit the entire specimen to the laboratory for testing. [~~Before sending a specimen from a horse to a testing laboratory, the commission veterinarian or commission veterinarian's designee shall divide the specimen into two parts. The veterinarian or designee shall ensure that the part of the specimen that is to be sent to the laboratory is of a quantity sufficient for testing and subsequent storage by the laboratory.~~]

(b) - (d) (No change.)

[~~(e) Notwithstanding this section, a urine specimen will not be split if less than 50 cc of urine are obtained. In such instances, the Commission is entitled to submit the entire urine specimen for testing or detain the horse until an adequate amount of urine can be obtained.~~]

(e) [~~(f)~~] If the test on the split specimen confirms the findings of the original laboratory, it is [~~considered to be~~] a prima facie violation of the applicable provisions of the chapter.

(f) [~~(g)~~] If the test on the split specimen portion does not substantially confirm the findings of the original laboratory, the stewards may not take disciplinary action regarding the original test results.

(g) [~~(h)~~] If an act of God, power failure, accident, labor strike, or any other event, beyond the control of the Commission [~~or its representatives~~], prevents the split from being tested, the findings of the original laboratory are [~~shall be~~] prima facie evidence of the condition of the horse at the time of the race.

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

Filed with the Office of the Secretary of State, on December 4, 2001.

TRD-200107562
Judith L. Kennison
General Counsel
Texas Racing Commission
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 833-6699

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16 TAC §319.363

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

The Texas Racing Commission proposes the repeal §319.363, relating to the storage of split samples. The repeal is necessary because a new section has been created which provides for storage procedures. These procedure which will be applicable to both horses and greyhounds.

Judith L. Kennison, General Counsel for the Texas Racing Commission, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing the proposal.

Ms. Kennison has also determined that for each of the first five years the repeal is in effect the public benefit anticipated will be that the Commission's rules will be internally consistent. There will be no fiscal implications for small businesses or micro-businesses. There is no anticipated economic cost to an individual required to comply with the repeal as proposed. The proposal will have no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Written comments must be submitted within 30 days after publication of the proposed repeal in the *Texas Register* to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, fax (512) 833-6907.

The repeal is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas, and §3.16 which authorizes the Commission to adopt rules relating to split testing procedures.

The repeal implements Texas Civil Statutes, Article 179e.

§319.363. Storage of Splits.

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

Filed with the Office of the Secretary of State, on December 4, 2001.

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Judith L. Kennison
General Counsel
Texas Racing Commission
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 833-6699

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DIVISION 4. PROVISIONS FOR GREYHOUNDS

16 TAC §319.391

The Texas Racing Commission proposes amendments to §319.391, relating to the testing of greyhounds. The amendments provide a procedure to request a split sample, to determine when a split is to be performed, and to maintain the split sample for greyhound testing.

Judith L. Kennison, General Counsel for the Texas Racing Commission, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing the proposal.

Ms. Kennison has also determined that for each of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the proposal will be that the Commission's rules will be internally consistent. There will be no fiscal implications for small businesses or micro-businesses. There is no anticipated economic cost to an individual required to comply with the amendments as proposed. The proposal will have no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Written comments must be submitted within 30 days after publication of the proposed amendments in the *Texas Register* to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, fax (512) 833-6907.

The amendments are proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas, and §3.16 which authorizes the Commission to adopt rules relating to split testing procedures.

The proposal implements Texas Civil Statutes, Article 179e.

§319.391. Testing of Greyhounds.

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

(c) Before sending a specimen from a greyhound to a testing laboratory, the commission veterinarian shall determine whether the specimen is of sufficient quantity to be split. If there is sufficient quantity, the commission veterinarian or the commission veterinarian's designee shall divide the specimen into two parts. The commission veterinarian or the commission veterinarian's designee shall retain custody of the portion of the specimen that is not sent to the laboratory. The commission veterinarian or commission veterinarian's designee shall store the split specimen in a manner that ensures the integrity of the specimen. If the specimen is of insufficient quantity to be split, the commission veterinarian shall certify that fact in writing and submit the entire specimen to the laboratory for testing. [~~The racing judges or the commission veterinarian may authorize a specimen to be split.~~]

(d) The trainer or kennel owner for a greyhound that has tested positive for a prohibited drug, chemical, or other substance may request, in writing, that the split specimen, if any, be submitted for testing at a Commission-approved and listed laboratory. The trainer or kennel owner must notify the executive secretary of the request not later than 48 hours after notice of the positive test. Failure to request the split specimen be tested within the prescribed time period constitutes a waiver of the right to have the split specimen tested. [~~The commission veterinarian may require a body fluid sample to be stored in a frozen state for future analysis.~~]

(e) If the split specimen is sent for testing, the commission staff shall arrange for transportation of the specimen in a manner that ensures the integrity of the specimen. To ensure the integrity of the specimen, the split specimen must be shipped within 10 days after the kennel owner is notified of the positive test. Subject to the deadline, the kennel owner is entitled to be present or have a representative present at the time the split specimen is sent for testing.

(f) If the test on the split specimen confirms the finding of the original laboratory, it is a prima facia violation of the applicable provisions of this chapter. If the test on the split specimen does not substantially confirm the findings of the original laboratory, the racing judges may not take disciplinary action regarding the original test results.

(g) If an act of God, power failure, accident, labor strike, or other event beyond the control of the Commission prevents the split specimen from being tested, the findings of the original laboratory are prima facia evidence of the condition of the greyhound at the time of the race.

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

Filed with the Office of the Secretary of State, on December 4, 2001.

TRD-200107564
Judith L. Kennison
General Counsel
Texas Racing Commission
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 833-6699

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PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT

SUBCHAPTER D. LOTTERY GAME RULES

16 TAC §401.305, §401.312

The Texas Lottery Commission proposes amendments to 16 TAC §401.305 and §401.312 relating to Lotto Texas and Texas Two Step on-line game rules, respectively. The proposed amendments provide for the payment of the greater of the advertised jackpot amount or the jackpot amount based on sales determined in part by the applicable interest rate factor; and, definitions of "advertised jackpot", "annual payment option", and "jackpot amount". The amendments also delete language that provides that no prize amount shall be less than $5.00. While the 3 of 6 prize pays $5.00, it is possible, albeit

a remote possibility, that the 4 of 6 prize category could pay less than $5.00 because of the pari-mutuel nature of that prize category. Therefore, the Commission proposes the deletion of the language. The amendments, in part, also eliminate redundant, confusing, or obsolete language and update the rules to current agency practice. Additionally, the Commission received a comment in which the commenter suggested the Commission reconsider the wording "cash value option" and instead use the phrase "net present cash value" in the "Lotto Texas" rule. Staff agrees with the commenter and proposes this new language as a definition for "net present cash value option". With regard to Texas Two Step, proposed amendments also allow players to claim prizes up to $999,999 at claims centers, clarify what numbers selected by the player must match the numbers drawn to win a prize, and more accurately describe how the advertised jackpot is determined.

Government Code §2001.039, and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature (1999), requires each state agency to review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedures Act). 16 TAC Chapter 401 has been reviewed in its entirety and the Commission determined that reasons for adopting certain sections continue to exist. The certain sections that have been readopted pursuant to Commission Order No. 00-0004, dated January 28, 2000, are set out in Exhibit "A" to the Order. The notice of the proposed rule review was published in the November 12, 1999, issue of the *Texas Register* (24 TexReg 10149). No comments were received regarding the agency's rule review of Chapter 401. The proposal of this rulemaking as to §401.305 is consistent with and, in part, the result of the agency's rule review.

Bart Sanchez, Financial Administration Director, has determined that for each year of the first five years the sections are in effect there will not be foreseeable additional fiscal implications for state or local government as a result of enforcing or administering these rules. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing these sections.

Robert Tirloni, On-line Products Manager, Marketing Division, has determined that for each of the first five years the sections as proposed are in effect, the public benefit anticipated as a result of the proposed amendments is to benefit the players by paying the greater of the advertised jackpot amount or the jackpot amount based on sales determined in part by the applicable interest rate factor and also by eliminating redundant or obsolete language and updating §401.305 to current agency practice.

Written comments on the proposed amendments may be submitted to Kimberly L. Kiplin, General Counsel, Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630. The Texas Lottery Commission will also conduct a hearing to receive comment on the proposed amendments on January 9, 2002 at 9:00 a.m. at the Commission auditorium, 611 E. Sixth Street, Austin, Texas.

The amendments are proposed under Government Code, Section 466.015 which authorizes the Commission to adopt all rules necessary to administer the State Lottery Act and to adopt rules governing the establishment and operation of the lottery, and under Government Code, Section 467.102 which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction. The amendments are also proposed under Government Code, Section 466.015 which authorizes the Executive Director to propose rules to be adopted by the Commission.

The amendments affect Government Code, Chapter 466.

§401.305. "Lotto Texas" On-Line Game Rule.

(a) Lotto Texas. A Texas Lottery on-line game to be known as "Lotto Texas" is authorized to be conducted by the executive director under the following rules and under such further instructions and directives as the executive director may issue in furtherance thereof. If a conflict arises between this section and §401.304 of this title (relating to On-Line Game Rules (General)), this section shall have precedence.

(b) Definitions. In addition to the definitions provided in §401.301 [~~§401.304~~] of this title (relating to General Definitions [~~On-Line Game Rules (General)~~]), and unless the context in this section otherwise requires, the following definitions apply.

(1) Advertised jackpot-The jackpot amount the commission establishes for each Lotto Texas drawing and authorizes commission vendors to publicize. The advertised jackpot or share of the advertised jackpot is the amount the commission may pay as the annual payment option in 25 annual payments consistent with the provisions of this rule. The advertised jackpot is determined by the indirect prize category and by estimating the direct prize category and may be increased prior to the draw by the commission based on sales projections.

(2) Annual payment option-The option selected if the player elects at the time the player purchases a ticket or if the player makes no election at the time the player purchases the ticket. The option is to be paid the jackpot amount in 25 annual payments, in the event the player has a valid winning jackpot ticket and consistent with the provisions of the rule.

(3) Jackpot amount-The greater of either the advertised jackpot or the jackpot based on sales determined in part by the applicable interest rate factor. The amount actually paid will either be a winner's share of the net present cash value of the jackpot amount or a winner's share of the jackpot amount, depending on the payment option and consistent with the provisions of the rule.

(4) [~~(1)~~] Net Present Cash value option--An election a player makes at the time the player purchases a ticket to be paid the net present cash value of the player's share of the jackpot amount, in the event the player has a valid winning jackpot ticket. The net present cash value is the cost that the Comptroller of Public Accounts informs the commission is the cost to purchase a 25-year annuity on the first business day after the drawing. The term "net present cash value option" is synonymous with the terms "cash value option", "cash option", and "net present value".

(5) [~~(2)~~] Number--Any play integer from one through 54 inclusive.

(6) [~~(3)~~] Play--The six numbers selected on each play board and printed on the ticket.

(7) [~~(4)~~] Play board--A field of the 54 numbers found on the playslip.

(8) [~~(5)~~] Playslip--An optically readable card issued by the commission [~~Texas Lottery~~] used by players of Lotto Texas to select plays. There shall be five play boards on each playslip identified at A, B, C, D, and E. A playslip has no pecuniary value and shall not constitute evidence of ticket purchase or of numbers selected.

(c) Price of ticket. The price of each Lotto Texas play shall be $1.00. A player may purchase up to five plays on one ticket. Multiple

draws are available for up to 10 consecutive draws beginning with the current draw.

(d) Play for Lotto Texas.

(1) Type of play. A Lotto Texas player must select six numbers in each play or allow number selection by a random number generator operated by the computer, referred to as Quick Pick. A winning play is achieved only when three, four, five, or six of the numbers selected by the player match, in any order, the six winning numbers drawn by the lottery.

(2) Method of play. The player may [~~will~~] use playslips to make number selections. The on-line terminal will read the playslip and issue ticket(s) with corresponding plays. If a playslip is not available or if a player is unable to complete a playslip, the on-line retailer may enter the selected numbers via the keyboard. However, the retailer shall not accept telephone or mail-in requests to manually enter selected numbers. A [~~If offered by the lottery, a~~] player may leave all play selections to a random number generator operated by the computer, commonly referred to as Quick Pick[~~"quick pick."~~].

(3) One prize per play. The holder of a winning ticket may win only one prize per play in connection with the winning numbers [~~number~~] drawn and shall be entitled only to the highest prize category won by those numbers.

(e) Prizes for Lotto Texas.

(1) Prize amounts. The prize amounts, for each drawing, paid to each Lotto Texas player who selects a matching combination of numbers will vary due to a pari-mutuel calculation, with the exception of the fourth prize, which is a guaranteed $5.00. The calculation of a prize shall be rounded down so that prizes can be paid in multiples of whole dollars. Each prize category breakage, with the exception of the fourth prize breakage, will carry forward to the next drawing for each respective prize category. The fourth prize category breakage will be placed in the reserve fund. [~~No prize amount shall be less than $5.00.~~] The pari-mutuel prize amounts,except the jackpot prize amount, are based on the total amount in the prize category for that Lotto Texas drawing distributed equally over the number of matching combinations in each prize category. The jackpot amount will be the greater of either the advertised jackpot or the jackpot based on sales determined in part by the applicable interest rate factor. The amount actually paid will either be a winner's share of the net present cash value of the jackpot amount or a winner's share of the jackpot amount, depending on the payment option and consistent with the provisions of the rule.
Figure: 16 TAC §401.305(e)(1)

(2) Prize pool. The prize pool for Lotto Texas prizes shall be a minimum of 55% of Lotto Texas sales.

(3) Prize categories.

(A) First prize (jackpot).

(i) In the event of a prize winner who does not select the net present cash value option, the prize winner's share of the jackpot amount shall be paid in 25 installments. To determine the annuitized future value of each share (prize amount), the annuitized future value of the jackpot amount [~~prize category~~] is divided by the shares. A share is the matching combination, in one play, of all six numbers drawn by the commission [~~Texas Lottery~~] (in any order). Each share will be paid in 25 installments. The initial payment shall be paid only upon completion of all internal validation procedures. The subsequent 24 payments shall be paid annually by monies generated by the purchase of securities which shall be purchased through the Comptroller of Public Accounts-Treasury Operations, State of Texas, after each drawing for which lottery records reflect the sale of one or more winning Lotto Texas six of six plays, and the value of the 24 installments shall be determined by the face or market value of said securities at purchase. Annual installment payments shall be based on the annual maturity value of the securities purchased. The payment of annual annuities will be made on the 15th day of the anniversary of the month in which the ticket won. If the net present cash value of each share is equal to or greater than the amount required to pay an initial first-year cash installment and 24 subsequent annuitized annual installments yielding total payments greater than [~~of~~] $2 million [~~or greater~~], each share shall be paid in 25 installments in the same manner as described in this paragraph. If the net present cash value of each share is less than the amount required to pay an initial first-year cash installment and 24 subsequent installments yielding total payments of $2 million or less, each share shall be paid the net present cash value of each share in one payment.

(ii) In the event of a prize winner who selects the net present cash value option, the prize winner's share will be paid in a single, lump sum payment based on the discounted, net present cash value of the prize winner's share of the jackpot amount on the next business day after the drawing. The player must make the election of the net present cash value option at the time of purchasing a Lotto Texas ticket. If the player does not make any election at the time of purchasing a Lotto Texas ticket, the share will be paid in accordance with clause (i) of this subparagraph.

(iii) The six of six jackpot prize must be claimed at the Austin claim center. The jackpot amount is determined by the indirect prize category and by estimating the direct prize category. The total prize category contribution for a drawing will include the following.

(I) The direct prize category contribution may be 68.24% of the prize pool for the drawing.

(II) The indirect prize category contribution, which may be increased by the executive director, will include the roll-over from the previous drawing, if any.

(III) The commission will pay the greater of either the advertised jackpot or the jackpot based on sales determined in part by the applicable interest rate factor. The amount actually paid will either be a winner's share of the net present cash value of the jackpot amount or a winner's share of the jackpot amount, depending on the payment option and consistent with the provisions of the rule.

(B) Second Prize. The prize amount shall be calculated by dividing the prize category contributions by the number of shares for the prize category. A share is the matching combination, in one play, of any five of the six numbers drawn by the commission [~~Texas Lottery~~] (in any order). The total prize category contribution will include the following.

(i) The direct prize category contribution shall be 5.07% of the prize pool for the drawing.

(ii) The indirect prize category contribution, which may be increased by the executive director, will include the breakage and/or roll-over from the previous drawing, if any.

(C) Third prize. The prize amount shall be calculated by dividing the prize category contributions by the number of shares for the prize category. A share is the matching combination, in one play, of any four of the six numbers drawn by the commission [~~Texas Lottery~~] (in any order). The total prize category contribution will include the following.

(i) The direct prize category contribution shall be 12.51% of the prize pool for the drawing.

(ii) The indirect prize category contribution, which may be increased by the executive director, will include the breakage and/or roll-over from the previous drawing, if any.

(D) Fourth prize. The prize amount is a guaranteed minimum $5.00. The difference between the prizes won and the direct prize category contribution will increase or decrease the prize reserve fund. The total prize category contribution will include the direct prize category contribution of 12.18% of the prize pool for the drawing. [Any roll-over amounts shall be added to the prize reserve fund. The total prize category contribution will include the following:]

[(i) The direct prize category contribution shall be 12.18% of the prize pool for the drawing.]

[(ii) The indirect prize category contribution as determined by the executive director.]

(4) Prize reserve fund.

(A) The Lotto Texas prize reserve is 2.0% of the prize pool.

(B) The Lotto Texas prize reserve fund may be increased or decreased by paying Lotto Texas prizes [any amounts allocated to the prize pool and not paid to the winners. The Lotto Texas prize reserve fund may be increased or decreased, for example, by rounding down, paying Lotto Texas prizes, and roll-over amounts from the fourth prize]. The Lotto Texas prize reserve fund may be used only for the Lotto Texas game.

(f) Ticket purchases.

(1) Lotto Texas tickets may be purchased only at a licensed location from a lottery retailer authorized by the lottery director to sell on-line tickets.

(2) Lotto Texas tickets shall show the player's selection of numbers [number] or Quick Pick (QP) numbers, boards played, drawing date, jackpot payment option, and validation and reference numbers.

(3) It shall be the exclusive responsibility of the player to verify the accuracy of the player's selection(s) and other data printed on the ticket. A ticket is a bearer instrument until signed.

(4) Except as provided in subsection (d)(2) of this section, Lotto Texas tickets must be purchased using official Lotto Texas playslips. Playslips which have been mechanically completed are not valid. Lotto Texas tickets must be printed on official Texas lottery paper stock and purchased at a licensed location through an authorized Texas lottery retailer's on-line terminal.

(g) Drawings.

(1) The Lotto Texas drawings shall be held each week on Wednesday and Saturday evenings at 9:59 p.m. Central Time except that the drawing schedule may be changed by the executive director, if necessary.

(2) Lotto Texas tickets will not be sold during the draw break for the Lotto Texas game [from 9:45 p.m. Central Time until 10 p.m. Central Time] on Wednesday and Saturday nights.

(3) The drawings will be conducted by lottery officials.

(4) Each drawing shall determine, at random, six winning numbers in accordance with Lotto Texas drawing procedures. Any numbers drawn are not declared winning numbers until the drawing is certified by the commission [Texas Lottery] in accordance with the drawing procedures. The winning numbers shall be used in determining all Lotto Texas winners for that drawing.

(5) Each drawing shall be witnessed by an independent certified public accountant. All drawing equipment used shall be examined by at least one commission [lottery] security representative, the drawing supervisor, and the independent certified public accountant immediately prior to a drawing and immediately after the drawing.

(6) A drawing will not be invalidated based on the financial liability of the commission [Texas Lottery].

(h) Announcement of incentive or bonus program. The executive director shall announce each incentive or bonus program prior to its commencement. The announcement shall specify the beginning and ending time, if applicable, of the incentive or bonus program and the value for the award(s).

§401.312. "Texas Two Step" On-line Game.

(a) Texas Two Step. A commission on-line game to be known as "Texas Two Step" is authorized to be conducted by the executive director under the following rules and under such further instructions and directives as the executive director may issue in furtherance thereof. If a conflict arises between this section and §401.304 of this title (relating to On-Line Game Rules (General)), this section shall have precedence.

(b) Definitions. In addition to the definitions provided in §401.301 [§401.304 of this title (relating to On-Line Game Rules (General))], and unless the context in this section otherwise requires, the following definitions apply.

(1) Advertised jackpot--The jackpot amount the commission establishes for each Texas Two Step drawing and authorizes commission vendors to publicize.

(2) [(1)] Number--Any play integer from 1 through 35 inclusive.

(3) [(2)] Play--The five numbers selected on each play board and printed on the ticket. Four numbers are selected from the first field of 35 numbers and one number is selected from the second field of 35 numbers.

(4) [(3)] Play board--Two fields of 35 numbers each found on the playslip.

(5) [(4)] Playslip--An optically readable card issued by the commission used by players of Texas Two Step to select plays. There shall be five play boards on each playslip identified at A, B, C, D, and E. A playslip has no pecuniary value and shall not constitute evidence of ticket purchase or of numbers selected.

(c) Price of ticket. The price of each Texas Two Step play shall be $1.00. A player may purchase up to five plays on one ticket. Multiple draws are available for up to 10 consecutive draws beginning with the current draw.

(d) Play for Texas Two Step.

(1) Type of play. A Texas Two Step player must select four numbers from the first field of numbers from 1 through 35 and an additional one number from the second field of numbers from 1 through 35 in each play or allow number selection by a random number generator operated by the computer, referred to as Quick Pick. A winning play is achieved only when [zero, one, two,] three or four numbers selected from the first field of 35 numbers match, in any order, the four numbers drawn from the first field of 35 numbers in addition to matching either zero or one number drawn from the second field of 35 numbers or when zero, one or two numbers selected from the first field of 35 numbers match, in any order, the four numbers drawn from the first field of 35 numbers in addition to matching the one number drawn from the second field of 35 numbers.

(2) Method of play. The player may use playslips to make number selections. The on-line terminal will read the playslip and issue ticket(s) with corresponding plays. If a playslip is not available or if a player is unable to complete a playslip, the on-line retailer may enter the selected numbers via the keyboard. However, the retailer shall not accept telephone or mail-in requests to manually enter selected numbers. A player may leave all play selections to a random number generator operated by the computer, commonly referred to as Quick Pick.

(3) One prize per play. The holder of a winning ticket may win only one prize per play in connection with the winning number drawn and shall be entitled only to the highest prize category won by those numbers.

(e) Prizes for Texas Two Step.

(1) Prize amounts. The prize amounts, for each drawing, paid to each Texas Two Step player who selects a matching combination of numbers will vary due to a pari-mutuel calculation, with the exception of the sixth and seventh prize, which are guaranteed prizes of $7.00 and $5.00, respectively. The calculation of pari-mutuel prize categories 2 through 5 shall be rounded down so those prizes can be paid in multiples of whole dollars. Each prize category breakage will carry forward to the next drawing for each respective prize category. [~~No prize amount shall be less than $5.00.~~] The prize amounts , except the First prize (jackpot), are based on the total amount in the prize category for that Texas Two Step drawing distributed equally over the number of matching combinations in each prize category.
Figure: 16 TAC §401.312(e)(1)

(2) Prize pool. The prize pool for Texas Two Step prizes shall be a minimum of 50% of Texas Two Step sales.

(3) Prize categories.

(A) First prize (jackpot) - The prize winner's share of the first prize or advertised jackpot is won by matching all four numbers drawn (in any order) from the first field of 35 numbers in addition to matching the number drawn from the second field of 35 numbers. The jackpot share (prize amount) shall be calculated by dividing the advertised jackpot [~~prize category contributions~~] by the number of shares for the prize category. Each first prize or jackpot share will be paid in one lump sum payment. The first prize or jackpot share of $600 to $999,999 [~~$300,000~~] must be claimed at a commission claim center. First prize or jackpot share of $1,000,000 [~~$300,001~~] or larger must be claimed at the commission headquarters in Austin. The advertised jackpot is determined by the indirect prize category and by estimating the direct prize category. The total prize category contribution for a drawing will include the following.

(i) The direct prize category contribution may [~~shall~~] be 45.56% of the prize pool for the drawing.

(ii) The indirect prize category contribution, which may be increased by the executive director, will include the roll-over from the previous drawing, if any.

(iii) The commission will pay the advertised jackpot amount for Texas Two Step. If the direct and indirect prize category contributions are greater than the advertised jackpot amount, the difference will be added to the Texas Two Step prize reserve fund [~~carry forward to the next drawing for the first prize or jackpot prize category~~] and will be used for future Texas Two Step jackpot prizes. If the direct and indirect prize category contributions are less than the advertised jackpot amount, the difference will be taken from the Texas Two Step prize reserve fund to fund the advertised jackpot amount.

(B) Second Prize. The prize amount shall be calculated by dividing the prize category contributions by the number of shares for the prize category. A share is the matching combination, in one play, of all four numbers drawn (in any order) from the first field of 35 numbers in addition to matching zero numbers from the second field of 35 numbers drawn by the commission. The total prize category contribution will include the following.

(i) The direct prize category contribution shall be 5.57% of the prize pool for the drawing.

(ii) The indirect prize category contribution, which may be increased by the executive director, will include the breakage from the previous drawing, if any.

(C) Third prize. The prize amount shall be calculated by dividing the prize category contributions by the number of shares for the prize category. A share is the matching combination, in one play, of three of four numbers drawn (in any order) from the first field of 35 numbers in addition to matching the number from the second field of 35 numbers drawn by the commission. The total prize category contribution will include the following.

(i) The direct prize category contribution shall be 0.68% of the prize pool for the drawing.

(ii) The indirect prize category contribution, which may be increased by the executive director, will include the breakage from the previous drawing, if any.

(D) Fourth prize. The prize amount shall be calculated by dividing the prize category contributions by the number of shares for the prize category. A share is the matching combination, in one play, of three of four numbers drawn (in any order) from the first field of 35 numbers in addition to matching zero numbers from the second field of 35 numbers drawn by the commission. The total prize category contribution will include the following.

(i) The direct prize category contribution shall be 9.20% of the prize pool for the drawing.

(ii) The indirect prize category contribution, which may be increased by the executive director, will include the breakage from the previous drawing, if any.

(E) Fifth prize. The prize amount shall be calculated by dividing the prize category contributions by the number of shares for the prize category. A share is the matching combination, in one play, of two of four numbers drawn (in any order) from the first field of 35 numbers in addition to matching the number from the second field of 35 numbers drawn by the commission. The total prize category contribution will include the following.

(i) The direct prize category contribution shall be 6.09% of the prize pool for the drawing.

(ii) The indirect prize category contribution, which may be increased by the executive director, will include the breakage from the previous drawing, if any.

(F) Sixth prize. The prize amount is a guaranteed minimum $7.00. The difference between the prizes won and the direct prize contribution will increase or decrease the prize reserve fund. The total prize category contribution will include the direct prize category contribution of 13.73% of the prize pool for the drawing.

(G) Seventh prize. The prize amount is a guaranteed minimum $5.00. The difference between the prizes won and the direct prize contribution will increase or decrease the prize reserve fund. The total prize category contribution will include the direct prize category contribution of 17.17% of the prize pool for the drawing.

(4) Prize reserve fund.

(A) The Texas Two Step prize reserve fund is 2.0% of the prize pool.

(B) The Texas Two Step prize reserve fund may be increased or decreased by the difference between the first prize category's (advertised jackpot), sixth[~~,~~] and seventh prize category [~~actual~~] prizes that are actuallywon and the respective[~~that~~] prize category's share of the prize pool. The Texas Two Step prize reserve fund may be used only for the Texas Two Step game.

(f) Ticket purchases.

(1) Texas Two Step tickets may be purchased only at a licensed location from a commission retailer authorized by the lottery director to sell on-line tickets.

(2) Texas Two Step tickets shall show the player's selection of numbers or Quick Pick (QP) numbers, boards played, drawing date(s) and validation and reference numbers.

(3) It shall be the exclusive responsibility of the player to verify the accuracy of the player's selection(s) and other data printed on the ticket. A ticket is a bearer instrument until signed.

(4) Except as provided in subsection (d)(2) of this section, Texas Two Step tickets must be purchased using official Texas Two Step playslips. Playslips which have been mechanically completed are not valid. Texas Two Step tickets must be printed on official Texas Lottery paper stock and purchased at a licensed location through an authorized commission retailer's on-line terminal.

(g) Drawings.

(1) The Texas Two Step drawings shall be held each week on Tuesday and Friday evenings at 9:59 p.m. Central Time except that the drawing schedule may be changed by the executive director, if necessary.

(2) Texas Two Step tickets will not be sold during the draw break for the Texas Two Step game on Tuesday and Friday evenings.

(3) The drawings will be conducted by commission officials.

(4) Each drawing shall determine, at random, five winning numbers in accordance with Texas Two Step drawing procedures. Any numbers drawn are not declared winning numbers until the drawing is certified by the commission in accordance with the drawing procedures. The winning numbers shall be used in determining all Texas Two Step winners for that drawing.

(5) Each drawing shall be witnessed by an independent certified public accountant. All drawing equipment used shall be examined by at least one commission security representative, the drawing supervisor, and the independent certified public accountant immediately prior to a drawing and immediately after the drawing.

(6) A drawing will not be invalidated based on the financial liability of the commission.

(h) Announcement of incentive or bonus program. The executive director shall announce each incentive or bonus program prior to its commencement. The announcement shall specify the beginning and ending time, if applicable, of the incentive or bonus program and the value for the award(s).

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

Filed with the Office of the Secretary of State, on December 10, 2001.

TRD-200107712
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 344-5113

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING SPECIAL EDUCATION SERVICES

The Texas Education Agency (TEA) proposes the repeal of §89.1049 and §89.1141; new §§89.1049, 89.1052, 89.1053, 89.1054, 89.1141, and 89.1152; and amendments to §§89.1050, 89.1070, and 89.1131, concerning special education services. The sections clarify federal regulations and state statutes pertaining to delivering special education services to students with disabilities. The proposed amendments reflect new and revised rules resulting from revisions to the Texas Education Code (TEC), clarification of rulemaking intent to align with the Individuals with Disabilities Education Act (IDEA) Amendments of 1997, and additional revisions that clarify current practice as well as the commissioner of education's intent regarding special education issues.

During the 77th Texas Legislative Session, 2001, several new sections of special education law were added and other sections were amended. Additionally, requests for clarification were received from both special education stakeholders and the United States Department of Education, Office of Special Education Programs, regarding the commissioner of education's intent with implementation of sections of 19 TAC Chapter 89 adopted effective September 1, 1996, and March 6, 2001. The proposed amendments address the legislative requirements and the requests for clarification. Technical edits are also proposed to correct references to federal statutory requirements.

The most significant issue pertaining to these proposed amendments relates to the development of new §89.1053, relating to the use of restraint and time-out for students with disabilities. This section and §89.1054, relating to seclusion, were developed pursuant to requirements found in TEC, §37.0021. Additionally, during the legislative session in 2001, the TEC was amended to require the commissioner to develop rules regarding the transfer of parental rights to adult students with disabilities. Based on changes to the TEC, the commissioner, under his general rulemaking authority, will create a rule regarding the discretionary placement of students with disabilities in juvenile justice alternative education programs. As a result of these amendments to state statute, the repeal of and new §89.1049 and new §89.1052 are proposed to reflect legislative intent.

Additional changes include: the clarification of requirements in §89.1050(b) for developing an individualized education program (IEP) for students three years of age and older; the clarification of requirements in §89.1050(d) related to timelines for making eligibility determinations and placement decisions; the clarification of intent in §89.1050(e) related to the requirement to provide a written or audiotaped copy of the individualized education program (IEP) as referenced in TEC, §29.005; the clarification of requirements in §89.1050(f) for conducting admission, review, and dismissal (ARD) committee meetings for a student new to a school district; and the addition of a reference in §89.1050(g) to proposed new 19 TAC §89.1053, relating to procedures for use of restraint and time-out, and §89.1054, relating to seclusion. Additional changes also include: the clarification of graduation requirements in §89.1070 and related evaluation requirements for students graduating under the provisions of §89.1070(c); the alignment of §89.1131(e) with current certification requirements for orientation and mobility specialists; the repeal of and new §89.1141, relating to education service center regional special education leadership to align with federal requirements at 34 CFR, §300.382(j), and current responsibilities for the provision of leadership, training, and technical assistance in the area of special education; and the addition of §89.1152, relating to presentment to the ARD committee of issues under dispute prior to the filing of a request for due process hearing.

Nora Hancock, associate commissioner for education of special populations, has determined that for the first five-year period the repeals, amendments, and new sections are in effect there will be fiscal implications for state or local government as a result of enforcing or administering the sections. The training requirements found in proposed new §89.1053, relating to procedures for use of restraint and time-out for students with disabilities, have an anticipated fiscal impact to school districts over the next five years of $6,072,619. The increased funding received by local education agencies through the IDEA, Part B, is available for use in covering increased training costs. TEC, §37.0021, requires that the TEA identify through commissioner's rules any discipline management practice or behavior management technique that requires a district employee or volunteer or an independent contractor of a district to be trained before using that practice or technique. Through this proposed rulemaking effort, the TEA prescribes those training requirements. The estimated costs related to training a core group of personnel are $1,093,908 for fiscal year 2002 (25% of core personnel) and $3,281,722 for fiscal year 2003 (75% of core personnel). For fiscal years 2004-2006, the cost of providing initial training for new personnel and ongoing training for continuing personnel is $565,663 per year. Ongoing training will be necessary for personnel to maintain current knowledge consistent with professionally accepted practices for behavior management as specified in the law.

Ms. Hancock has determined that for each year of the first five years the repeals, amendments, and new sections are in effect the public benefit anticipated as a result of enforcing the sections will be new and revised rules as required by the 77th Texas Legislature, 2001; clarification of rulemaking intent and/or federal requirements related to the ARD committee and graduation; guidance relating to current certification requirements for certain professionals; and current standards related to the implementation of federal regulations and state law. 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 repeals, amendments, and new sections.

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 repeals, amendments, and new sections 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*.

DIVISION 2. CLARIFICATION OF PROVISIONS IN FEDERAL REGULATIONS AND STATE LAW

19 TAC §89.1049

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

The repeal is proposed under 34 Code of Federal Regulations (CFR), §300.600, which outlines the responsibilities of TEA for all educational programs; and Texas Education Code, §29.001 and §29.017, which authorizes the commissioner of education to adopt rules related to delivering special education services, including the transfer of parental rights at age of majority.

The repeal implements 34 CFR, §300.600; and Texas Education Code, §29.001 and §29.017.

§89.1049. Parental Rights Regarding Adult Students.

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

Filed with the Office of the Secretary of State, on December 10, 2001.

TRD-200107701
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 463-9701

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19 TAC §§89.1049, 89.1050, 89.1052 - 89.1054, 89.1070

The amendments and new sections are proposed under 34 Code of Federal Regulations (CFR), §300.600, which outlines the responsibilities of TEA for all educational programs; and Texas Education Code, §§29.001, 29.005, 29.017, 37.0021, 37.004, and 42.003, which authorizes the commissioner of education to adopt rules related to delivering special education services, including the transfer of parental rights at age of majority, the use of restraint and time-out, and placement of students with disabilities.

The amendments and new sections implement 34 CFR, §300.600; and Texas Education Code, §§29.001, 29.005, 29.017, 37.0021, 37.004, and 42.003.

§89.1049. Parental Rights Regarding Adult Students.

(a) In accordance with 34 Code of Federal Regulations (CFR), §300.347(c) and §300.517, and Texas Education Code (TEC), §29.017,

beginning at least one year before a student reaches 18 years of age, the student's individualized education program (IEP) must include a statement that the student has been informed that, unless the student's parent or other individual has been granted guardianship of the student under the Probate Code, Chapter XIII, Guardianship, all rights granted to the parent under the Individuals with Disabilities Education Act (IDEA), Part B, other than the right to receive any notice required under IDEA, Part B, will transfer to the student upon reaching age 18. After the student reaches the age of 18, except as provided by subsection (b) of this section, the school district shall provide any notice required under IDEA, Part B, to both the adult student and the parent.

(b) In accordance with 34 CFR, §300.517(a)(2), and TEC, §29.017(a), all rights accorded to a parent under IDEA, Part B, including the right to receive any notice required by IDEA, Part B, will transfer to an 18-year-old student who is incarcerated in an adult or juvenile, state or local correctional institution, unless the student's parent or other individual has been granted guardianship of the student under the Probate Code, Chapter XIII, Guardianship.

(c) In accordance with 34 CFR, §300.517(a)(3), a school district must notify in writing the adult student and parent of the transfer of parental rights, as described in subsections (a) and (b) of this section, at the time the student reaches the age of 18. This notification is separate and distinct from the requirement that the student's IEP include a statement relating to the transfer of parental rights beginning at least one year before the student reaches the age of 18. This notification is not required to contain the elements of notice referenced in 34 CFR, §300.503, but must include a statement that parental rights have transferred to the adult student and provide contact information for the parties to use in obtaining additional information.

(d) A notice under IDEA, Part B, that is required to be given to an adult student and parent does not create a right for the parent to consent to or participate in the proposal or refusal to which the notice relates. For example, a notice of an admission, review, and dismissal (ARD) committee meeting does not constitute invitation to, or create a right for, the parent to attend the meeting. However, in accordance with 34 CFR, §300.344(a)(6), the adult student or the school district may invite individuals who have knowledge or special expertise regarding the student, including the parent.

§89.1050. The Admission, Review, and Dismissal (ARD) Committee.

(a) Each school district shall establish an admission, review, and dismissal (ARD) committee for each eligible student with a disability and for each student for whom a full and individual initial evaluation is conducted pursuant to §89.1011 of this title (relating to Referral for Full and Individual Initial Evaluation). The ARD committee shall be the individualized education program (IEP) team defined in federal law and regulations, including, specifically, 34 Code of Federal Regulations (CFR), §300.344. The school district shall be responsible for all of the functions for which the IEP team is responsible under federal law and regulations and for which the ARD committee is responsible under state law, including, specifically, the following:

(1) 34 CFR, §§300.340-300.349, and Texas Education Code (TEC), §29.005 (Individualized Education Program);

(2) 34 CFR, §§300.400-300.402 (relating to placement of eligible students in private schools by a school district);

(3) 34 CFR, §§300.452, 300.455, and 300.456 (relating to the development and implementation of service plans for eligible students in private school who have been designated to receive special education and related services);

(4) 34 CFR, §§300.520, 300.522, and 300.523, and TEC, §37.004 (Placement of Students with Disabilities);

(5) 34 CFR, §§300.532-300.536 (relating to evaluations, re-evaluations, and determination of eligibility);

(6) 34 CFR, §§300.550-300.553 (relating to least restrictive environment);

(7) TEC, §28.006 (Reading Diagnosis);

(8) TEC, §28.0211 (Satisfactory Performance on Assessment Instruments Required; Accelerated Instruction);

(9) TEC, Chapter 29, Subchapter I (Programs for Students Who Are Deaf or Hard of Hearing);

(10) TEC, §30.002 (Education of Children with Visual Impairments);

(11) TEC, §30.003 (Support of Students Enrolled in the Texas School for the Blind and Visually Impaired or Texas School for the Deaf);

(12) TEC, §33.081 (Extracurricular Activities);

(13) TEC, Chapter 39, Subchapter B (Assessment of Academic Skills); and

(14) TEC, §42.151 (Special Education).

(b) For a child from birth through two years of age with visual and/or auditory impairments, an individualized family services plan (IFSP) meeting must be held in place of an ARD committee meeting in accordance with 34 CFR, §§303.340-303.346, and the memorandum of understanding between the Texas Education Agency (TEA) and Texas Interagency Council on Early Childhood Intervention. For students three years of age and older, school districts must develop an IEP.

(c) At least one general education teacher of the student (if the student is, or may be, participating in the general education environment) shall participate as a member of the ARD committee. The special education teacher or special education provider that participates in the ARD committee meeting in accordance with 34 CFR, §300.344(a)(3), must be certified in the child's suspected areas of disability. When a specific certification is not required to serve certain disability categories, then the special education teacher or special education provider must be qualified to provide the educational services that the child may need. Districts should refer to §89.1131 of this title (relating to Qualifications of Special Education, Related Service, and Paraprofessional Personnel) to ensure that appropriate teachers and/or service providers are present and participate at each ARD committee meeting.

(d) The ARD committee shall make its decisions regarding students referred for a full and individual initial evaluation within 30 calendar days from the date of the completion of the written full and individual initial evaluation report. If the 30th day falls during the summer and school is not in session, the ARD committee shall have until the first day of classes in the fall to finalize decisions concerning the initial eligibility determination, the IEP, and placement [~~and the IEP~~], unless the full and individual initial evaluation indicates that the student will need extended school year (ESY) services during that summer.

(e) The written report of the ARD committee shall document the decisions of the committee with respect to issues discussed at the meeting. The report shall include the date, names, positions, and signatures of the members participating in each meeting in accordance with 34 CFR, §§300.344, 300.345, 300.348, and 300.349. The report shall also indicate each member's agreement or disagreement with the committee's decisions. In the event TEC, §29.005(d)(1), applies, the district shall provide a written or audiotaped copy of the student's IEP, as defined in 34 CFR, §300.346 and §300.347. In the event TEC,

§29.005(d)(2), applies, the district shall make a good faith effort to provide a written or audiotaped copy of the student's IEP, as defined in 34 CFR, §300.346 and §300.347.

(f) For a student who is new to a school district:

(1) when a student transfers within the state, the ARD committee may, but is not required to, meet when the student enrolls and a copy of the student's IEP is available, the parent(s) indicate that they are satisfied with the current IEP, and the district determines that the current IEP is appropriate and can be implemented as written; or

(2) if the conditions of subsection (f)(1) of this section are not met, then the ARD committee must meet when the student enrolls and the parents verify that the student was receiving special education services in the previous school district, or the previous school district verifies in writing or by telephone that the student was receiving special education services. At this meeting, the ARD committee must do one of the following:

(A) the ARD committee may determine that it has appropriate evaluation data and other information to develop and begin implementation of a complete IEP for the student; or

(B) the ARD committee may determine that valid evaluation data and other information from the previous school district are insufficient or unavailable to develop a complete IEP. In this event, the ARD committee may authorize the provision of temporary special education services pending receipt of valid evaluation data from the previous school district or the collection of new evaluation data by the current school district. In this situation, a second ARD committee meeting must be held within 30 school days from the date of the first ARD committee meeting to finalize or develop an IEP based on current information.

(3) In accordance with TEC, §25.002, the school district in which the student was previously enrolled shall furnish the new school district with a copy of the student's records, including the child's special education records, not later than the 30th calendar day after the student was enrolled in the new school district. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C., §1232g, does not require the student's current and previous school districts to obtain parental consent before requesting or sending the student's special education records if the disclosure is conducted in accordance with 34 CFR, §99.31(a)(2) and §99.34.

~~[(f) For a student who is new to a school district, the ARD committee may meet when the student enrolls and the parents verify that the student was receiving special education services in the previous school district, or the previous school district verifies in writing or by telephone that the student was receiving special education services. Special education services that are provided prior to receipt of valid evaluation data from the previous school district or collection of new evaluation data are temporary and contingent upon either receipt of valid evaluation data from the previous school district or the collection of new evaluation data. In any event, an ARD committee meeting must be held within 30 school days from the date of the first ARD committee meeting in the district to finalize or develop an IEP based on the evaluation data. The student's current and previous school districts are not required to obtain parental consent before requesting or sending the student's special education records if the disclosure is conducted in accordance with 34 CFR, §99.31(a)(2) and §99.34. In accordance with TEC, §25.002, the school district in which the student was previously enrolled shall furnish the new school district with a copy of the student's records, including the child's special education records, not later than the 30th calendar day after the student was enrolled in the new school district.]~~

(g) All disciplinary actions regarding students with disabilities shall be determined in accordance with 34 CFR, §§300.121 and 300.519-300.529 (relating to disciplinary actions and procedures), [~~and~~] the TEC, Chapter 37, Subchapter A (Alternative Settings for Behavior Management) , §89.1053 of this title (relating to Procedures for Use of Restraint and Time-Out) and §89.1054 of this title (relating to Seclusion) .

(h) All members of the ARD committee shall have the opportunity to participate in a collaborative manner in developing the IEP. A decision of the committee concerning required elements of the IEP shall be made by mutual agreement of the required members if possible. The committee may agree to an annual IEP or an IEP of shorter duration.

(1) When mutual agreement about all required elements of the IEP is not achieved, the party (the parents or adult student) who disagrees shall be offered a single opportunity to have the committee recess for a period of time not to exceed ten school days. This recess is not required when the student's presence on the campus presents a danger of physical harm to the student or others or when the student has committed an expellable offense or an offense which may lead to a placement in an alternative education program (AEP). The requirements of this subsection (h) do not prohibit the members of the ARD committee from recessing an ARD committee meeting for reasons other than the failure of the parents and the school district from reaching mutual agreement about all required elements of an IEP.

(2) During the recess the committee members shall consider alternatives, gather additional data, prepare further documentation, and/or obtain additional resource persons which may assist in enabling the ARD committee to reach mutual agreement.

(3) The date, time, and place for continuing the ARD committee meeting shall be determined by mutual agreement prior to the recess.

(4) If a ten-day recess is implemented as provided in paragraph (1) of this subsection and the ARD committee still cannot reach mutual agreement, the district shall implement the IEP which it has determined to be appropriate for the student.

(5) When mutual agreement is not reached, a written statement of the basis for the disagreement shall be included in the IEP. The members who disagree shall be offered the opportunity to write their own statements.

(6) When a district implements an IEP with which the parents disagree or the adult student disagrees, the district shall provide prior written notice to the parents or adult student as required in 34 CFR, §300.503.

(7) Parents shall have the right to file a complaint, request mediation, or request a due process hearing at any point when they disagree with decisions of the ARD committee.

§89.1052. Discretionary Placements in Juvenile Justice Alternative Education Programs (JJAEP).

(a) This section will expire on September 1, 2003.

(b) In a county with a JJAEP, a local school district or charter school shall invite the administrator of the JJAEP or the administrator's designee to an admission, review, and dismissal (ARD) committee meeting convened to discuss a student's expulsion under the provisions listed in Texas Education Code (TEC), §37.004(e), relating to offenses for which a school district may expel a student. The reasonable notice of the ARD committee meeting must be provided consistent with 34 CFR, §300.345 and §300.503, and §89.1015 of this title (relating

to Time Line for All Notices), and a copy of the student's current individualized education program (IEP) must be provided to the JJAEP administrator or designee with the notice. If the JJAEP representative is unable to attend the ARD committee meeting, the representative must be given the opportunity to participate in the meeting through alternative means including conference telephone calls. The JJAEP representative may participate in the meeting to the extent that the meeting relates to the student's placement in the JJAEP and implementation of the student's current IEP in the JJAEP.

(c) In accordance with TEC, §37.004(f), when the JJAEP administrator or designee provides written notice of specific concerns to the school district or charter school from which a student was expelled under one of the provisions listed in TEC, §37.004(e), relating to offenses for which a school district may expel a student, an ARD committee meeting must be convened to reconsider placement of the student in the JJAEP. The reasonable notice of the ARD committee meeting must be provided consistent with 34 CFR, §300.345 and §300.503, and §89.1015 of this title (relating to Time Line for All Notices). If the JJAEP representative is unable to attend the ARD committee meeting, the representative must be given the opportunity to participate in the meeting through alternative means including conference telephone calls. The JJAEP representative may participate in the meeting to the extent that the meeting relates to the student's continued placement in the JJAEP.

§89.1053. Procedures for Use of Restraint and Time-Out.

(a) Requirement to implement. In addition to the requirements of 34 Code of Federal Regulations (CFR), §300.346(a)(2)(i) and (c), school districts and charter schools must implement the provisions of this section regarding the use of restraint and time-out. In accordance with the provisions of Texas Education Code (TEC), §37.0021 (Use of Confinement, Restraint, Seclusion, and Time-Out), it is the policy of the state to treat all students with dignity and respect.

(b) Definitions.

(1) Emergency means a situation in which a student's behavior poses a threat of:

(A) imminent, serious physical harm to the student or others; or

(B) imminent, serious property destruction that would constitute a felony under Texas Penal Code, §28.03.

(2) Restraint means the use of physical force or a mechanical device to restrict the free movement of all or a portion of the student's body.

(3) Time-out means a behavior management technique in which, to provide a student with an opportunity to regain self-control, the student is separated from other students for a limited period in a setting:

(A) that is not locked; and

(B) from which the student is not physically prevented from leaving.

(c) Use of restraint. A school employee, volunteer, or independent contractor may use restraint only in an emergency as defined in subsection (b) of this section and with the following limitations.

(1) Restraint shall be limited to the use of such reasonable force as is necessary to address the emergency.

(2) Restraint shall be discontinued at the point at which the emergency no longer exists.

(3) Restraint shall be implemented in such a way as to protect the health and safety of the student.

(4) Restraint shall not deprive the student of basic human necessities.

(d) Training on use of restraint. Training for school employees, volunteers, or independent contractors shall be provided according to the following requirements.

(1) Not later than January 1, 2003, a core team of personnel on each campus must be trained in the use of restraint, and the team must include a campus administrator or designee and any general or special education personnel likely to use restraint.

(2) After January 1, 2003, personnel called upon to use restraint in an emergency and who have not received prior training must receive training within 30 school days following the use of restraint.

(3) Training on use of restraint must include prevention and de-escalation techniques and provide alternatives to the use of restraint.

(4) All trained personnel must have current knowledge of professionally accepted practices and standards regarding behavior management and the use of restraint.

(e) Documentation and notification on use of restraint. In a case in which restraint is used, school employees, volunteers, or independent contractors shall implement the following documentation requirements.

(1) On the day restraint is utilized, the campus administrator or designee must be verbally notified regarding the use of restraint.

(2) On the day restraint is utilized, an attempt shall be made to verbally notify the parent(s) regarding the use of restraint.

(3) Written notification of the use of restraint must be provided to the parent within one school day of the use of restraint.

(4) Written documentation regarding the use of restraint must be placed in the student's special education eligibility folder within one school day of the use of restraint.

(5) Written notification to the parent(s) and documentation to the student's special education eligibility folder shall include the following:

(A) name of the student;

(B) name of the staff member administering the restraint;

(C) date of the restraint and the time the restraint began and ended;

(D) location of the restraint;

(E) nature of the restraint;

(F) a description of the activity in which the student was engaged immediately preceding the use of restraint;

(G) the behavior that prompted the restraint;

(H) the efforts made to de-escalate the situation and alternatives to restraint that were attempted; and

(I) information documenting parent contact and notification.

(f) Clarification regarding restraint. For the purposes of subsections (c)-(e) of this section, restraint does not include the use of:

(1) physical contact or appropriately prescribed adaptive equipment to promote normative body positioning and/or physical functioning; or

(2) limited physical contact with a student to promote safety (e.g., holding a student's hand) or prevent a potentially harmful action (e.g., running into the street).

(g) Use of time-out. A school employee, volunteer, or independent contractor may use time-out in accordance with subsection (b)(3) of this section with the following limitations.

(1) Physical force or threat of physical force shall not be used to place a student in time-out.

(2) Time-out may only be used in conjunction with an array of positive behavior intervention strategies and techniques and must be included in the student's individualized education program (IEP) and/or behavior intervention plan (BIP) if it is utilized on a recurrent basis to increase or decrease a targeted behavior.

(3) Use of time-out shall not be implemented in a fashion that precludes the ability of the student to be involved in and progress in the general curriculum and advance appropriately toward attaining the annual goals specified in the student's IEP.

(h) Training on use of time-out. Training for school employees, volunteers, or independent contractors shall be provided according to the following requirements.

(1) Not later than January 1, 2003, general or special education personnel who implement time-out based on requirements established in a student's IEP and/or BIP must be trained in the use of time- out.

(2) After January 1, 2003, newly-identified personnel called upon to implement time-out based on requirements established in a student's IEP and/or BIP must receive training in the use of time-out within 30 school days of being assigned the responsibility for implementing time-out.

(3) Training on the use of time-out must not be provided as separate and distinct training, must include information regarding the scope of positive behavior interventions and strategies, and must address the impact of time-out on the ability of the student to be involved in and progress in the general curriculum and advance appropriately toward attaining the annual goals specified in the student's IEP.

(4) All trained personnel must have current knowledge of professionally accepted practices and standards regarding behavior management and the use of time-out.

(i) Documentation on use of time-out. Necessary documentation or data collection regarding the use of time- out, if any, must be addressed in the IEP or BIP. The admission, review, and dismissal (ARD) committee must use any collected data to judge the effectiveness of the intervention and provide a basis for making determinations regarding its continued use.

(j) Student safety. Any behavior management technique and/or discipline management practice must be implemented in such a way as to protect the health and safety of the student. No discipline management practice may be calculated to inflict injury, cause harm, demean, or deprive the student of basic human necessities.

(k) Data collection requirement. Beginning with the 2003-2004 school year, with the exception of actions covered by subsection (f) of this section, cumulative data regarding the use of restraint must be reported through the Public Education Information Management System (PEIMS).

§89.1054. Seclusion.

(a) Pursuant to Texas Education Code (TEC), §37.0021(b)(2), seclusion means a behavior management technique in which a student is confined in a locked box, locked closet, or locked room that:

(1) is designed solely to seclude a person; and

(2) contains less than 50 square feet of space.

(b) In accordance with TEC, §37.0021(c), a school district employee or volunteer or an independent contractor of a district may not place a student in seclusion. This subsection does not apply to the use of seclusion in a facility to which the following law, rules, or regulations apply:

(1) the Children's Health Act of 2000, Public Law No. 106-310, any subsequent amendments to that Act, any regulations adopted under that Act, or any subsequent amendments to those regulations;

(2) 40 Texas Administrative Code (TAC) §§720.1001-720.1013, rules adopted by the Texas Department of Protective and Regulatory Services relating to behavior intervention; or

(3) 25 TAC §412.308(e), a rule adopted by the Texas Department of Mental Health and Mental Retardation relating to the use of restraint and seclusion.

(c) Neither TEC, §37.0021(c), nor this section governs seclusion or confinement of a student that does not fall within the definition of seclusion set out in subsection (a) of this section. However, school districts must at all times comply with local fire and safety codes.

§89.1070. Graduation Requirements.

(a) Graduation with a regular high school diploma under subsection (b) or (d) of this section terminates a student's eligibility for special education services under this subchapter and Part B of the Individuals with Disabilities Education Act (IDEA), 20 United States Code, §§1400 [~~§§14.01~~] et seq. In addition, as provided in Texas Education Code (TEC), §42.003(a), graduation with a regular high school diploma under subsection (b) or (d) of this section terminates a student's entitlement to the benefits of the Foundation School Program.

(b) A student receiving special education services may graduate and be awarded a high school diploma [~~only~~] if:

(1) the student has satisfactorily completed the state's or district's (whichever is greater) minimum curriculum and [~~academic~~] credit requirements for graduation applicable to students in general education, including satisfactory performance on the exit level assessment instrument; or

(2) the [~~The~~] student has satisfactorily completed the state's or district's (whichever is greater) minimum curriculum and [~~academic~~] credit requirements for graduation applicable to students in general education and has been exempted from the exit-level assessment instrument under TEC, §39.027(a)(2)(B). [~~because modifications and accommodations provided during instruction would render the result of the assessment invalid.~~]

(c) A student receiving special education services may also graduate and receive a regular high school diploma when the student's admission, review, and dismissal (ARD) committee has determined that the student has successfully completed:

(1) the student's individualized education program (IEP) and met one of the following conditions:

(A) full-time employment, based on the student's abilities and local employment opportunities, in addition to sufficient self-

help skills to enable the student to maintain the employment without direct and ongoing educational support of the local school district;

(B) demonstrated mastery of specific employability skills and self-help skills which do not require direct ongoing educational support of the local school district; or

(C) access to services which are not within the legal responsibility of public education, or employment or educational options for which the student has been prepared by the academic program;

(2) the state's or district's (whichever is greater) minimum credit requirements for students without disabilities; and

(3) the state's or district's minimum curriculum requirements to the extent possible with modifications/substitutions only when it is determined necessary by the ARD committee for the student to receive an appropriate education.

~~[(c) A student receiving special education services may also graduate and receive a regular high school diploma when the student's admission, review, and dismissal (ARD) committee has determined that the student has successfully completed the student's individualized education program (IEP), including the district's minimum credit requirements for students without disabilities. Successful completion of an IEP occurs when one of the following conditions has been met:]~~

~~[(1) full-time employment, based on the student's abilities and local employment opportunities, in addition to sufficient self-help skills to enable the student to maintain the employment without direct and ongoing educational support of the local school district;]~~

~~[(2) demonstrated mastery of specific employability skills and self-help skills which do not require direct ongoing educational support of the local school district; or]~~

~~[(3) access to services which are not within the legal responsibility of public education, or employment or educational options for which the student has been prepared by the academic program.]~~

(d) A student receiving special education services may also graduate and receive a regular high school diploma upon the ARD committee determining that the student no longer meets age eligibility requirements and has completed the requirements specified in the IEP.

(e) When considering graduation under subsection (c) of this section, the ARD committee shall conduct an evaluation prior to graduation as required by 34 CFR, §300.534(c), and, when appropriate, seek in writing and consider written recommendations from appropriate adult service agencies and the views of the parent and, when appropriate, the student.

(f) Students who are allowed to participate in graduation ceremonies but who are not graduating under subsection (c) of this section and who will remain in school to complete their education do not have to be evaluated in accordance with subsection (e) of this section.

(g) [~~(f)~~] Employability and self-help skills referenced under subsection (c) of this section are those skills directly related to the preparation of students for employment, including general skills necessary to obtain or retain employment.

(h) [~~(g)~~] Students with disabilities who are eligible to take the exit level assessment instrument but have not performed satisfactorily are eligible for instruction in accordance with the TEC, §39.024.

(i) [~~(h)~~] For students who receive a diploma according to subsection (c) of this section, the ARD committee shall determine needed educational services upon the request of the student or parent to resume services, as long as the student meets the age eligibility 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 December 10, 2001.

TRD-200107702
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 463-9701

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DIVISION 5. SPECIAL EDUCATION AND RELATED SERVICE PERSONNEL

19 TAC §89.1131

The amendment is proposed under 34 Code of Federal Regulations (CFR), §300.600, which outlines the responsibilities of TEA for all educational programs; and Texas Education Code, §29.001, which authorizes the commissioner of education to adopt rules related to delivering special education services.

The amendment implements 34 CFR, §300.600; and Texas Education Code, §29.001.

§89.1131. Qualifications of Special Education, Related Service, and Paraprofessional Personnel.

(a) All special education and related service personnel shall be certified, endorsed, or licensed in the area or areas of assignment in accordance with 34 Code of Federal Regulations (CFR), §300.23 and §300.136; the Texas Education Code (TEC), §§21.002, 21.003, and 29.304; or appropriate state agency credentials.

(b) A teacher who holds a special education certificate or an endorsement may be assigned to any level of a basic special education instructional program serving eligible students 3-21 years of age, as defined in §89.1035(a) of this title (relating to Age Ranges for Student Eligibility), in accordance with the limitation of their certification, except for the following.

(1) Persons assigned to provide speech therapy instructional services must hold a valid Texas Education Agency (TEA) certificate in speech and hearing therapy or speech and language therapy, or a valid state license as a speech/language pathologist.

(2) Teachers holding only a special education endorsement for early childhood education for children with disabilities shall be assigned only to programs serving infants through Grade 6.

(3) Teachers assigned full-time to teaching students who are orthopedically impaired or other health impaired with the teaching station in the home or a hospital shall not be required to hold a special education certificate or endorsement as long as the personnel file contains an official transcript indicating that the teacher has completed a three-semester-hour survey course in the education of students with disabilities and three semester hours directly related to teaching students with physical impairments or other health impairments.

(4) Teachers certified in the education of students with visual impairments must be available to students with visual impairments, including deaf-blindness, through one of the school district's instructional options, a shared services arrangement with other school districts, or an education service center (ESC). A teacher who is

certified in the education of students with visual impairments must attend each admission, review, and dismissal (ARD) committee meeting or individualized family service plan (IFSP) meeting of a student with a visual impairment, including deaf-blindness.

(5) Teachers certified in the education of students with auditory impairments must be available to students with auditory impairments, including deaf-blindness, through one of the school district's instructional options, a regional day school program for the deaf, a shared services arrangement with other school districts, or an ESC. A teacher who is certified in the education of students with auditory impairments must attend each ARD committee meeting or IFSP meeting of a student with an auditory impairment, including deaf-blindness.

(6) The following provisions apply to physical education.

(A) When the ARD committee has made the determination and the arrangements are specified in the student's individualized education program (IEP), physical education may be provided by the following personnel:

(i) special education instructional or related service personnel who have the necessary skills and knowledge;

(ii) physical education teachers;

(iii) occupational therapists;

(iv) physical therapists; or

(v) occupational therapy assistants or physical therapy assistants working under supervision in accordance with the standards of their profession.

(B) When these services are provided by special education personnel, the district must document that they have the necessary skills and knowledge. Documentation may include, but need not be limited to, inservice records, evidence of attendance at seminars or workshops, or transcripts of college courses.

(7) Teachers assigned full-time or part-time to instruction of students from birth through age two with visual impairments, including deaf-blindness, shall be certified in the education of students with visual impairments. Teachers assigned full-time or part-time to instruction of students from birth through age two who are deaf, including deaf-blindness, shall be certified in education for students who are deaf and severely hard of hearing. Other certifications for serving these students shall require prior approval from TEA.

(8) Teachers with secondary certification with the generic delivery system may be assigned to teach Grades 6-12 only.

(c) Paraprofessional personnel must be certified and may be assigned to work with eligible students, general and special education teachers, and related service personnel. Aides may also be assigned to assist students with special education transportation, serve as a job coach, or serve in support of community-based instruction. Aides paid from state administrative funds may be assigned to the Special Education Resource System (SERS), the Special Education Management System (SEMS), or other special education clerical or administrative duties.

(d) Interpreting services for students who are deaf shall be provided by an interpreter who is certified in the appropriate language mode(s), if certification in such mode(s) is available. If certification is available, the interpreter must be certified by the Registry of Interpreters for the Deaf or the Texas Commission for the Deaf and Hard of Hearing, unless the interpreter has been granted an emergency permit by the commissioner of education to provide interpreting services for students who are deaf. The commissioner shall consider applications for the issuance of an emergency permit to provide interpreting services for students who are deaf on a case-by-case basis in accordance with requirements set forth in 34 CFR, §300.136, and standards and procedures established by the TEA. In no event will an emergency permit allow an uncertified interpreter to provide interpreting services for more than a total of three school years to students who are deaf.

(e) Orientation and mobility instruction must be provided by a certified orientation and mobility specialist (COMS) who is certified by the Academy for Certification of Vision Rehabilitation and Education Professionals [~~or by the Association for Education and Rehabilitation of the Blind and Visually Impaired~~].

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

Filed with the Office of the Secretary of State, on December 10, 2001.

TRD-200107703
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 463-9701

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DIVISION 6. REGIONAL EDUCATION SERVICE CENTER SPECIAL EDUCATION

19 TAC §89.1141

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

The repeal is proposed under 34 Code of Federal Regulations (CFR), §300.600, which outlines the responsibilities of TEA for all educational programs; and Texas Education Code, §29.001, which authorizes the commissioner of education to adopt rules related to delivering special education services.

The repeal implements 34 CFR, §300.600; and Texas Education Code, §29.001.

§89.1141. Regional Education Service Center Special Education Programs Component.

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

Filed with the Office of the Secretary of State, on December 10, 2001.

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Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
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For further information, please call: (512) 463-9701

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DIVISION 6. REGIONAL EDUCATION SERVICE CENTER SPECIAL EDUCATION PROGRAMS

19 TAC §89.1141

The new section is proposed under 34 Code of Federal Regulations (CFR), §300.600, which outlines the responsibilities of TEA for all educational programs; and Texas Education Code, §29.001, which authorizes the commissioner of education to adopt rules related to delivering special education services.

The new section implements 34 CFR, §300.600; and Texas Education Code, §29.001.

§89.1141. Education Service Center Regional Special Education Leadership.

(a) Each regional education service center (ESC) will provide leadership, training, and technical assistance in the area of special education for students with disabilities in accordance with the Texas Education Agency's (TEA) focus on increasing student achievement. ESCs will work with the TEA to promote and implement leadership and information dissemination activities to school districts, charter schools, parents, and communities.

(b) Each regional ESC will provide technical assistance, support, and training in the area of special education to general and special education and related service personnel, administrators, paraprofessionals, and parents of students with disabilities based on the results of a comprehensive needs assessment process.

(c) Regional ESC activities and responsibilities will be in accordance with current instructions, program guidelines, and program descriptions included in the ESC Performance Contract and Application, which will be made accessible to the public through the TEA website.

(d) The ESC must utilize available TEA funding to implement activities and address needs identified under subsections (a)-(c) of this section and Texas Education Code (TEC), §8.051(d)(5). If additional funding is needed to implement supplementary or enhanced activities identified through the regional needs assessment process, ESCs may access and utilize alternate sources of funding. Any charges must be determined only after priorities have been established through input from affected stakeholders.

(e) Personnel assignments through State Supplemental Visually Impaired funds require appropriate certification as identified in current program guidelines included in the ESC Performance Contract and Application.

(f) Regional ESCs may serve as fiscal agent for shared services arrangements in accordance with procedures established under §89.1075(e) of this title (relating to General Program Requirements and Local District Procedures).

(g) For the purposes of this subchapter, ESCs shall be considered to be educational service agencies as defined in federal regulations.

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

Filed with the Office of the Secretary of State, on December 10, 2001.

TRD-200107705

Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 463-9701

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DIVISION 7. RESOLUTION OF DISPUTES BETWEEN PARENTS AND SCHOOL DISTRICTS

19 TAC §89.1152

The new section is proposed under 34 Code of Federal Regulations (CFR), §300.600, which outlines the responsibilities of TEA for all educational programs; and Texas Education Code, §29.001, which authorizes the commissioner of education to adopt rules related to delivering special education services.

The new section implements 34 CFR, §300.600; and Texas Education Code, §29.001.

§89.1152. Presentment.

(a) This section will take effect on August 1, 2003.

(b) Pursuant to the policy to encourage and support the resolution of any dispute at the lowest level possible, and in a prompt, efficient, and effective manner, no issue may be raised at a due process hearing unless it was first raised at an admission, review, and dismissal (ARD) committee meeting. Hearing officers shall dismiss any hearing request upon satisfactory proof that the issues raised in the hearing were not first presented to the ARD committee.

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

Filed with the Office of the Secretary of State, on December 10, 2001.

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Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
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For further information, please call: (512) 463-9701

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TITLE 22. EXAMINING BOARDS

PART 10. TEXAS FUNERAL SERVICE COMMISSION

CHAPTER 201. LICENSING AND ENFORCEMENT--PRACTICE AND PROCEDURE

22 TAC §201.18

The Texas Funeral Service Commission proposes an amendment to §201.18, concerning Charges for Providing Copies of Public Information.

The Texas Funeral Service Commission proposes the amendment to change the language of the existing section and adopt by reference the regulations for providing public information of the Building and Procurement Commission, formerly the General Services Commission.

O.C. Robbins, Executive Director of the Texas Funeral Service Commission has determined that for the first five-year period this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section beyond what is already required under the existing rule.

Mr. Robbins has also determined that for the first five-year period this section is in effect the public benefit will be that it conforms the costs and procedures for providing public information with the Building and Procurement Commission.

Comments on the proposal may be submitted in writing for a 30 day period to O.C. Robbins, Executive Director, Texas Funeral Service Commission, P.O. Box 12217 Capitol Station, Austin, Texas 78711-1440, or faxed to (512) 479-5064, or submitted electronically to chet.robbins@tfsc.state.tx.us.

The amendment is proposed under §651.152 of the Texas Occupations Code which authorizes the Commission to issue such rules and regulations as may be necessary to effect the provision of this section.

No other statutes, articles, or codes are affected by the proposed amendment.

§201.18. Charges for Providing Copies of Public Information.

The Commission determines charges for public information in accordance with the rules of the Building and Procurement Commission at 1 TAC §§111.61 - 111.71 et seq.

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

[(1) Copies of public information--A reproduction, made available to a requestor, of a document, writing, letter, memorandum or other written, printed, typed, copied, or developed material that contains public information, as defined in Texas Government Code, Chapter 552, which is not excepted from disclosure by that chapter.]

[(2) Nonstandard-size copy--A copy of public information that is made available to a requestor in any format other than a standard-size paper copy.]

[(3) Readily available information--Information that already exists in printed form, or information that is store electronically and is ready to be printed of copies without requiring any programming.]

[(4) Standard-size copy--A printed impression on one side of a piece of paper that measures up to 8 1/2 by 14 inches. Each side of a piece of paper on which an impression is made is counted as a single copy. A piece of paper that is printed on both sides is counted as two copies.]

[(b) Copy charges. The following charges apply when copies of public information are requested by nongovernmental entities or individuals:]

[(1) Standard-size copies of readily available information (fewer than 50 pages):]

[(A) $.10 per copy;]

[(B) Actual postage and shipping costs; and]

[(C) $.50 per page for long distance fax transmission;]

[(2) Standard-size copies of readily available information (50 pages or more) and standard-size copies of not readily available information:]

[(A) $.10 per copy;]

[(B) Personnel charge of $15 per hour for the actual time spent to comply with request;]

[(C) Overhead charge of 20% of the personnel charge applicable to the request;]

[(D) Actual postage and shipping costs; and]

[(E) $.50 per page for long distance fax transmission;]

[(3) Nonstandard-size copy of readily available information:]

[(A) $31 for each computer generated printed listing of a class of licensees (i.e., funeral establishments, funeral directors, embalmers, or funeral directors and embalmers) with address, license number, and expiration date; provided, this charge applies for each listing, whether sorted alphabetically, by license type, city, county, or zip code;]

[(B) $31 for each computer generated set of name and address printed labels for a class of licensees (i.e., funeral establishments, funeral directors, embalmers, or funeral directors and embalmers); provided, this charge applies for each label set, whether sorted alphabetically, by license type, city, county, or zip code;]

[(C) Other paper copies:]

[(i) $.50 per copy;]

[(ii) $15 per hour personnel charge;]

[(iii) Overhead charge of 20% of personnel charge;]

[(iv) Actual postage and shipping costs; and]

[(v) $.50 per page for long distance fax transmission;]

[(D) Non-paper copies:]

[(i) $15 per hour personnel charge;]

[(ii) Overhead charge of 20% of personnel charge;]

[(iii) Actual charges to Commission, if any, for external preparation;]

[(iv) $1.00 per diskette;]

[(v) $1.00 per audio cassette;]

[(vi) $10 per magnetic tape; and]

[(vii) Actual postage and shipping costs.]

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

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

TRD-200107604

O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 936-2474

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CHAPTER 203. LICENSING AND ENFORCEMENT--SPECIFIC SUBSTANTIVE RULES

22 TAC §203.23

The Texas Funeral Service Commission proposes an amendment to §203.23, concerning the Location of Retained Records.

The Texas Funeral Service Commission proposes an amendment to change some of the language. Language referring to Texas Civil Statutes is updated to Texas Occupations Code and the word commissioner in subsection (a) is a misspelling and should be commission.

O.C. Robbins, Executive Director, Texas Funeral Service Commission, has determined that for the first five-year period this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section, beyond what is already required under the existing rule.

Mr. Robbins has also determined that for the first five-year period this section is in effect the public benefit will be that it corrects a mistake of the existing rule and updates language to conform with statute.

Comments on the proposal may be submitted in writing for a 30 day period to O.C. Robbins, Executive Director, Texas Funeral Service Commission, 510 South Congress, Suite 206, Austin, Texas 78704, or P.O. Box 12217, Capitol Station, Austin, Texas 78711-1440, or faxed to (512) 479-5064, or submitted electronically to chet.robbins@tfsc.state.tx.us.

The amendment is proposed under §651.152 of the Texas Occupations 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 provision of this section.

No other statutes, articles, or codes are affected by the proposed amendment.

§203.23. Location of Retained Records.

(a) All records required for retention by Texas Occupations Code Chapter 651 [~~Texas Civil Statutes, Article 4582b, §3(H)(23) and (25) (concerning violations of this Act)~~] and rules of this title [~~§203.16 of this title (relating to Minimum standards for embalming)~~], will be maintained for a minimum of two years within the physical confines of the licensed establishment where the funeral arrangements were made. The records must be made available to the Texas Funeral Service Commission through its staff and members, or to the next of kin or person authorized for the making of funeral arrangements during regular business hours, and copies must be provided upon request to the commission [~~commissioner~~].

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

(d) The executive director will advise the commission of all petitions submitted in accordance [~~accord~~] with this procedure, along with his recommendations.

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

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

Filed with the Office of the Secretary of State, on December 4, 2001.

TRD-200107573
O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 936-2474

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PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. PROVISIONS OF THE REAL ESTATE LICENSE ACT

SUBCHAPTER E. REQUIREMENTS FOR LICENSURE

22 TAC §535.51

The Texas Real Estate Commission (TREC) proposes an amendment to §535.51, concerning general requirements for a real estate license.

The amendment would adopt by reference a modified Application for Moral Character Determination. The application is filed by a person who wishes to have TREC determine whether the person's moral character satisfies requirements for licensing or registration, that is, whether the person would transact business with honesty, trustworthiness and integrity. Potential licensees may wish to have a moral character issue resolved prior to completing education requirements that may be required for a license. The application for a moral character determination is typically filed by a person who has been convicted of a criminal offense or who has previously been disciplined by another regulatory agency. The form contains a series of questions about the person's background, similar to the questions that would be asked when an application is filed for a license issued by TREC. The form would be modified to caution the person that it should not be filed at the same time as an application for a license or if the person has already filed an application for a license, since an issue of the person's moral character would also be resolved by the filing of an application for a license. Since the application for moral character determination is a part of the licensing process, the form would also be modified to advise the person filing the application that it is mandatory that the person supply TREC with the person's Social Security number. The number is used to enforce child support orders under the Texas Family Code, §231.302. A question relating to disciplinary actions by another licensing agency also would be modified to include whether the person has been placed on probation by another agency. Minor language changes would also be made to make

the application more consistent with other TREC license application forms now in use.

Mark A. Moseley, General Counsel, has determined that for the first five-year period the section is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the section. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the section.

Mr. Moseley also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be a clarification of when an application for moral character determination should be filed by a potential licensee. There is no anticipated economic cost to persons who are required to comply with the proposed section.

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

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

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

§535.51. General Requirements.

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

(e) The commission adopts by reference the following forms approved by the commission which are published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188:

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

(7) Application for Moral Character Determination, TREC Form MCD-3 [~~MCD-2~~];

(8) - (10) (No change.)

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

Filed with the Office of the Secretary of State, on December 4, 2001.

TRD-200107565
Mark A. Moseley
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 465-3900

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 13. HEALTH PLANNING AND RESOURCE DEVELOPMENT

SUBCHAPTER B. DATA COLLECTION

25 TAC §13.17

The Texas Department of Health proposes an amendment to §13.17, concerning duties of nonprofit hospitals. The amendment establishes requirements for nonprofit hospitals in the areas of reporting on charity care policies and community benefits, providing charity care and eligibility policies to each individual seeking care at the hospital, and publishing public notices in the newspaper. It also establishes a mechanism for receiving credit for nonprofit hospitals for taking care of county indigent patients. The amendment will implement Chapter 654 (House Bill 2419) of the Session Laws (77th Legislature 2001), which amended the Health and Safety Code, Chapter 311.

Ben Delgado, Deputy Commissioner for Administration, has determined that for the first five year period the section is in effect, there will be no fiscal implications on the state or local governments as a result of implementing or administering the proposed rule.

Mr. Delgado has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section as proposed will be the availability of information necessary to assess the level of charity care and community benefits provided by nonprofit hospitals and availability of information to the public regarding eligibility for programs and types of programs provided. It is estimated that the cost of implementing these requirements will range from $200 to $3,000 for each nonprofit hospital. Since only nonprofit hospitals have the reporting obligation under the Health and Safety Code, Chapter 311, there is no anticipated cost to small or large businesses or micro businesses or persons that are not hospitals. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Shaku Desai, Office of Health Information and Analysis, 1100 West 49th Street, Austin Texas 78756-3199, (512) 458-7261, Fax (512) 458-7344. Comments will be accepted for 30 days following the publication of this proposal in the *Texas Register*.

The amendment is authorized under the Health and Safety Code, Chapters 104 and 311. Section 104.42(a) authorizes the Board of Health to adopt rules relating to the collection and dissemination of data from health care facilities necessary to facilitate health planning and resource development. Section 311.032(b) mandates the adoption of rules on the collection and reporting of hospital financial and utilization data. The Health and Safety Code, §12.001 provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the Texas Department of Health and Commissioner of Health.

The amendment affects Health and Safety Code, Chapter 12, 104, and 311.

§13.17. Duties of Nonprofit Hospitals under Health and Safety Code, Chapter 311.

(a) (No change.)

(b) Annual statement of community benefits standard.

(1) - (7) (No change.)

(8) A hospital that satisfies paragraphs (2)(A) or (7) [~~(6)~~] of this subsection shall be excluded in determining a hospital system's compliance with the standards provided in paragraph [~~paragraphs~~] (2)(B) and (C) of this subsection.

(9) (No change.)

(10) A nonprofit hospital or hospital system under contract with a local county to provide indigent health care services under Health and Safety Code, Chapter 61 may credit unreimbursed costs from direct care provided to an eligible county resident toward meeting the nonprofit hospital's or hospital system's charity care and government-sponsored indigent health care requirement.

(c) Informational manual. Each nonprofit hospital as defined under §13.13 of this title (relating to Definitions) shall use the form developed by the department to annually report a brief summary of the charity care policies and community benefits that the hospital provides.

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

(1) The department shall notify nonprofit hospitals in writing that the annual report of a community benefits plan, [~~and~~] the statement of community benefits standard, and a brief summary of charity care policy and community benefits must be filed in accordance with these rules.

(2) Nonprofit hospitals changing to a hospital system reporting basis shall report for a continuous period of time.

(3) All hospitals or hospital systems shall report as required under this title if the hospital or hospital system, for the previous fiscal year, reported as a nonprofit hospital or hospital system under §13.15 of this title (relating to Survey Forms and Methods of Reporting Data).

(4) All hospitals or hospital systems shall report any change of ownership which may affect the nonprofit status of the hospital or hospital system to the Office of Policy and Planning, formerly known as the Bureau of State Health Data and Policy Analysis, at the department within 60 days of the effective date of the change.

(5) Each nonprofit hospital or hospital system shall report the following information to the department:

(A) the hospital's mission statement;

(B) a disclosure of the health care needs of the community that were considered in developing the hospital's community benefits plan pursuant to Health and Safety Code, §311.044(b) [~~of Chapter 311~~];

(C) a disclosure of the amount and types of community benefits, including charity care, actually provided. Charity care shall be reported as a separate item from other community benefits;

(D) a statement of its total operating expenses computed in accordance with generally accepted accounting principles for hospitals from the most recent completed and audited prior fiscal year of the hospital;

(E) a completed worksheet that computes the ratio of cost to charge for the fiscal year referred to in subparagraph (D) of this paragraph and that included the same requirements as Worksheet 1-A adopted by the department in August 1994 for the 1994 "Annual Statement of Community Benefits Standards";

(F) the amount of charity care provided;

(G) the amount of government-sponsored indigent health care provided;

(H) the amount of community benefits provided;

(I) the amount of net patient revenue and the amount constituting 4.0% of net patient revenue;

(J) the dollar amount of the hospital's or hospital system's charity care and community benefits requirements met;

(K) the amount of tax-exempt benefits provided, if the hospital is required to report tax-exempt benefits under subsection (b)(2)(A) or (B) of this section; [~~and~~]

(L) the amount of charity care expenses reported in the hospital's or hospital system's audited financial statement; and [~~.~~]

(M) a brief summary of the charity care policy and community benefits provided by each nonprofit hospital as defined under §13.13 of this title.

(e) [~~(d)~~] Posting of sign. Nonprofit hospitals shall prepare a statement notifying the public that the annual report of the community benefits plan is public information, that it is filed with the department, and that it is available on request from the Office of Policy and Planning, formerly known as the Bureau of State Health Data and Policy Analysis, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. The statement must indicate the report's availability date and be posted in prominent places throughout the hospital, including, but not limited to, the waiting areas of the emergency room and the admissions office. Nonprofit hospitals shall also print the statement in the patient guide or other materials that provide the patient with information about the hospital's admissions criteria.

(f) [~~(e)~~] Charity care notice. Each hospital shall provide, to each person who seeks any health care service at the hospital, notice, in appropriate languages, if possible, about the charity care program, including the charity care and eligibility policies of the program, and how to apply for charity care. Such notice shall also be conspicuously posted in the general waiting area, in the waiting area for emergency services, in the business office, and in such other locations as the hospital deems likely to give notice of the charity care program and policies. Each hospital shall annually publish notice of the hospital's charity care program and policies in a local newspaper of general circulation in the county. Each notice under this subsection must be written in language readily understandable to the average reader.

(g) [~~(f)~~] Exemptions. A nonprofit hospital is exempt from the reporting requirement in subsection (d) [~~(c)~~] of this section if the hospital is located in a county with a population under 50,000 and in which the entire county or the population of the entire county has been designated as a "health professional shortage area" during the current or any previous fiscal year and has continued to maintain that designation.

(h) [~~(g)~~] For purposes of this section only (excluding subsection (d)(5)(M) of this section), a nonprofit hospital shall include a nonprofit hospital as defined in §13.13 of this title [~~(relating to Definitions)~~] and:

(1) a Medicaid disproportionate share hospital; or

(2) a public hospital that is owned or operated by a political subdivision of municipal corporation of the state, including a hospital district or authority.

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

Filed with the Office of the Secretary of State, on December 5, 2001.

TRD-200107595
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 458-7236

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PART 8. INTERAGENCY COUNCIL ON EARLY CHILDHOOD INTERVENTION

CHAPTER 621. EARLY CHILDHOOD INTERVENTION

SUBCHAPTER G. DEVELOPMENTAL REHABILITATION SERVICES

25 TAC §§621.155, 621.157, 621.159, 621.161, 621.163

The Interagency Council on Early Childhood Intervention proposes new §§621.155, 621.157, 621.159, 621.161, 621.163, concerning developmental rehabilitation services.

The purpose of these sections is to establish the criteria, procedures, and standards of conduct governing the relationship between the Council and its officers and employees, and private donors and private organizations which exist to further the duties and purposes of the Council.

The law requires the rules to govern all aspects of conduct of the agency and its employees in the relationship with the organization, including: administration and investment of funds received by the organization for the benefit of the agency; use of an employee or property of the agency by the donor or organization; service by an officer or employee of the agency as an officer or director of the donor or organization; and monetary enrichment of an officer or employee of the agency by the donor or organization.

Donna Samuelson, Deputy Executive Director, ECI, has determined that there will be no fiscal implication for the state. There will be no fiscal implications for local government as a result of enforcing or administering the rules.

Ms. Samuelson also has determined that for each year the proposed sections are in effect, the public benefit anticipated as a result of enforcing the sections will be established criteria, procedures, and standards of conduct governing the relationship between the Council and its officers and employees, and private donors and private organizations which exist to further the duties and purposes of the Council.

There will be no impact on local employment. There will be no adverse effect on small or micro-business. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Questions about the content of this proposal may be directed to Donna Samuelson at the Texas Interagency Council on Early Childhood Intervention at (512) 424-6754. Written comments on the proposal may be submitted to Donna Samuelson, Deputy Director, Texas Interagency Council on Early Childhood Intervention, 4900 North Lamar, Austin, Texas, 78751-2399, within 30 days of publication in the *Texas Register*.

The new sections are proposed under the Texas Government Code, §2255.001 which requires state agencies who are authorized to accept money from private donors to adopt rules governing the relationship between the donor organization and the agency and its employees. The Texas Human Resources Code 73.0051(e) authorizes the Interagency Council on Early Childhood Intervention (Council) to accept gifts, grants and donations from public and private sources for use in Council programs.

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

§621.155. Purpose.

The purpose of these sections is to establish the criteria, procedures, and standards of conduct governing the relationship between the Interagency Council on Early Childhood Intervention (Council) and its officers and employees and private donors and private organizations which exist to further the duties and purposes of the Council.

§621.157. Definitions.

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

(1) Executive Director--The Executive Director of the Interagency Council on Early Childhood Intervention.

(2) Board--Board of the Interagency Council on Early Childhood Intervention.

(3) Council--Interagency Council on Early Childhood Intervention.

(4) Donation--A contribution of anything of value (financial or in-kind gifts such as goods or services) given to the Council or to a private organization or foundation which exists to further the duties or functions of the Council.

(5) Employee--A regular full-time or part-time employee of the Council.

(6) Officer -- A member of the board of the Council.

(7) Private donor--One or more persons which give a donation to the Council on Early Childhood Intervention or to a private organization which exists to further the duties and purposes of the Council.

(8) Private organization--A private organization which exists to further the purposes and duties of the Council.

§621.159. Donations by Private Donors to the Interagency Council on Early Childhood Intervention.

(a) All donations to the Council shall be expended in accordance with the provisions of the state Appropriations Act and shall be deposited in the state treasury unless exempted by specific statutory authority.

(b) All donations will be coordinated through the Executive Director of the Council.

(c) The Council may not transfer a private donation to a foundation or private/public development fund without specific written permission from the donor and the written approval of the Executive Director.

§621.161. Relationship Between Private Organizations and the Interagency Council on Early Childhood Intervention.

(a) A private organization which exists to further the duties and purposes of the Council and the Council shall enter into a memorandum of understanding (MOU) which contains specific provisions regarding:

(1) the relationship between the private organization and the Council;

(2) fundraising and solicitation;

(3) the use of all funds and other donations from fundraising or solicitation, less legitimate expenses as described in the MOU, for the benefit of the Council;

(4) the maintenance by the private organization or receipts and documentation of all funds and other donations received, including furnishing such records to the Council;

(5) the furnishing to the Council of any audit of the private organization by the Internal Revenue Service or a private firm; and

(6) the conditions under which the Council will provide property and/or staff support to the organization to further the duties and purposes of the Council and the organization;

(b) The Council may assist an organization in fund raising and solicitation when:

(1) the ultimate use of the funds, less administrative expenses, will benefit early childhood intervention programs and is consistent with and will further the goals and mission of the Council;

(2) such fund raising activity does not violate rules governing standards of conduct between Council employees and private donors found herein.

(c) The Council may accept from a private organization financial assistance designed to promote early childhood intervention services and programs in the state of Texas. These funds must enhance state funds and not supplant or replace state appropriations. Before the Council may accept such assistance, the Executive Director must ascertain and document that the acceptance will promote the goals of the Council, and that the acceptance does not violate the personnel or administrative policies of the Council.

(d) With regard to all funds received:

(1) The private organization shall maintain receipts and documentation of all funds and other donations received, and shall furnish such documentation to the Council on request.

(2) The organization shall maintain all funds in insured accounts at established financial institutions, unless the organization and the Council Executive Director approve other investments.

(3) State funds held by the organization shall be invested according to the state's Public Funds Investment Act.

(4) The organization shall obtain an independent audit on an annual basis and submit the results to the Executive Director of the Council. Records relating to activities supported by public funds will be subject to public scrutiny.

(5) Funds generated by the organization will be spent in accordance with the organization's established priorities. Council employees can not directly spend organization funds - all organization expenditures will be controlled by the organization and its employees.

(6) Expenditures of funds by the organization shall meet requirements of the source of funds, if applicable.

(7) The organization may solicit and accept corporate sponsorships and will ensure the sponsorships serve and support the organization and ECI Board mission. The organization shall establish selection criteria and guidelines when seeking corporate sponsorships and ensure sponsorships serve the public interest and are consistent with the Council's mission.

(8) Fundraising for the organization shall be conducted by organization employees and board members and not by state employees with regulatory authority over the potential donor or those for whom it could pose a conflict of interest with a potential donor.

(9) No funding generated by the organization shall be used to provide a salary supplement or bonus to any state employee.

(10) The organization shall perform an annual evaluation of its achievement of established goals/objectives to determine the effectiveness of the organization.

§621.163. Standards of Conduct for Officers or Employees of the Council

(a) An officer or employee shall not accept or solicit any gift, favor, or service from a private donor or private organization that might reasonably tend to influence his/her official conduct.

(b) An officer or employee shall not accept employment or engage in any business or professional activity with a private donor or private organization which the officer or employee might reasonably expect would require or induce him/her to disclose confidential information acquired by reason of his/her official position.

(c) An officer or employee shall not accept other employment or compensation from a private donor or private organization which would reasonably be expected to impair the officer's or employee's independence of judgment in the performance of his/her official position.

(d) An officer or employee shall not make personal investments in association with a private donor or private organization which could reasonably be expected to create a substantial conflict between the officer's or employee's private interest and the interest of the Council.

(e) An officer or employee shall not solicit, accept, or agree to accept any benefits for having exercised his/her official powers on behalf of a private donor or private organization or performed his official duties in favor of a private donor or private organization.

(f) The Executive Director of the Council or an officer of the Council may be a non-voting member(s) of the board of directors of a private organization which exists to further the duties and purposes of the Council.

(g) An officer or employee shall not authorize a private donor or private organization to use property of the Council unless the property is used in accordance with a contract or memorandum of understanding between the Council and the private donor or private organization, or the Council is otherwise compensated for the use of the property.

(h) The relationship between a private donor and a private organization and the Council, including fundraising and solicitation activities, is subject to all applicable federal and state laws, rules and regulations, and local ordinances governing each entity and its employees.

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

Filed with the Office of the Secretary of State, on December 10, 2001.

TRD-200107681
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 424-6750

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 34. STATE FIRE MARSHAL

SUBCHAPTER E. FIRE EXTINGUISHER RULES

28 TAC §34.517

The Texas Department of Insurance proposes amendments to §34.517 concerning servicing of portable fire extinguishers. These amendments are necessary to implement legislation enacted by the 77th Legislature in Senate Bill 327. Senate Bill 327 amended Article 5.43-1 of the Insurance Code, which regulates the leasing, renting, selling, installing, and servicing of portable fire extinguishers and the planning, certifying, installing, or servicing of fixed fire extinguisher systems. Article 5.43-1 prohibited the servicing, leasing, selling, renting or installing of portable fire extinguishers, fixed fire extinguisher systems, and extinguisher equipment not labeled or listed by a testing laboratory approved by the Texas Department of Insurance. As amended, Article 5.43-1 requires the commissioner by rule to allow portable fire extinguishers to be serviced regardless of whether the fire extinguisher carries the required labeling or listing. The proposed amendments to §34.517 describe the types of portable fire extinguishers that may be serviced. The three types of portable fire extinguishers listed in the proposed amendments are for commercial use only. The proposed amendments set forth requirements for labeling after servicing is completed. Nothing in the rule requires owners of these types of portable extinguishers to service rather than replace unlabeled extinguishers.

G. Mike Davis, state fire marshal, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the rule. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Mr. Davis has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of the amendments will be cost savings to consumers who choose to service existing fire extinguishers in lieu of having to purchase new fire extinguishers. Mr. Davis has determined that this proposal will have no adverse economic effect since it allows owners of the three categories of extinguishers to choose whether to service or replace unlabeled extinguishers. Any economic cost to persons required to comply with these amendments, including any entity qualifying as a small or micro business under Government Code §2006.001, for each year of the first five years the proposed amendments will be in effect are the result of the legislative enactment of Senate Bill 327, and not as a result of the adoption, enforcement, or administration of the proposed amendments. It is not legal or feasible to waive the requirements of this rule for small or micro-businesses. To do so would allow differentiation of protection between consumers/customers of small entities compared to those protections provided to the consumers/customers of large entities.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on January 20, 2002 to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to G. Mike Davis, State Fire Marshall, Mail Code 112-FM Texas Department of Insurance, P.O. Box 149221, Austin, Texas 78714-9221. A request for a public hearing should be submitted separately to the Office of the Chief Clerk.

The amendments are proposed pursuant to the Insurance Code article 5.43-1 and §36.001. Article 5.43-1 regulates the leasing, renting, selling, installing, and servicing of portable fire extinguishers and the planning, certifying, installing, or servicing of fixed fire extinguisher systems. Article 5.43-1 also prohibits the servicing, leasing, selling, renting or installing of portable fire extinguishers, fixed fire extinguisher systems, and extinguisher equipment not labeled or listed by a testing laboratory approved by the Texas Department of Insurance. Section 36.001 provides that the Commissioner of Insurance may adopt rules to execute the duties and functions of the Texas Department of Insurance as authorized by statute.

The following article is affected by this proposal: Insurance Code Article 5.43-1

§34.517. Installation and Service.

(a) The following requirements are applicable to all portable extinguishers.

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

(3) When requested in writing by the owner, a portable fire extinguisher of the type described in subparagraphs (A), (B) and (C) of this paragraph may be serviced in accordance with the requirements of this subchapter, regardless of whether it carries the label of approval or listing of a testing laboratory approved in accordance with this subchapter.

(A) All portable fire extinguishers that are serviced in accordance with the requirements of the United States Coast Guard and installed for use in foreign shipping vessels;

(B) All portable carbon dioxide fire extinguishers that are serviced in accordance with the requirements of the United States Department of Transportation; or

(C) Cartridge actuated portable fire extinguishers used exclusively by employees of the firm owning the extinguishers.

(4) A licensee who services portable fire extinguishers in accordance with paragraph (3) of this subsection, shall comply with the following:

(A) The back of the service tag shall be plainly marked with the words "No Listing Mark".

(B) All missing markings, code symbols, instructions and information, required by the applicable performance standard and fire test standard specified in §34.507(1) of this subchapter (relating to adopted standards and recommendations), except for the approving or listing mark of the testing laboratory, shall be affixed to each extinguisher in the form of a label designated in the standard.

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

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

Filed with the Office of the Secretary of State, on December 10, 2001.

TRD-200107695
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 463-6327

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER O. STATE SALES AND USE TAX

34 TAC §3.368

The Comptroller of Public Accounts proposes a new §3.368, concerning the certified public accountant audit program. This section implements Senate Bill 1037, 77th Legislature, 2001. The section establishes administrative and procedural guidelines for a new audit program in which a taxpayer may hire a certified public accountant who is not employed by the comptroller to perform a sales and use tax audit to determine a taxpayer's tax liability under Tax Code, Chapter 151.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing taxpayers with a more efficient means of obtaining tax information. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Eleanor H. Kim, Assistant Director of Tax Administration, P.O. Box 13528, Austin, Texas 78711.

This new rule is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new rule implements Tax Code, §151.0232.

§3.368. Certified Public Accountant (CPA) Audit Program.

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

(1) Applicant--A certified public accountant who applies to be a qualified practitioner.

(2) CPA audit program--A program that the comptroller created under Tax Code, §151.0232, in which a taxpayer may hire a certified public accountant who is not employed by the comptroller to perform a sales and use tax audit to determine a taxpayer's tax liability under Tax Code, Chapter 151.

(3) Examination--As used in this section, the term means an examination that is prepared and graded by an independent exam administrator who has contracted with the comptroller to administer the examination for the CPA audit program.

(4) Priority I accounts--Taxpayers who cumulatively report the top 65% of the tax under Tax Code, Chapter 151, recalculated annually.

(5) Qualified practitioner--A certified public accountant who meets the requirements that are stated in subsection (b)(1) of this section.

(6) Training--A set of education courses, both for initial training and continuing education, that applicants for and participants of the CPA audit program must complete to perform a sales and use tax audit for the State of Texas.

(b) Participation in the CPA audit program.

(1) A certified public accountant who wishes to participate in the CPA audit program must:

(A) be licensed as a certified public accountant by Texas State Board of Public Accountancy;

(B) have had no disciplinary actions before the Texas State Board of Public Accountancy for the preceding three years;

(C) not be delinquent for any state tax for which the CPA is liable, and not be associated with a firm that is delinquent for any state tax;

(D) complete the minimum training that the comptroller requires;

(E) pass an examination as required by the comptroller;

(F) sign a confidentiality agreement with the comptroller; and

(G) obtain an authorization card that the comptroller issues to perform a sales and use tax audit.

(2) A taxpayer who wishes to participate in the CPA audit program must:

(A) hold a Texas sales and use tax permit for the entire audit period under consideration for the CPA audit program;

(B) not be delinquent for any tax that the comptroller collects and administers, for which the taxpayer is liable;

(C) not be in bankruptcy status;

(D) have no voluntary disclosure agreements in place or pending for sales tax for the audit period under consideration for the CPA audit program;

(E) not be classified as a Priority I account by the comptroller, not be routinely audited by the comptroller, and not have received a notice of an upcoming sales and use tax audit from the comptroller;

(F) have complete records that are available for the entire audit period under consideration for the CPA audit program;

(G) not have participated in the CPA audit program for a sales and use tax audit in the immediately preceding four years;

(H) provide the name, address, license number, and practice unit number of the qualified practitioner who is selected to conduct the audit, and a description of the nature of any prior relationship with the selected qualified practitioner and the CPA firm with which the qualified practitioner is associated;

(I) submit to the comptroller a completed program application form before the taxpayer allows the qualified practitioner to perform any sales and use tax audit work; and

(J) submit additional documents that the comptroller may require.

(c) Training for practitioners.

(1) The comptroller will establish a standard outline of subject areas that addresses both taxability and procedural matters that may be included in the examination. The applicant must complete all courses that cover the required procedural subjects to be eligible to take the examination that is required to be a qualified practitioner.

(2) The comptroller will also establish a standard outline of subject areas to be covered in continuing education courses that a qualified practitioner must complete while participating in the CPA audit program.

(3) Applicants and qualified practitioners may complete the required training by enrollment in courses that any instructor of their choice offers. See subsection (p) of this section for further information on instructors.

(4) Upon successful completion of each training course, the applicant bears the responsibility to obtain a Certificate of Completion from the instructor.

(d) Examination.

(1) Before taking the required examination, an applicant must obtain a preliminary approval from the comptroller that the applicant satisfies the requirements of subsection (b)(1)(A) through (b)(1)(D) of this section. An applicant must also submit copies of Certificates of Completion for required procedural courses.

(2) Examinations will be given and graded by an independent exam administrator whom the comptroller selects.

(3) Examinations will be conducted at locations that the independent exam administrator designates. The independent exam administrator will set dates, times, instructions, and requirements, including any fees, to take the examination.

(4) The independent exam administrator must obtain a copy of the comptroller's preliminary approval letter from each applicant prior to administering the exam, and must forward applicants' grades to the comptroller.

(5) Failure to pass the examination shall require such applicant to retake the examination. An applicant may retake the examination, provided that the applicant is qualified as set forth under subsection (d)(1) of this section. A waiting period of 30 days between examinations is required.

(6) Neither the independent exam administrator nor the comptroller will release copies of the examinations to applicants. An applicant is not permitted to make copies of the examination and is prohibited from disclosing any information about the contents or administration of the examinations that could affect the validity of the examination.

(e) Authorization card. The comptroller's authorization card is issued only to a certified public accountant who has met all requirements to become a qualified practitioner.

(1) The authorization card expires three years from the date of issuance and is neither transferable nor applicable to the firm, partners, officers, shareholders, employees, staff, or any persons who are associated with the qualified practitioner. Only qualified practitioners who hold active and valid authorization cards that the comptroller has issued are eligible to state or imply that they are qualified practitioners who are authorized to conduct Texas sales and use tax audits.

(2) Before the qualified practitioner's authorization card expires, the practitioner must meet the following requirements to renew the card:

(A) complete an application for requalification;

(B) complete at least 16 hours of qualifying continuing education in Texas sales and use tax each year that the qualified practitioner held the authorization card;

(C) complete at least 350 hours of sales and use tax practice each year that the qualified practitioner held the authorization card;

(D) have no disciplinary actions from the Texas State Board of Public Accountancy during the three years that the qualified practitioner held the authorization card;

(E) submit sales and use tax audits to the comptroller that demonstrate a current and on-going knowledge of Texas sales and use tax law, rules, hearings decisions, and policy statements; and

(F) not be delinquent for any state tax for which the CPA is liable, and not be associated with a firm that is delinquent for any state tax.

(3) The authorization card that is issued to the qualified practitioner becomes automatically invalid if the Texas State Board of Public Accountancy revokes the license of the certified public accountant or the firm with which the qualified practitioner is associated. The comptroller has sole discretion to cancel an authorization card that is issued to a qualified practitioner based on any violations of this section, poor work performance, complaints, violations of the confidentiality agreement, or other performance that the comptroller considers to be or would cause a detriment to the comptroller, taxpayers, or the State of Texas. See subsection (m) of this section for information on appeal.

(f) Consideration of taxpayer's request to participate in CPA audit program. The comptroller may consider the following factors to determine whether the taxpayer's request should be approved or rejected:

(1) the taxpayer's history of tax compliance, including:

(A) timely filing of all reports;

(B) timely payment of all taxes and fees that are due the state;

(C) prior audit history;

(D) delinquency in state taxes;

(E) correction of problems that have been previously identified; and

(F) collection of tax that was not remitted.

(2) the extent, availability, and completeness of the taxpayer's records for the period to be covered by the audit;

(3) the taxpayer's ability to pay any expected liability;

(4) the size and sophistication of the taxpayer; and

(5) any other factors that the comptroller considers relevant.

(g) Contract.

(1) If the comptroller approves the taxpayer's application to participate in the CPA audit program, the comptroller shall send the taxpayer notice of the preliminary approval, along with a contract for signature, and if necessary, an Agreement to Extend Period of Limitation. The taxpayer must sign and return the contract and Agreement to Extend Period of Limitation.

(2) At the time the contract is returned to the comptroller, the taxpayer must also submit an audit plan summary and notification of sampling procedures, if any, that the qualified practitioner whom

the taxpayer has selected to conduct the sales and use tax audit has completed.

(3) The comptroller will sign the contract only if the audit plan summary is satisfactory.

(4) The contract will contain the following:

(A) the signatures of the taxpayer and an authorized representative of the comptroller;

(B) a specific period to be audited and the procedure to be followed;

(C) a specific date by which the audit is to be completed and submitted to the comptroller for review;

(D) the completed Audit Plan Summary as Exhibit A;

(E) the Notification of Sampling Procedures, if necessary, as Exhibit B; and

(F) the Agreement to Extend Period of Limitation, if necessary, as Exhibit C.

(h) Audit Period. The audit period for an audit to be conducted by a qualified practitioner shall follow the four-year statute of limitations guidelines that the comptroller uses, unless the taxpayer requests and the comptroller approves a shorter audit period. The comptroller will not approve an audit period that is less than one year. With approval from the comptroller, a qualified practitioner may separate a four-year audit period into shorter audit periods and conduct sequential audit that cover one-year or two-year periods.

(i) Audit Process.

(1) In conducting the sales and use tax audit, the qualified practitioner must adhere to all Texas sales and use tax laws and rules, all requirements that pertain to confidential information and disclosure, all audit and sampling procedures that the comptroller uses in conducting a sales tax audit, and all Rules of Professional Conduct (22 TAC, Part 22, Chapter 501), including maintaining independence in fact and appearance from the taxpayer. The qualified practitioner must exercise due professional care, and adequately plan and consistently supervise the performance of the audit engagement and employees who work on the sales tax audit.

(2) A qualified practitioner may use sampling procedures that reflect, as closely as possible, the normal conditions of the taxpayer's business as required by Tax Code, §111.0042. The sampling method must be one that the comptroller has approved, and all notifications and documentation should be issued in accordance with comptroller's audit procedures.

(3) The comptroller will rescind the CPA audit program contract between the taxpayer and the comptroller if, at any time during the audit process, any of the following events occur:

(A) the taxpayer files for bankruptcy subsequent to approval of participation but prior to completion of the audit by the qualified practitioner; or

(B) the Texas State Board of Public Accountancy revokes or suspends the license of a certified public accountant who is the qualified practitioner on the audit engagement; or

(C) the Texas State Board of Public Accountancy revokes or suspends the license of the firm with which the qualified practitioner is associated; or

(D) the qualified practitioner's independence as a CPA has been impaired and cannot be cured by disclosure under applicable professional standards; or

(E) the qualified practitioner violates paragraph (1) of this subsection.

(4) If the contract is rescinded during the audit process, the comptroller may assign an employee of the comptroller to complete the audit, may allow the taxpayer to select another qualified practitioner to complete the audit, or may cancel the audit.

(5) The qualified practitioner must submit the audit by the date specified in the contract and in the format specified by the comptroller, including all supporting documentation and work papers. If the qualified practitioner finds that any of the exceptions to the statute of limitations, as enumerated in Tax Code, §111.205, exist, then the qualified practitioner must report those facts to the comptroller. The comptroller may examine records and perform reviews that the comptroller determines are necessary to verify the results of the audit or comply with other applicable laws before the audit is finalized.

(6) The comptroller may return the audit to the qualified practitioner for correction and/or adjustments that the comptroller deems necessary. If the qualified practitioner is unable or unwilling to make the adjustments or complete the audit as specified in the contract, the comptroller may either allow another qualified practitioner whom the taxpayer selects to complete the audit, or may assign an employee to complete the audit.

(j) Extension of audit submission date. If the audit cannot be completed by the date specified in the contract, the taxpayer must provide written notification to the comptroller at least 30 days prior to the specified completion date, and therein outline the reasons for the extension of time. If necessary, the taxpayer must also submit a signed Agreement to Extend Period of Limitation that accurately reflects the applicable requested extension date. The comptroller may accept or reject the request for extension and may terminate the contract if the comptroller determines that the taxpayer has not made a good faith effort to ensure that the audit is completed by the specified completion date, or if any portion of the specified audit period is jeopardized due to the taxpayer's failure to execute an Agreement to Extend Period of Limitation, as specified in the contract.

(k) Taxpayer's Rights. A taxpayer who has a contract with the comptroller to participate in the CPA audit program does not relinquish any rights to request a refund or to request a redetermination or refund hearing as provided by Tax Code, Chapter 111.

(l) Restrictions.

(1) A taxpayer and a qualified practitioner are prohibited from entering into a contract that pays a fee or compensates the qualified practitioner based upon the results of the audit.

(2) A taxpayer and a qualified practitioner are prohibited from entering into a contract if, for the three years prior to the beginning of the audit, the qualified practitioner or firm had any relationship with the taxpayer that pertained to Texas sales and use taxes.

(3) For any reporting period that is included in the sales tax audit, the taxpayer may not select a qualified practitioner or firm to perform the sales and use tax audit if that qualified practitioner or firm prepared the taxpayer's sales and use tax returns or refund requests.

(4) For the audit period that is included in the contract, or for sales tax returns that are due for 12 consecutive months following the audit period, the taxpayer may not submit subsequent refund requests or amended returns for sales taxes that the qualified practitioner or firm that conducted the sales tax audit under the CPA audit program have prepared.

(5) The qualified practitioner or the firm with which the qualified practitioner is associated may not represent the taxpayer in

any redetermination hearing or refund hearing on the audit conducted by the qualified practitioner or the firm with which the qualified practitioner is associated.

(m) Appeal of decision. The comptroller has exclusive authority to administer the CPA audit program. This authority includes, but is not limited to, the authorization to approve an audit engagement and the decision to deny or revoke authorization granted under this section. The decision of the comptroller to deny or revoke authorization under this section is not a contested case and is not subject to an administrative hearing or appeal.

(n) Penalty and interest. Unless the audit or information that the comptroller reviews under this subsection discloses fraud or willful evasion of the tax, the comptroller may not assess a penalty and may waive all or part of the interest that would otherwise accrue on any amount that is identified to be due as a result of an audit conducted under the CPA audit program, provided that the assessment is timely made. This subsection does not apply to any amount that the taxpayer collected and that was a tax or represented to be a tax but was not remitted to the comptroller, or to any audit under a CPA program that the comptroller completes for any reason.

(o) Detrimental reliance. In any subsequent audit of the taxpayer by the comptroller, detrimental reliance that is based upon the results of the audit that the qualified practitioner conducts, or incorrect or misleading advice that the qualified practitioner gives, is not a defense against assessment of tax, penalty, or interest.

(p) Instructors.

(1) A person who offers courses for the CPA audit program may submit that person's name for addition to the list of instructors. The list will be maintained on the comptroller's website (www.window.state.tx.us) for public viewing. Publication of the name of the instructor on the comptroller's website does not constitute an approval by the comptroller of the instructor's qualification.

(2) The comptroller is not responsible for review or approval of training materials that instructors prepare and present. Publication of the name of the instructor on the comptroller's website does not constitute an approval of the accuracy or content of classes and information that instructors present.

(3) Instructors shall be solely responsible for setting the fees to be charged applicants for training, as well as for collection of the fees. The comptroller shall have no responsibility whatsoever for any costs or expenses that pertain to the training of applicants, and those costs and expenses shall be arranged between the instructors and the applicant only.

(q) Confidentiality of information. A qualified practitioner who participates in the CPA audit program is acting on behalf of the comptroller in performing an audit under this program, and is subject to all the requirements and penalties that apply to an employee of the comptroller regarding the confidentiality and disclosure of information obtained from or during an audit.

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

Filed with the Office of the Secretary of State, on December 7, 2001.

TRD-200107631

Martin Cherry
Deputy General Counsel for Taxation
Comptroller of Public Accounts
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 463-3699

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

The Texas Department of Human Services (DHS) proposes amendments to §92.20, concerning license fees, and §92.157, concerning involuntary appointment of a trustee, in its Licensing Standards for Assisted Living Facilities chapter. The purpose of the amendment is to establish a separate trust fund account for assisted living facilities, as directed by the 77th Legislature.

James R. Hine, 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. Hine 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 lower expenditures for assisted living facilities, which should influence fees charged to consumers. Assisted living facilities previously paid trust fund assessments that were placed in a trust fund account for nursing facilities. The assessment cap was $10 million. A separate trust fund account with a cap of $500,000 that can be used only when a court places a trustee in an assisted living facility will allow for a lower assessment for assisted living facilities. There will be no adverse economic effect on small or micro businesses, because these changes will allow a separate account for all trust fund fees for assisted living, and will lower the capped amount for businesses. This should provide some monetary savings for assisted living facilities, some of which may be small businesses or micro businesses. There will be no anticipated economic cost to persons who are required to comply with the proposed sections. There will be no anticipated effect on local employment in geographic areas affected by these sections.

Questions about the content of this proposal may be directed to Jeanoyce Wilson at (512) 438-2353 in DHS's Long Term Care Policy section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-016, 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. APPLICATION PROCEDURES

40 TAC §92.20

The amendment is proposed under the Health and Safety Code, Chapter 242, which authorizes the department to license and regulate assisted living facilities, and the Health and Safety Code, Chapter 247, which authorize the establishment of the assisted living facility trust fund and an additional assisted living facility license fee.

The amendment implements the Health and Safety Code, §§242.0965 - 242.0975 and §§247.001 - 247.068.

§92.20. License Fees.

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

(c) Trust fund fee.

(1) (No change.)

(2) DHS charges and collects an annual fee from each institution licensed under Health and Safety Code, Chapter 247, each calendar year if the amount of the assisted living [~~nursing and convalescent~~] trust fund is less than $500,000 [~~$10,000,000~~]. The fee is deposited to the credit of the assisted living facility trust fund. The fee is based on a monetary amount specified for each licensed unit of capacity or bed space, [~~not to exceed $20 annually,~~] and is in an amount sufficient to provide not more than $500,000 [~~$10,000,000~~] in the trust fund. In calculating the fee, the amount will be rounded to the next whole cent.

(3) DHS may charge and collect a trust fund fee more than once a year only if necessary to ensure that the amount in the assisted living [~~nursing and convalescent~~] trust fund is sufficient to make the disbursements required under Health and Safety Code, §242.0965 [~~§242.096~~].

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

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

Filed with the Office of the Secretary of State, on December 7, 2001.

TRD-200107612
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 438-3734

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SUBCHAPTER H. ENFORCEMENT

40 TAC §92.157

The amendment is proposed under the Health and Safety Code, Chapter 242, which authorizes the department to license and regulate assisted living facilities, and the Health and Safety Code, Chapter 247, which authorize the establishment of the assisted living facility trust fund and an additional assisted living facility license fee.

The amendment implements the Health and Safety Code, §§242.0965 - 242.0975 and §§247.001 - 247.068.

§92.157. Involuntary Appointment of a Trustee.

(a) (No change.)

(b) A trustee appointed under this section is entitled to a reasonable fee as determined by the court, to be paid from the assisted living facility trust fund [~~Nursing and Convalescent Home Trust Fund~~].

(c) - (d) (No change.)

(e) A facility that receives emergency assistance funds under this section must reimburse DHS for the amounts received not later that one year after the date on which the funds were received by the trustee. The owner of the facility at the time the trustee was appointed is responsible for the reimbursement [~~and must pay interest from the date the funds were disbursed on the amount outstanding at a rate equal to the rate of interest determined under Texas Civil Statutes, Article 5069-1.05, to be applicable to judgments rendered during the month in which the money was disbursed to the facility~~]. DHS will deposit the reimbursement [~~and the interest~~] received under this subsection to the credit of the assisted living [~~nursing and convalescent home~~] trust fund. [~~If the funds are not repaid within the year, DHS may determine that the facility is not eligible for a Medicaid contract.~~]

(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 December 7, 2001.

TRD-200107613
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 438-3734

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CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

SUBCHAPTER D. FACILITY CONSTRUCTION

40 TAC §92.71, §92.72

The Texas Department of Human Services (DHS) proposes amendments to §92.71, concerning introduction and application: Type E facilities, and §92.72, concerning general requirements: Type E facilities, in its Licensing Standards for Assisted Living Facilities chapter. The purpose of the amendments is to provide a Type E assisted living facility license for two-story buildings that meet certain Life Safety Code conditions, and implement Senate Bill 691 and Senate Bill 527, which amended the Health and Safety Code, Chapter 247.

James R. Hine, 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. Hine 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 an increased number of licensed assisted living facilities. More facilities will have the option to apply for a Type E assisted living facility license. Type E licensure rules previously allowed only a single-story building. The proposed rules will allow two-story buildings if certain conditions are met. There will be no effect

on small or micro businesses as a result of enforcing or administering the sections, because allowing two-story buildings will open the Type E assisted living facility license to more owners, who may be small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There will be no anticipated effect on local employment in geographic areas affected by these sections.

Questions about the content of this proposal may be directed to Jeanoyce Wilson at (512) 438-2353 in DHS's Long Term Care Policy section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-016, 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 amendments are proposed under the Health and Safety Code, Chapter 247, which authorizes the department to license and regulate assisted living facilities.

The amendments implement the Health and Safety Code, §§247.001 - 247.068.

§92.71. Introduction and Application: Type E Facilities.

(a) Classification of facilities. A Type E facility provides [~~is a one-story building(s) providing~~] sleeping accommodations for 16 or fewer residents exclusive of "live-in" houseparents, family, or staff. Two-story buildings must meet all life safety code requirements in regard to protecting vertical openings, as specified in the 1988 edition of the National Fire Protection Association (NFPA) 101, Section 21-2.3.1.

(b) (No change.)

§92.72. General Requirements: Type E Facilities.

(a) General. The concept of the National Fire Protection Association (NFPA) 101 Life Safety Code requirements for fire safety with regard to the residents is based on evacuation capability. In accordance with Chapter 21 of the Life Safety Code [~~this title~~] (relating to Residential Board and Care Occupancies), residents of Type E facilities are classified as "prompt" evacuation capability.

(b) - (l) (No change.)

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

Filed with the Office of the Secretary of State, on December 7, 2001.

TRD-200107614
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 438-3734

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PART 2. TEXAS REHABILITATION COMMISSION

CHAPTER 106. PURCHASE OF GOODS AND SERVICES BY TEXAS REHABILITATION COMMISSION

SUBCHAPTER D. PURCHASE OF GOODS AND SERVICES

40 TAC §106.105

The Texas Rehabilitation Commission (TRC) proposes a change to Title 40, Chapter 106, concerning purchase of goods and services by TRC. The change is being proposed to correct an erroneous citation to the Human Resources Code in 40 TAC §106.105.

Charles E. Harrison, Jr., Deputy Commissioner for Financial Services, has determined that for the first five-year period the section is in effect, there will be no material fiscal implications for state or local government.

Mr. Harrison also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the agency's compliance with Chapter 111, Human Resources Code. There will be no material effect on small businesses. There is no material anticipated economic cost to persons who are required to comply with the section as proposed. In accordance with Government Code §2001.022, TRC has determined that the proposed rule will not affect a local economy.

Comments on the proposal may be submitted to Roger Darley, Assistant General Counsel, Texas Rehabilitation Commission, 4900 North Lamar Boulevard, Suite 7300, Austin, Texas 78751.

The amendment is proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.105. Alternative Purchasing Methods - Schedule of Rates for Medical Services.

Pursuant to Human Resources Code, §111.0552 [~~§111.055(a)~~], the board adopts the following rules and standards governing the determination of rates TRC will pay for medical services.

(1) A proposed rate schedule for medical services will be developed and maintained by the TRC Deputy Commissioner for Administrative Services. The proposed rate schedule will be updated and submitted for board approval at least annually. The proposed rate schedule will include a comparison of the proposed rate schedule to other cost-based rates for medical services, including Medicaid and Medicare rates, and for any proposed rate that exceeds the Medicare or Medicaid rate, will document the reasons why the proposed rate ensures the best value in the use of dollars for clients.

(2) The current proposed rate schedule will be made available to members of the public upon request. Members of the public may submit written comments concerning the proposed rate schedule at any time to the TRC Deputy Commissioner for Administrative Services, 4900 North Lamar Boulevard, Austin, Texas 78751.

(3) Annually, the board shall adopt by rule a schedule of rates based upon the proposed rate schedule submitted by the TRC Deputy Commissioner for Administrative Services. The board shall hold a public hearing before adopting the rate schedule to allow interested persons to submit comments. In adopting the rate schedule,

the board shall compare the proposed rate schedule to other cost-based rates for medical services, including Medicaid and Medicare rates, and for any rate adopted that exceeds the Medicare or Medicaid rate, document the reasons why the rate adopted ensures the bast value in the use of dollars for clients.

(4) The following standards will be used when determining the rates TRC will pay for medical services:

(A) Rates will be established based on Medicare and Medicaid schedules for current procedural terminology (CPT). Where Medicare and Medicaid schedules are not applicable, rates that represent best value will be established based upon factors that include reasonable and customary industry standards for each specific service.

(B) Rates will be established at a level adequate to insure availability of qualified providers, and in adequate numbers to provide assessment and treatment, and within a geographic distribution that mirrors client/claimant distribution.

(C) Exceptions to established rates can be made on a case by case basis by the TRC medical director.

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

Filed with the Office of the Secretary of State, on December 10, 2001.

TRD-200107678
Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
Earliest possible date of adoption: January 20, 2002
For further information, please call: (512) 424-4050

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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 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 101. ASSESSMENT

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §101.3

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed new section, submitted by the Texas Education Agency has been automatically withdrawn. The new section as proposed appeared in the June 1, 2001 issue of the *Texas Register* (26 TexReg 3896).

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107709

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ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 daysafter the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federalstatute or regula tion requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 1. ADMINISTRATION

PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 255. FINANCE

1 TAC §255.1

The Commission on State Emergency Communications (CSEC) adopts an amendment to §255.1, concerning the statewide 9-1-1 Equalization Surcharge to be assessed to each customer receiving intrastate long-distance service except those specifically exempted by law, without changes to the proposed text as published in the November 2, 2001, issue of the *Texas Register* (26 TexReg 8624).

The section is amended to reflect consistency with the 77th Texas Legislature's passage of HB 2914 which provides statutory authority to bill only one Equalization Surcharge. Rule 255.1 is being amended to increase the surcharge rate, combining both the 9-1-1 and Poison surcharges, the net effect of the two changes would not be an increase or decrease in the rates currently applied. Section 771.072 states that equalization surcharges will be imposed on customers for intrastate long-distance service. This revenue will be allocated to the 9-1-1 Program and the Poison Program. CSEC staff agrees there appears to be authority to bill a single "Equalization Surcharge," and not two separate surcharges.

No comments were received regarding adoption of the amendment.

The amendment is adopted pursuant to the Health and Safety Code, Chapter 771, §§771.072, 771.073, 771.074, 771.075, and 771.078.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107679

Paul Mallett
Executive Director
Commission on State Emergency Communications
Effective date: December 30, 2001
Proposal publication date: November 2, 2001
For further information, please call: (512) 305-6933

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1 TAC §255.9

The Commission on State Emergency Communications (CSEC) adopts the repeal of §255.9, concerning the statewide Poison Control Surcharge to be assessed to each customer receiving intrastate long-distance service, without changes to the proposed repeal as published in the November 2, 2001, issue of the *Texas Register* (26 TexReg 8625).

The section is being repealed to reflect consistency with the 77th Texas Legislature's passage of HB 2914 which provides statutory authority to bill only one Equalization Surcharge. Current CSEC Rule 255.1 is being amended to increase the surcharge rate, combining both the 9-1-1 and Poison surcharges, the net effect of the two changes would not be an increase or decrease in the rates currently applied.

No comments were received regarding adoption of the repeal.

The repeal is adopted pursuant to the Health and Safety Code, Chapter 771, §§771.072, 771.073, 777.074, 771.075, and 771.078.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107680
Paul Mallett
Executive Director
Commission on State Emergency Communications
Effective date: December 30, 2001
Proposal publication date: November 2, 2001
For further information, please call: (512) 305-6933

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 7. GAS UTILITIES DIVISION
SUBCHAPTER B. SUBSTANTIVE RULES

16 TAC §7.70, §7.81

The Railroad Commission of Texas adopts amendments to §7.70, relating to general and definitions, and §7.81, relating to safety regulations adopted, without changes to the proposal published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8268). The amendments will adopt by reference recent amendments issued by the United States Department of Transportation (DOT) in 49 Code of Federal Regulations (CFR) Parts 192, 193, 195, and 199 concerning qualifications of pipeline personnel, determining the extent of corrosion on gas pipelines, pipeline repair, underwater abandoned pipeline facilities, standard NFPA 59A concerning liquefied natural gas, industry standard on leak detection, risk-based alternative to pressure testing certain older pipelines, standards for breakout tanks, pipeline integrity management in high consequence areas, areas unusually sensitive to environmental damage, and drug and alcohol testing for pipeline facility employees; and in 49 CFR Part 40, relating to procedures for transportation workplace drug and alcohol testing programs.

The Commission adopts the amendments in §7.70 and §7.81 to reflect the new date (September 30, 2001) on which the Commission adopts by reference the federal regulations in 49 CFR Parts 192, 193, 195, and 199, and 49 CFR Part 40.

DOT's Amendment Nos. 192-86 and 195-67, published at 64 Federal Register (FR) 46853, require pipeline operators to develop and maintain a written qualification program for individuals performing covered tasks on pipeline facilities. The intent of the rule is to ensure a qualified work force and to reduce the probability and consequences of incidents caused by human error. The rule was developed through a negotiation process. Amendment No. 192-90, published at 66 FR 43523, contains corrections to the final regulations on qualification of pipeline personnel, published at 64 FR 46853. The corrections were minor and did not affect the substance or content of the rule. Amendment No. 195-72 published at 66 FR 43523 contains corrections to the final regulations on qualification of pipeline personnel, published August 27, 1999, at 64 FR 46853. These corrections were minor and did not affect the substance or content of the rule.

Amendment No. 192-87, published at 64 FR 56978, requires that when gas pipeline operators find harmful external corrosion on buried metallic pipelines that have been exposed, they must investigate further to determine if additional harmful corrosion exists in the vicinity of the original exposure. The new requirement may prevent accidents due to corrosion that might otherwise go undetected near an exposed portion of a pipeline.

Amendment Nos. 192-88 and 195-68, published at 64 FR 69660, concern a safety performance standard for the repair of corroded or damaged steel pipe in gas or hazardous liquid pipelines. Because present safety standards specify particular methods of repair, operators must get approval from government regulators to use innovative repair technologies. The new performance standard is likely to encourage technological innovations and reduce repair costs without reducing safety.

Amendment Nos. 192-89 and 195-69, published at 65 FR 54440, require the last operator of an abandoned natural gas or hazardous liquid pipeline facility that is located offshore or that crosses under, over, or through a commercially navigable waterway to submit a report of the abandonment to the Secretary of Transportation. The results of the final rule will be a Congressionally mandated central depository of information about underwater abandoned pipeline facilities that the Secretary of Transportation will make available to the appropriate federal and state agencies. Amendment No. 192-89 was corrected at 65 FR 57861 to change a date on page 54443, in §192.727(g)(2), from "April 10, 2000," to "April 10, 2001."

Amendment No. 193-17, published at 65 FR 10950, incorporates by reference an industry consensus standard for liquefied natural gas (LNG) facilities subject to the pipeline safety regulations. The standard, developed by the National Fire Protection Association (NFPA), specifies siting, design, construction, equipment, and fire protection requirements that apply to new LNG facilities and to existing facilities that have been replaced, relocated, or significantly altered. The incorporation by reference of this standard will allow the LNG industry to use the latest technology, materials, and practices while maintaining the current level of safety.

Amendment No. 195-62, published at 63 FR 36373, adopts as a referenced document an industry publication for pipeline leak detection, API 1130, "Computational Pipeline Monitoring," published by the American Petroleum Institute (API). This rule requires that an operator of a hazardous liquid pipeline use API 1130 in conjunction with other information in designing, evaluating, operating, maintaining, and testing its software- based leak detection system. The use of this document will significantly advance the acceptance of leak detection technology on hazardous liquid pipelines. The rule does not require operators to install such systems.

Amendment No. 195-65, published at 64 FR 6814, corrects a final rule published at 63 FR 59475, which allowed operators of older hazardous liquid and carbon dioxide pipelines to elect a risk-based alternative in lieu of the existing hydrostatic pressure test rule. This amendment makes a minor correction by removing an unrelated sentence that inadvertently appeared in Table 4 of Appendix B.

Amendment No. 195-66, published at 64 FR 15926, incorporates by reference consensus standards for aboveground steel storage tanks into the hazardous liquid pipeline safety regulations. These standards apply to the design, construction, and testing of new tanks, and the repairs, alterations, and replacement of existing tanks. All new and existing breakout tanks are also subject to the operating and maintenance requirements specified in this rule. The incorporation by reference of these standards will significantly improve the minimum level of safety applicable to the transportation and storage of petroleum and petroleum products at breakout tanks. This amendment was corrected at 64 FR 40777 to correct the effective date of the final rule published on April 2, 1999, to comply with requirements of the Small Business Regulatory Enforcement Fairness Act of 1996; the effective date was corrected to July 28, 1999. Amendment No. 195-66 was again corrected at 65 FR 4770; these corrections were minor and added API 1130 to the list of incorporated references and corrected the reference to API Standard 653 to include Addendum 2.

Amendment No. 195-70, published at 65 FR 75378, specifies regulations to assess, evaluate, repair, and validate through comprehensive analysis the integrity of hazardous liquid pipeline segments that, in the event of a leak or failure, could affect

populated areas, areas unusually sensitive to environmental damage, and commercially navigable waterways. The Office of Pipeline Safety requires that an operator develop and follow an integrity management program that provides for continually assessing the integrity of all pipeline segments that could affect these high consequence areas through internal inspection, pressure testing, or other equally effective assessment means. The program must also provide for periodically evaluating the pipeline segments through comprehensive information analysis, remediating potential problems found through the assessment and evaluation, and ensuring additional protection to the segments and the high consequence areas through preventive and mitigative measures. Through this required program, hazardous liquid operators will comprehensively evaluate the entire range of threats to each pipeline segment's integrity by analyzing all available information about the pipeline segment and the consequences of a failure on a high consequence area. This includes analyzing information on the potential for damage due to excavation; data gathered through the required integrity assessment; results of other inspections, tests, surveillance, and patrols required by the pipeline safety regulations, including corrosion control monitoring and cathodic protection surveys; and information about how a failure could affect the high consequence area. The final rule requires an operator to take prompt action to address the integrity issues raised by the assessment and analysis. This means an operator must evaluate all defects and repair those that could reduce a pipeline's integrity. An operator must develop a schedule that prioritizes the defects for evaluation and repair, including time frames for promptly reviewing and analyzing the integrity assessment results and completing the repairs. An operator must also provide additional protection for these pipeline segments through other remedial actions, and preventive and mitigative measures. The final rule took effect March 31, 2001, and required an operator to complete an identification of all pipeline segments that could affect a high consequence area no later than December 31, 2001, and to develop a written integrity management program no later than March 31, 2002. Amendment No. 195-70 was later amended at 66 FR 9532 to delay the effective date of the final rule from March 31, 2001, to May 29, 2001.

Amendment No. 195-71, published at 65 FR 80530, defines drinking water and ecological areas that are unusually sensitive to environmental damage if there is a hazardous liquid pipeline release. The Research and Special Programs Administration (RSPA) of DOT created this definition through a series of public workshops, pilot testing, technical review of the pilot test results, and extensive collaboration with a wide range of federal, state, public, and industry stakeholders. The final rule does not require specific action by pipeline operators but will be used in existing and future regulations. This amendment was changed at 66 FR 9532 to delay the effective date from February 20, 2001, to April 21, 2001.

Amendment No. 199-19, published at 66 FR 47114, conforms the pipeline facility drug and alcohol testing regulations with DOT's "Procedures for Transportation Workplace Drug and Alcohol Testing Programs." The amendment also changes the format of the regulations to make them easier to apply and understand. The purpose of the changes is to make the regulations clearer and consistent with DOT's drug and alcohol testing policies.

The Commission also proposes to adopt by reference DOT's amendments to 49 CFR Part 40 regarding procedures for transportation workplace drug and alcohol testing programs. At 65 FR 79462, DOT revised its drug and alcohol testing procedures regulations to make the organization and language clearer, to incorporate guidance and interpretations of the rule into the rule text, and to update the rule to include new provisions responding to changes in technology, the testing industry, and the Department's program. The final rule was adopted and published at 66 FR 41944 and effective August 1, 2001.

The Commission received one comment on behalf of three entities, TXU Gas Distribution, TXU Lone Star Pipeline, and TXU Fuel Company. Specifically, the comment states that the Commission should provide guidance to liquid pipeline operators regarding the conflicting time deadlines between the DOT regulations, adopted by reference in §7.81, and the requirements imposed by the Commission's pipeline integrity assessment and management rule.

DOT's rules require the pipelines to identify high consequence areas by December 31, 2001, and develop a written plan by March 31, 2002. On the other hand, the Commission's rule §8.101, Pipeline Integrity Assessment and Management Plans for Natural Gas and Hazardous Liquids Pipelines, requires pipeline operators to identify on a system-by-system or segment-within-each-system basis which type of integrity analysis the operator has chosen to use (a risk-based analysis or a prescriptive plan) and to develop integrity assessment plans by February 1, 2002. The comment asserts that the Commission should "not force the industry to guess at acceptable means to resolve the conflicts."

In response, the Commission states its position that there is no conflict; the more stringent of the two rules applies. Furthermore, at this time, the DOT liquids rule applies only to operators with more than 500 miles of pipe. The Commission rules apply to all pipelines. Therefore, pipeline operators must designate high consequence areas by December 31, 2001, and must complete their integrity assessment plans by February 1, 2002.

The Commission received no comments from groups or associations on the proposal.

The amendments are adopted under Texas Utilities Code §121.201, which authorizes the Commission to adopt rules and safety standards for the transportation of gas and for gas pipeline facilities, and under the Texas Natural Resources Code, §117.001, which authorizes the Commission to regulate the pipeline transportation of hazardous liquids and carbon dioxide and facilities related thereto under, and to take any other requisite action in accordance with, the Pipeline Safety Act, 49 United States Code §60101.

Texas Utilities Code §121.201 and Texas Natural Resources Code §117.001 are affected by the adoption.

Issued in Austin, Texas, on December 4, 2001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 4, 2001.

TRD-200107526

Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Effective date: December 24, 2001
Proposal publication date: October 19, 2001
For further information, please call: (512) 463-7033

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CHAPTER 11. SURFACE MINING AND RECLAMATION DIVISION

SUBCHAPTER A. RULES OF PRACTICE AND PROCEDURE

16 TAC §11.1

The Railroad Commission of Texas (Commission) adopts amendments to §11.1, relating to Adoption by Reference, without change to the proposal published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8273). The Commission adopts the amendments to change the title of the rule and to correct the reference to the Commission's rules in 16 TAC Chapter 1; these amendments are nonsubstantive.

The Commission received no comments on the proposed amendments.

The Commission has concurrently adopted the review of Chapter 11, Subchapters A and E, in their entirety in accordance with Tex. Gov. Code §2001.39 (*as amended by Acts 1999, 76th Leg., ch. 1499 §1.11(a)*).

The Commission adopts the amendments under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure.

Texas Government Code, §2001.004, is affected by the section as amended.

Issued in Austin, Texas, on December 4, 2001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 4, 2001.

TRD-200107527
Mary Ross McDonald
General Counsel
Railroad Commission of Texas
Effective date: December 24, 2001
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For further information, please call: (512) 463-7033

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PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER J. COSTS, RATES, AND TARIFFS

DIVISION 2. RECOVERY OF STRANDED COSTS

16 TAC §25.263

The Public Utility Commission of Texas (commission) adopts new §25.263, relating to True-Up Proceeding, with changes to the text published in the June 15, 2001 *Texas Register* (26 TexReg 4359). This new rule implements the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated (Vernon 1998, Supplement 2001) §39.252, which addresses a utility's right to recover stranded costs, and PURA §39.262, which requires the commission to conduct a true-up proceeding for each investor-owned electric utility after the introduction of customer choice and which prohibits over-recovery of stranded costs. Project Number 23571 is assigned to this proceeding.

The commission received written comments and/or reply comments on the proposed new section from American Electric Power Company (AEP); TXU Electric Company (TXU); Reliant Energy, Incorporated (Reliant); Texas Industrial Energy Consumers (TIEC); the Alliance for Retail Markets (ARM); Entergy Gulf States, Incorporated (Entergy); El Paso Electric Company (EPE); Texas-New Mexico Power Company (TNMP); the Steering Committee of Cities Serviced by TXU Electric Company and the Steering Committee of Cities served by Central Power and Light Company (Cities); and Office of Public Utility Counsel (OPC).

A public hearing on this rule was held at the commission's offices on July 25, 2001. To the extent parties offered oral comments at the hearing that differed from the submitted written comments, such comments are summarized herein.

Comments on specific questions posed in the rulemaking proceeding

The commission requested specific comment with regard to three questions related to the development of the final rule. The parties' responses to those questions are summarized below.

Preamble Question #1: The true-up adjustment required by PURA §39.262(d)(2) is determined in the proposed rule by calculating the effect on ECOM of using capacity auction prices, actual fuel costs, and actual sales as certain inputs to the ECOM model. Are there any substantive differences between using this method versus a method in which the adjustment is simply the difference between the price of power obtained through the capacity auctions and the corresponding power cost projections used in the ECOM model in the PURA §39.201 proceeding? If so, should an alternative method for calculating the adjustment required by PURA §39.262(d)(2) be incorporated into the final rule?

TXU commented that substantive differences exist between the method used in the proposed rule versus a method in which the adjustment is the difference between the price of power obtained through the capacity auctions and the corresponding power cost projections used in the excess-costs-over-market (ECOM) model in the PURA §39.201 proceeding. As one example, TXU noted that capacity auction prices could be driven by different underlying fuel costs than those used in the market price of the ECOM model.

ARM commented that the method proposed in the rule appropriately substitutes the actual capacity auction prices for the estimated "market price" in the ECOM model. ARM stated, however, that the proposed method adjusts the fuel cost and generation mix inputs to the ECOM model, and these adjustments would need to be examined in another contested case. ARM argued that PURA §39.262(d)(2) requires only that the capacity auction prices be substituted for the power cost projections originally employed in the ECOM model and that no other adjustments are contemplated or permitted. ARM urged the commission to avoid further adjustments to the ECOM model.

Cities contended that it is impossible to undertake a simple comparison between the power cost projections of the ECOM model and the general price of power obtained through the capacity auction. Cities commented that the price of each of the capacity auction components (baseload, intermediate, cyclic, and peaking) is not comparable to the ECOM model market price (stated separately for three different rate classes) because the load shapes do not match. Cities did not offer an alternative method.

TIEC stated that a simple comparison of market prices does not capture the effect on ECOM because the ECOM model calculates the net present value of a stream of lost revenues. The rerun of the ECOM model will result in an updated net present value that will reflect the change in cost of fuel less the change in market revenues. The true-up adjustment proposed in the rule is necessary, rather than the alternative proposed in this question.

Reliant commented that the two methods are not substantially different as long as the general method outlined in the proposed rule is performed correctly. However, Reliant stated that if the commission wishes to retain the ECOM model for purposes of the PURA §39.262(d)(2) true-up, that model will work appropriately only if power prices used as inputs to the ECOM model are disaggregated by generation type. If the ECOM model is used in the capacity auction true-up, Reliant provided two methods to accomplish such a disaggregation. Reliant pointed out that, historically, an estimated annual average power price has been used in the ECOM model because the specific market information by fuel type was not available. Reliant commented that now, however, the capacity auctions will yield actual power prices by generation type, and those actual power prices should be used in the ECOM model. Reliant further commented that, for purposes of the capacity auction true-up, the ECOM model has two main components: the price of power and the price of fuel. The difference between those components is the margin predicted to be available to contribute to fixed costs and therefore to reduce stranded costs. Reliant provided numerical examples illustrating that if actual fuel costs and sales amounts are not used, the contribution of a company's capacity auction results to stranded costs could be over- or understated.

Both Reliant and AEP commented that the "Plant Economics" feature of the ECOM model distorts the results of the capacity auction true-up because it allows the model to disallow costs that are truly economic. Under the assumptions of the ECOM model, the plant owner should not run a class of plants when they are not profitable; hence the ECOM model excludes those variable costs from stranded costs. In the proposed rule, an annual average price of power is calculated by dividing total revenues from the capacity auction by total megawatt-hour (MWh) sales from the capacity auctions, and then the "Plant Economics" worksheet in the ECOM model compares this average capacity auction price to the variable costs of each plant type (gas, nuclear, and coal/lignite) to determine whether the plant type is economic. Reliant commented, however, that in reality the decision whether to run a plant will be made based on the revenues that a specific plant will receive when it runs, not the average price for all generation plant types across a whole year.

Reliant argued, therefore, that the simplest method is to discard the ECOM model altogether and adopt a formula that preserves the net margin that exists in the ECOM model. Reliant commented that the purpose of the PURA §39.262(d)(2) true-up is to ensure that the affiliated power generation company (APGC) ultimately receives the same margin from the capacity auction process as the ECOM model predicted. The APGC may recover part of, all of, or more than that ECOM margin through the bid premiums. In addition, the APGC will experience some gain or loss on fuel when the capacity auction strike prices are compared to the APGC's actual costs. The remainder (or overcollection) of the margin should be recovered from (or paid back to) ratepayers in the true-up proceeding. Thus, Reliant submitted that at the time of the true-up the APGC can be made whole by the following formula that eliminates the need to re-run the ECOM model:

(ECOM market revenues - ECOM fuel costs) - ((capacity auction price x total busbar sales) - actual fuel costs)

AEP agreed, in general, with the overall direction in the proposed rule to true-up actual capacity auction and fuel prices to the ECOM model. However, AEP suggested there were two necessary adjustments to properly account for the fundamental differences between the ECOM model and the capacity auction products. These adjustments include: (1) the use of product specific market prices rather than average market prices; and (2) if average market prices are used, an adjustment to the economic "backdown" logic (i.e., the "Plant Economics" adjustment) utilized in the ECOM model, such that incremental costs to serve the capacity auction did not themselves become stranded. AEP believes it is more appropriate to account for these adjustments outside of the ECOM model as opposed to including them directly in the ECOM model, but admitted they could be adapted for use in the ECOM model if necessary. AEP stated that the use of either a weighted-average market price or product-specific market price will result in an accurate measure of ECOM if, and only if, the ECOM true-up occurs outside the ECOM model. Also, a necessary adjustment to the proposed rule methodology would be to adjust the capacity auction results for "product adjustments" that reflect the firm characteristic of the capacity auction products.

Like Reliant, AEP argued that the true-up calculation would be much more complicated if it were attempted within the ECOM model because of the use of the "Plant Economics" adjustment. AEP said there is a problem with using a per-megawatt weighted-average price as an input in the model as proposed in the rule because baseload prices will be weighted along with gas-fired products. The resulting weighted-average market prices will likely be substantially lower than the market prices that gas-fired generation will see in a deregulated market. If the commission uses the ECOM model to calculate the true-up amounts, to correct for the "Plant Economics" adjustment, the specific market prices by fuel type would need to be used instead of the proposed weighted-average price. Because of the problems involved with using the ECOM model for the capacity auction true-up, AEP submitted a formula similar to that proposed by Reliant to calculate the capacity auction true-up without the use of the ECOM model.

In response to Cities' contention that a simple comparison is not possible between the power cost projection of the ECOM

model and the general price of power obtained through the capacity auction, TXU claimed that PURA §39.262(d)(2) requires that this comparison be made. TXU also disagreed with arguments by ARM and OPC that only capacity auction prices, and not fuel price and generation figures, should be updated in determining the amount of the capacity auction true-up. TXU noted that determining fuel price and generation updates would be a fairly minor undertaking and that all proceedings under Chapter 39 must be contested case proceedings unless otherwise noted. TXU further noted that if the power price in the capacity auction differs from the prices used in the ECOM model only because of fuel price changes, the commission would be making an apples-to-oranges comparison if it adopts ARM's proposal. TXU argued that adjusting fuel costs and generation to reflect changes in underlying circumstances is consistent with the methodology employed by the commission when it updated natural gas prices and power costs in the unbundled cost of service (UCOS) cases.

TXU also recommended that the commission not adopt the changes to subsection (i)(2) proposed by ARM that would calculate the capacity auction true-up amount based on the prices determined by a rerun of the ECOM model, multiplied by the total capacity auction sales for "that year" and divided by the originally projected sales for "that year." TXU complained that the reference to "that year" is confusing because the ECOM model produces a single present value figure, not different figures for each year. Further, TXU argued that the reason for computing the ratio of the capacity auction sales to predicted sales for the entire fleet is not clear.

Cities, in response to both Reliant's and AEP's proposal to true-up the amount of stranded costs for the years 2002 and 2003 by either abandoning or revising the ECOM model, stated that rather than modifying the model, Reliant and AEP are proposing to circumvent Senate Bill 7 by re-litigating issues already resolved by the commission. According to Cities, a true-up must be faithful to the ECOM model approved in the unbundled cost of service cases.

ARM argued in its reply comments that no adjustments to the ECOM model are permitted by the statute, "other than the substitution of prices based on the capacity auctions for the proxy 'market' price in the competitive scenario of the ECOM model." ARM commented that adjustments to the ECOM model that are advocated by the utilities in their comments "would constitute impermissible manipulation of the model to increase stranded costs" and would be illegal because PURA §39.262(d)(2) does not permit any adjustments to the ECOM model other than substitution of capacity auctions prices for the market prices in the model.

AEP replied that some of the commenting parties implied that PURA requires use of the ECOM model. AEP felt that PURA only requires the comparison of the price of power, and the commission has the discretion to make this comparison outside the confines of the ECOM model. The capacity auction true-up should be done outside of the ECOM model because using the model is administratively burdensome, subject to error, and requires more care in making adjustments. AEP also stated that the capacity auction prices for the individual products must be calculated and then applied to the actual MWh sales by product during the true-up period, rather than applying an average market price. AEP further stated that ECOM is very sensitive to actual fuel costs and MWh generation, and the capacity auction true-up process should account for this by substituting actual fuel costs and actual MWh sales for ECOM model inputs.

OPC and ARM replied that the commission should require an updated ECOM model run, but they argued that such run can be adjusted only for changes in the market price, not for updated sales and costs.

OPC disagreed with Reliant's argument that the purpose of the capacity auction or wholesale true-up is to ensure that the APGC receives the same margin from the capacity auction as the ECOM model predicted. OPC replied that the purpose of the wholesale true-up is to measure the difference between the revenue received by the APGC during the period from the start of competition to the time of the true-up and its forecast regulated revenue requirement during the same period. OPC claimed that Reliant's proposed calculation has no relation to the wholesale true-up described in PURA.

Reliant reiterated in its reply comments that the only way to calculate the capacity auction true-up is to apply the fixed cost contribution assumed in the ECOM model. Reliant argued that the language in PURA §39.262(d)(2) included assumptions about the cost of capacity, the cost of fuel, and sales. These power-cost projections resulted in an expected contribution to reduce stranded costs. According to Reliant, simply computing a dollar per MWh price from the capacity auction, as OPC and ARM argued, leads to a meaningless comparison because it tells nothing about the actual contribution available to reduce stranded costs. Thus, Reliant believes it is necessary to update the sales volume and fuel costs to calculate the contribution that results from the capacity auction. This can be done by first multiplying the dollar-per-MWh price an APGC will receive in the capacity auction times the APGC's actual total sales volumes, and then subtracting actual total fuel costs. The contribution from the revenues at the capacity auction price can then be compared to the contribution in the ECOM model. Reliant believes that OPC's and ARM's suggested method creates a mismatch of inputs and thereby distorts the true amount of stranded costs. The mismatch occurs because the calculation that OPC and ARM propose would include the prices from the capacity auction, but the sales volumes and fuel costs from the ECOM model. This creates the possibility that the capacity auction's contribution to stranded costs could be significantly overstated or understated. Reliant noted that in Senate Bill 7, the legislature allowed utilities to recover their stranded costs, but provided that they should not over-recover those stranded costs. Reliant replied that under OPC's and ARM's proposal, the APGC would almost certainly under-recover or over-recover stranded costs, because the actual sales volumes and fuel costs will undoubtedly vary from the amounts in the ECOM model. As it did in its comments, Reliant provided in its replies numerical examples illustrating its contentions. Reliant argued that because OPC's and ARM's narrow interpretation of PURA §39.262(d)(2) would generate inaccurate numbers for purposes of the true-up, that interpretation should be rejected.

The commission concludes that PURA §39.262(d)(2) does not mandate that the capacity auction true-up calculation be done within the context of the ECOM model. The purpose of PURA §39.262(d)(2) is to reconcile and update the effects of power costs on revenues, and no requirement to use the ECOM model for this purpose is specified in the statute. Further, with regard to the consideration of fuel costs, when interpreting the phrase "power cost projections" in PURA §39.262(d)(2), it is appropriate to interpret the term to include not only market revenues, but also

the fuel costs that are part of the regulated revenue requirement. Because the purpose of the capacity auction true-up is to reflect actual power costs for 2002 and 2003, the way to achieve this objective is to use updated, actual data for power costs that include the effects of fuel. To do so is comparable to the commission's decision in Docket Number 22344, *Generic Issues Associated with Applications for Approval of Unbundled Cost of Service Rate Pursuant to PURA §39.201 and Public Utility Commission Substantive Rule §25.344*, in which the commission established updated gas prices and then reflected those updated prices in both the market-revenue calculations and regulated-revenue calculations of the ECOM model. The commission believes it is logical to assume that the legislature intended that fuel costs be updated because failure to do so could conceivably lead to unfair and unpredictable results for one set of parties or the other, as noted by Reliant. Another way to understand this point is to assume an extreme hypothetical--for example, assume that the use of the capacity auction results in the true-up did not occur until, say, 2025. To get a correct ECOM result, actual sales and fuel costs would have to be used for all the intervening years. Otherwise, the result would be meaningless, because the original projected data would not be comparable to actual, realized data.

Similarly, the commission agrees that it is appropriate to adjust sales figures in the ECOM model for comparison to capacity auction prices. Reliant gives examples in its reply comments showing that if the sales and fuel amounts are not adjusted with market revenues, the result can be either a benefit or a detriment to a company, depending on the direction and magnitude of the changes to the inputs. The commission does not presume that the legislature intended to have such an unpredictable and potentially unfair result.

Additionally, calculating the capacity auction true-up without the use of the ECOM model avoids various controversial issues related to use of the model, including issues related to the "Plant Economics" sheet in the model, questions regarding the generation- mix inputs, and other issues. The commission therefore has revised the rule to provide for calculation of the capacity auction true-up outside of the ECOM model. The commission finds that Reliant's and AEP's recommended approach, in which aggregated capacity auction revenues, actual fuel costs, and sales amounts are compared to data from the ECOM model, is appropriate. The rule has been modified to incorporate this change.

Preamble Question #2: Should the final rule incorporate criteria for determining whether a utility has used good-faith attempts to renegotiate above-cost fuel and purchased power costs as required by PURA §39.252(d)? If so, what should those criteria be?

TIEC and Cities supported the incorporation of specific criteria, but stated that the criteria should not be exclusive and the commission should make the determination on a case-by-case basis. The commission should preserve the flexibility to examine a wide range of utility actions that may impact the amount of a utility's stranded costs, including actions of its APGC or affiliated retail electric provider (AREP).

OPC, ARM, TXU, and Reliant agreed that specific criteria should not be incorporated into the rule to measure compliance with PURA §39.252(d). Reliant stated that each utility has a unique set of fuel and purchased power contracts, and the determination as to whether the utility has made a good-faith attempt to renegotiate its contracts can be determined only on a case-by-case basis. ARM suggested that the commission should consider the utility's management of its fuel and purchased power contracts, and the exercise of any discretion permitted by any contract to lower costs. TXU added that the commission should use a case-by-case approach because each utility will have contracts with different terms and conditions, and the legislature chose not to establish any specific criteria.

The commission believes that specific criteria for determining whether a utility has used good-faith attempts to renegotiate above-cost fuel and purchased power costs should not be incorporated in the rule to measure compliance with PURA §39.252(d). That determination should be made on a case-by-case basis. Therefore, no change to the rule has been made.

Preamble Question #3: The definitions of market price used in subsection (j) of the proposed rule use the same mix of power products (i.e., based on a three-year full requirements request for proposal and 12 months of capacity auction products) developed in the price to beat rule (Substantive Rule §25.41) to permit adjustments to the price to beat. Is this the appropriate method to determine the "prevailing market price" or is another method more appropriate? If this method is appropriate, should the prices used be forward looking or should they be historical prices?

Nearly all of the commenters expressed concerns about the proposed methodology for determining the prevailing market price used in the reconciliation (the "retail clawback") between the price to beat (PTB) rates charged by the AREP and the market prices for residential and small commercial customers. Some commenters proposed alternative methods to determine the prevailing market price. The utilities generally supported an approach that would involve compilation of retail market prices by an independent third party. However, ARM, TIEC, and OPC advocated basing the market price solely on the capacity auction results, shaped for retail PTB loads. Specific comments on the retail clawback are discussed below.

Modified Capacity Auction Method

ARM argued that the methodology in the proposed rule is not appropriate because it utilizes the results of "phantom" requests for proposals (RFPs) to serve load that responding bidders will not actually be permitted to serve. Cities also questioned whether the contemplated RFPs for hypothetical load would result in competitive bids that accurately reflect true market prices. Failure to use true market prices increases the likelihood that the retail clawback will be undervalued. ARM further contended that too much research and analysis would be required to respond to a hypothetical RFP. ARM recommended determining the prevailing market price solely by reference to the winning bids for power purchased in the capacity auctions, shaped to serve a residential or small commercial customer, as appropriate. ARM claimed that this method not only bases the determination of market price on actual transactions, but also provides an important check on any incentive a utility may have to "game" the capacity auction prices. ARM explained that tying the market price used in the wholesale clawback to that used for the retail clawback provides a necessary check on any potential attempts by the utilities to manipulate the true-up. Accordingly, ARM recommended deleting the definitions of residential market price of electricity and small commercial market price of electricity in proposed subsections (c)(7) and (c)(9), respectively, and instead using definitions that would equate to the baseload capacity auction price of wholesale electricity.

In its initial comments, TIEC recommended specifying that the three-year full requirements RFP require firm bids for a prospective three-year period. TIEC explained that the forward-looking requirement would ensure that bona fide bids would result. TIEC added that the utility should have the burden of proof that it conducted a legitimate, widely advertised RFP. TXU objected to this recommendation, noting that it would exacerbate problems associated with using wholesale prices to determine retail rates. Further, TXU argued that using firm bids for a three-year period would be inconsistent with the view that PURA requires historical price comparisons for the true-up. In its reply comments, TIEC recognized that obtaining bona fide, binding offers through an RFP may prove to be too difficult. Consequently, TIEC agreed with ARM that capacity auction prices alone, shaped for residential and small commercial customers, should be employed as the starting point for developing retail market prices. TIEC also agreed that the same capacity auction market prices should be used in both the capacity auction true- up and the retail clawback in order to avoid gaming. OPC initially supported the market price definition in the proposed rule. However, in its reply comments, OPC agreed with those parties advocating use of capacity entitlements alone, properly shaped for each customer class, as a proxy for the retail market price.

ARM and TIEC recommended that the true-up rule establish the principle of using capacity auction prices as the basis for market prices, and that an implementation workshop be convened to address the specifics of the transformation and shaping for residential and small commercial customers. TIEC also suggested that the auction prices be shaped to serve an industrial customer if the rule requires the ECOM model to be rerun for the capacity auction true-up per PURA §39.262(d)(2). Cities added that the capacity auction products and prices must be appropriately balanced to reflect the specific utility's discrete load shape, because the capacity auction products reflect supply-side components. In addition, TIEC noted that it is more appropriate to use the entire 2002 and 2003 time frame for the capacity auction portion of the calculation rather than the one-year period in the proposed rule.

Entergy replied that these comments by Cities, ARM, and TIEC identify real limitations in the proposed rule, but that none of the proposed modifications would calculate a true retail price or resolve the fundamental problems inherent in attempting to use wholesale market indicators to derive retail prices.

Moreover, AEP replied that the concern over gaming the capacity auction is not realistic. AEP suggested that this idea rests on the unsupported premise that the utility, rather than the market, would control the auction prices. AEP also said that it means that the utility would engage in the economically perverse behavior of minimizing its gains from the capacity auction. Reliant and TXU also rejected ARM's arguments that a utility could game the capacity auctions by flooding the market with capacity to depress prices. Reliant questioned why retail electric providers (REPs) represented by ARM fear depressed prices for the wholesale electricity they will buy. Reliant stated that regardless, a balancing of the retail and wholesale clawbacks will occur if actual, observed market prices (i.e., Electricity Facts Labels) are used because retail prices will reflect wholesale prices and wholesale prices will be influenced by the capacity auctions. Moreover, TXU suggested that gaming is not a concern because the capacity auctions are conducted under the commission's rules. Entergy also opposed the use of capacity auction prices. In addition, Entergy argued against proposed modifications to capacity auction prices to reflect the cost of retail service because the load shaping process contemplated by TIEC and ARM would be complex and contentious.

Electricity Facts Label Proposals

Reliant, TXU, Entergy, AEP, and TNMP pointed out several shortcomings with the method in the proposed rule, most notably that it does not provide for a historical price comparison and does not capture all of the costs associated with providing retail electric service (e.g., line losses, ISO fees, capacity costs, ancillary services, taxes, and sales and administrative costs). AEP argued that the use of RFPs and/or capacity auction results is fundamentally flawed because these methods do not yield a retail price. AEP explained that the proposed calculation is based on prices for products traded in the wholesale market rather than the retail market. According to AEP, this will almost certainly understate the prevailing market price and, therefore, overstate the amount of the retail clawback. AEP also suggested that decisions regarding relative weighting or blending of RFP and capacity auction results could have a large and potentially arbitrary effect. Entergy emphasized that the rule must reflect all of the costs associated with serving retail load. Entergy noted that there are significant costs associated with converting a wholesale product into a retail product, and that the commission should rely on retail market price indicators to determine the clawback. Moreover, Entergy argued that in the order adopting the PTB rule, the commission recognized that the "representative power price" was intended to serve only as a benchmark to track market changes. TNMP stated that PURA §39.262(c) compares the PTB and the price of retail electric service, not the PTB and wholesale electricity price. TXU agreed that there should be a retail-to-retail comparison, noting that the methodology in the proposed rule would not even reflect an accurate cost of wholesale power. TXU claimed that a RFP issued by an AREP at a time when all other AREPs are issuing the same type of RFP, and for a purpose mandated by commission rule rather than an actual need for power, will not provoke a valid market response. TXU argued that bidders will know that the RFPs are not bona-fide requests, i.e., that they are not being issued with an expectation of purchasing power. Finally, TXU noted that the proposed methodology is not appropriate for non-generating entities such as TXU SESCO.

Reliant commented that there is inadequate specificity in the proposed rule to actually calculate the retail price surrogate, and that the proposed method would result in additional administrative costs and estimation error. Reliant also stated that it is unlikely that competitive REPs would enter into three-year contracts at this stage of the market. Moreover, Reliant noted that the associated price from a three-year RFP would reflect at least one full year of full-requirements retail service that falls outside the period being trued up. According to Reliant, the retail price surrogate as calculated under the proposed rule would not reflect the actual retail prices charged by competing REPs, nor would it result in a value that is comparable to the PTB.

Reliant, TXU, Entergy, AEP, and TNMP supported using an actual, observable retail market price to compare to the PTB instead of an administratively determined market price. The utilities generally supported using an independent third party, such as an accounting firm, which would be overseen by the Electric Reliability Council of Texas (ERCOT) or the commission, to compile market prices offered by REPs during the 2002- 2003 period. The utilities suggested that the independent party could use Electricity Facts Labels and other information to obtain data on prices and calculate a weighted average of retail prices charged

by all REPs to residential and small commercial customers within the AREP's service area.

More specifically, TXU recommended using prices stated on REPs' Electricity Facts Labels times the system average use for each class to calculate the average prices per kilowatt-hour (kWh) for residential and small commercial customers. TXU said that the overall market price should be calculated by weighting the number of customers served in the territory by each REP, including the AREP and provider of last resort (POLR), under each price times the average prices per kWh. TXU suggested that all REPs should be required to report, on a confidential basis, their customer count to an independent third party designated by the commission. These reports should be filed quarterly.

AEP also recommended that an independent entity act as a retail market price collection and calculation agent during the 2002-2003 period to gather the data necessary to support retail clawback calculations. AEP suggested that on a monthly basis, the calculation agent would collect all retail market prices and monitor PTB tariffs to calculate (tariff by tariff) the difference between a weighted average of actual market price offers taken and the PTB in each AREP's transmission and distribution utility (TDU) service area. AEP said the market price offers would be weighted by volume data available from the Electric Reliability Council of Texas (ERCOT) for each of the respective REP's offers. AEP suggested that the results would be subject to commission audit with any privileged data remaining confidential.

Reliant also preferred using an independent third party to collect data using Electricity Facts Labels to determine the prevailing market price. Reliant recommended revising subsections (c) and (j) such that the market prices for residential and small commercial customers in effect on January 1, 2004, as calculated by the independent third party, be compared to the PTB on that date. Reliant suggested that the market prices be obtained from pricing disclosures pursuant to §25.475(e), relating to Information Disclosures to Residential and Small Commercial Customers. Under Reliant's proposal, the difference between the PTB and market price would be compared to the statutory maximum of $150 per customer, multiplied by the difference between the number of applicable customers taking PTB service from the AREP in its affiliated TDU area and the number of customers being served by the AREP outside its affiliated TDU region on January 1, 2004.

If the commission chooses instead to use the capacity auctions to determine the prevailing market price, Reliant emphasized that all costs must be included and the estimated commodity cost must be calculated with appropriate consideration of the load shape of PTB customers. As initially presented, Reliant's proposal for the capacity auction method used data from the most recent capacity auction prior to the determination date to establish the commodity component of the retail price. However, upon reviewing the comments of other parties, Reliant recognized that because capacity auction prices are indicative of future markets, the prices from the most recent capacity auction prior to the determination date may not truly reflect retail prices on that date. Thus, Reliant recommended changing subsections (c) and (j) such that the market clearing prices from all capacity auction products delivered during the years 2002 and 2003 be used to determine the commodity component of the retail price. Reliant also proposed language to include line losses, fees, and taxes specific to serving residential and small commercial customers, respectively, as well as a $ 0.5 per kWh allowance for sales and administrative costs. Reliant further stated that even though the electric power price (i.e., commodity price before adjusting for costs of retail service) may be determined by observing capacity auction prices over a period of time, the retail clawback must still be determined using the number of customers on the PTB as of January 1, 2004 to comport with PURA §39.262(e). Reliant said this assures computational consistency between the amount of credit due to the TDU and the legislatively imposed cap which is determined by multiplying that number of customers, minus the number of customers obtained outside the TDU's service area, by $150. Thus, while Reliant maintained that its Electricity Facts Label proposal is the preferred method, a reasonable capacity auction approach is available.

Entergy suggested that, because the legislature explicitly required that capacity auction prices be used in one portion of the true-up (i.e., the reconciliation of PURA §39.262(d)(2)), it presumably did not intend that such prices be used in the retail clawback where they are not mentioned. Like the other utilities, Entergy preferred deriving the retail market prices using weighted prices from the Electricity Facts Labels and other market information gathered by an independent third party. However, Entergy also recognized that a properly structured RFP process could be a viable method for determining the market price so long as the bids were real bids (i.e., capable of being accepted) and the products being bid mirrored PTB service obligations and risks.

TNMP suggested that the methodology for determining the prevailing market price would be most promptly addressed through use of survey techniques to be proposed by each affiliated REP, based on the particular circumstances in that REP's service area, as approved by the commission.

TIEC contended that AEP's proposal for retaining an independent entity to calculate market prices may yield limited survey results due to confidentiality concerns, may be a cumbersome and costly approach, and may be subject to manipulation. ARM strongly opposed recommendations that the prices be obtained either from the Electricity Facts Label or compiled by an independent third party from prices charged by REPs. ARM objections to an independent third party administrator compiling pricing and customer load information included potentially large costs and administrative burdens on REPs to the benefit of the AREPs. Most important to REPs, ARM expressed concern that there is no way the commission can ensure the confidentiality of competitive REP's customer and pricing data provided to the commission. Cities said that it had no conceptual objection to basing the clawback calculation on a comparison of PTB prices and a weighted average of retail prices offered by competitors. However, Cities believed that this would require the disclosure of highly sensitive and confidential information that may be difficult to obtain for larger commercial customers. Further, it may not be possible for the commission to require disclosure of this information.

AEP responded, however, that the commission is accustomed to handling proprietary information, that PURA §39.352(f) contemplates that the commission may need to have access to confidential information, and that providing it is consistent with REP reporting requirements of PURA §39.352(c). AEP also pointed out that the customer protection rules also recognize the commission's authority to obtain confidential information. AEP argued that the commission has clear authority to obtain both the Electricity Facts Labels and the Terms of Service documents, which are the two primary sources for obtaining REPs' retail market

prices. Entergy suggested that commission involvement would permit the discovery of market data, while administration by an independent third party could assure the confidentiality necessary to protect the data.

Some participants in the public hearing commented that the Electricity Facts Labels were not indicative of prices paid by commercial customers. ARM argued that the Electricity Facts Label is not representative of all the prices charged to small commercial customer loads because its ignores prices charged to customers whose load approaches the 1000 kW cutoff for the PTB load. In addition, ARM noted that the prices on the Electricity Facts Label are based on representative, not actual, consumption levels, and as such, do not reflect actual prices in the market. TIEC added that the utilities' Electricity Fact Label proposals are inadequate because the resulting prices reflect arbitrarily selected consumption levels that will not accurately reflect the actual price offered in the market to all PTB customers. TXU noted, however, that usage levels of approximately 84% of its customers fall within the Electricity Facts Labels usage levels of 1,500, 2,500, and 3,500 kWh per month. Therefore, TXU argued that the prices on the Electricity Facts Labels provide a reliable estimation of the prices available to the vast majority of PTB customers. For the small number of commercial PTB customers whose usage does not fall within the Electricity Facts Label levels, TXU suggested that REPs could submit rate information to an independent third party.

The commission finds that the modified capacity auction method proposed by ARM, TIEC, and OPC for determining market prices would be complex and difficult to administer. It would also likely lead to litigation over how to properly shape the capacity auction prices to retail load. Therefore, the commission agrees with those parties advocating the use of actual, observed market prices, rather than administratively determined prices, for comparison to the PTB rates for residential and small commercial customers. By using actual retail prices in the marketplace, there is no need to develop complex procedures for converting wholesale prices to retail prices. The Electricity Facts Labels will be an important source of this market data and can be supplemented by other information--such as customer counts, volume levels, and prices offered to customers that do not fall within the Electricity Facts Label usage levels--provided by REPs on a confidential basis to an independent third party designated by the commission. Additional information may need to be obtained from ERCOT for this purpose. REPs can also redact sensitive customer information and present aggregated information to protect confidentiality.

The commission prefers TXU's methodology for calculating the weighted average of prices during 2002 and 2003 on a quarterly basis to determine the prevailing market price. However, for reasons set forth below, the commission does not agree with TXU's proposal to include POLR and PTB rates in the prevailing market price. The commission amends the definitions of residential and small commercial market price of electricity in proposed subsections (c)(7) and (c)(9) accordingly (also see additional discussion regarding these definitions in §25.263(c)-Definitions). Details regarding funding, oversight, timing, minimum switching threshold, and what rates to include in the comparison are discussed below.

Funding and Oversight

Most of the utilities suggested that either ERCOT or the commission oversee the independent third party, and that the costs be spread to all market participants. However, AEP, Entergy, and TXU agreed that such costs should be recovered from only the AREPs. AEP stated it would be appropriate for ERCOT to oversee the survey of retail prices and for all market participants to share in its funding, noting that PURA §39.151 provides adequate authority for this approach. AEP was not opposed, however, to having a third party contracted to carry out the survey with the commission's oversight and necessary funding reasonably allocated among and recovered from the AREPs. AEP suggested that a working group of affected market participants be established to collaborate and provide recommendations to the commission regarding a third-party agent and other processes and reporting requirements. Entergy recommended that the process be overseen by either ERCOT or the commission, or both, as long as it is actually conducted by an independent third party such as a reputable accounting firm. Entergy agreed with AEP that PURA §39.151 provides statutory authority for ERCOT to administer the program and to spread the costs to market participants. Entergy also stated that its affiliated REP would be willing to fund its share of the process if the commission determines that it should be funded only by AREPs. Entergy noted, however, that it would be fairer and more appropriate to spread the costs to all market participants and, hence, to all customers. In response to questions at the public hearing concerning the commission's ability to require REPs to pay for the independent third party, TXU also stated that it is willing to share such costs with other AREPs and, if cost-sharing is agreed to by the utilities, no question of the commission's authority arises. In the alternative, TXU commented that the commission has in the past required utilities to pay for an independent witness in a proceeding. Reliant added that in previous proceedings at the commission, outside consultants have been retained for specific purposes under contracts executed by a number of the parties to a particular proceeding. Reliant explained that in the past, consultants performed their work under the direction of the Staff, but the consultants' fees and expenses were paid by the utility and often recovered through rates or other mechanisms. Reliant suggested that a similar procedure could be employed to compute the retail clawback. Reliant said it is agreeable to entering into a multi-party contract to hire the needed independent third party and to paying its share of the expenses incurred under the contract. Entergy and Reliant did not anticipate that the costs would be significant.

The commission agrees with the utilities that an independent third party, such as a reputable accounting firm, should be used to collect the necessary information and calculate the prevailing market price. It is appropriate for the commission to oversee this process and thereby ensure that the methodology is applied in accordance with this rule and commission orders. The commission appreciates the compromise position presented by the utilities to agree to pay for the costs associated with this independent third-party process. The commission agrees with Entergy and Reliant that these costs should not be significant. Moreover, because of the commission's oversight role, the commission will ensure the costs are reasonable. Further, because the retail clawback is a responsibility of the AREP and TDU, it is not appropriate that other market participants should have to bear the cost of hiring the third-party consultant. Therefore, the commission finds that only the AREPs should pay for the costs of determining the prevailing market price of electricity. The commission adds a new definition for "independent third party" to the rule and will initiate a proceeding to designate the independent third party and determine the cost allocation between AREPs.

Timing Issues

Numerous commenters emphasized that comparison of the PTB and prevailing market prices should reflect the period through January 1, 2004, not a "snapshot" on a single date (i.e., January 1, 2004). Entergy stated that the proposed rule compares the PTB and market prices on January 1, 2004, but that PURA calls for the comparison to be made during the period the PTB is in effect through January 1, 2004. Entergy claimed that, to be accurate, the clawback reconciliation must be based on a periodic comparison of the PTB and market prices--perhaps on a quarterly basis--during 2002 and 2003. Entergy noted that the recent volatility in natural gas prices illustrates the importance of considering prices over the entire period and not simply at one moment in time. TXU agreed that the proposed rule is flawed in providing for a true-up based on a PTB snapshot. TNMP also questioned why the rule provides for the determination of the market price on a single day when the definition of market price anticipates use of the simple average of bids for a three-year period. AEP stated that inter-temporal issues make the ultimate timing of the price comparison incorrect because it creates a timing mismatch. AEP explained that the proposed calculation incorrectly compares PTB volumes from 2002 and 2003 to market prices obtained at the beginning of 2004 for the period 2004 to 2006. This results from the rule's use of a forward-looking RFP.

OPC also argued that the use of a January 1, 2004 market price and the PTB on that particular date, rather than the actual historical prevailing market prices and PTB applied during 2002 and 2003, is inconsistent with PURA §39.262(e). Reliant commented that, contrary to what OPC argues, the statute does not require the use of data from the years 2002 and 2003; it only requires that the prevailing market price and the PTB be from "the same time period," and that requirement can be met by using the January 1, 2004 date for both. Reliant argued that there is no basis for OPC's assertion that "the market prices in 2002 and 2003 are likely to be significantly lower than in 2004, whereas the PTB in 2004 is likely to be much lower than the PTB in 2002 and 2003." Reliant suggested that it is more likely that the spread between the prevailing market price and the PTB will be relatively unchanged from the start of customer choice to January 1, 2004, because of allowable fuel and purchased power adjustments to the PTB. Thus, Reliant contended that it makes sense to use data from that date for measuring the retail clawback.

The commission agrees with the majority of parties recommending that the PTB and market prices be compared on a periodic basis through January 1, 2004, rather than on January 1, 2004. PURA §39.262(e) states that "To the extent the price to beat exceeded the market price of electricity, the affiliated retail electric provider shall reconcile and credit to the affiliated transmission and distribution utility any positive difference between the price to beat established under Section 39.202 ... and the prevailing market price of electricity during the same time period." The commission believes that this provision requires a reconciliation of the PTB and market prices during the same period (i.e., the period from 2002 through 2003), rather than a snapshot comparison on January 1, 2004.

Minimum Switching Threshold

Entergy and AEP proposed that an AREP should be exempt from the retail clawback if customer switching has not exceeded a minimum threshold of 5.0% as of January 1, 2004. The actual switching rate for this calculation would be calculated in the same manner specified in §25.41(i). AEP claimed that the 5.0% threshold captures those circumstances where there is so little customer switching that it can be fairly concluded that the PTB is the market price for that area. In these cases, AEP argued, there would be no need to calculate the retail clawback. Entergy proposed using a preliminary threshold assessment, based on visible customer switching data and wholesale prices, to determine whether to conduct a more thorough clawback assessment. Under Entergy's proposal, if the commission determined that less than 5.0% of residential and small commercial customers have switched to non-affiliated REPs, no further clawback investigation would be necessary. Entergy suggested that the commission could also employ an assessment based on wholesale market data such as hourly balancing energy transactions during 2002 and 2003. Entergy claimed that because these data would not include retail costs, it would understate the actual market price of retail service. If the wholesale benchmark exceeds the PTB, Entergy argued that the commission could determine with confidence that no further clawback was required. Entergy contended that these preliminary threshold assessments avoid the necessity of a full clawback proceeding if the market has not developed in some areas.

OPC commented that PURA does not allow for a minimum switching threshold. According to OPC, if few customers switch, at the very least there should be a calculation of the excess profits of the affiliated REP and a commission finding of whether the amount is material enough to require a refund.

The commission recognizes that if there is very little customer switching to competitive REPs in an area, it could indicate that the PTB is at or below the market price. However, there could be numerous reasons--besides price--why customers do not select alternative providers for electricity. Likewise, competitive REPs may avoid certain markets for reasons other than not being able to compete with the PTB. Obviously, if there are no customers switching and no REPs making offers in an area, there is no need for the retail clawback because there is nothing to compare to the PTB. The commission is reluctant at this point, however, to establish an arbitrary level for a minimum switching threshold. Nonetheless, if there is evidence that a market has not developed in a certain area, the commission may consider good cause exceptions, on a case-by-case basis, to the retail clawback provisions of the rule.

POLR and PTB Prices

AEP suggested that market price should include offers by competitive REPs, PTB rates, POLR rates, and rates provided to state institutions. TXU also commented that a determination of the prevailing market price should take into account the rate that all customers have chosen to pay, including PTB and POLR customers. TXU claimed that if the market price were determined by ignoring the PTB rate, the result would be skewed.

Cities emphasized, however, that it was absurd to include PTB and POLR customers and prices in the calculation of the benchmark-unregulated price because it was contrary to legislative intent to include regulated prices and it would eliminate the significance of the clawback. Cities was especially critical of AEP, which queried how price could be determined in a market in which the only price was the PTB because AEP's hypothetical only demonstrated that a clawback would not apply under its scenario. ARM and OPC agreed that it would be inappropriate to use the PTB or POLR rates to estimate the market price because those are regulated rates approved by the commission, not market-based rates. OPC added that including the PTB in the market price would dramatically overestimate market prices due to the dominance of the PTB in the weighted average. OPC further argued that the prices of premium electricity, such as green power,

must be excluded. TIEC added that it would defeat the purpose of the PTB clawback to include regulated rates such as POLR and the PTB in the market price calculation.

The commission disagrees with AEP and TXU that PTB and POLR rates should be included in the determination of prevailing market price. The commission interprets PURA §39.262(e) to make a distinction between the price to beat and other prices in the market when it provides that "to the extent that the price to beat exceeded the market price of electricity, the affiliated retail electric provider shall reconcile and credit to the affiliated transmission and distribution utility any positive difference between the price to beat ... and the prevailing market price." Therefore, the commission concludes that the PTB should not be included in determining the prevailing market price for purposes of the retail clawback. Furthermore, the POLR rate is a regulated rate that requires approval by the commission. It is not expected that customers will voluntarily select the POLR price, but rather customers will default to the POLR if their service is terminated by their chosen REP, either for non-payment or if the REP goes out of business. POLR service is unique in this sense and the price should reflect the cost of providing the safety net accorded by POLR service. Therefore, POLR rates should not be considered in determining market prices.

Applicability of Retail Clawback to Non-Stranded Cost Utilities

AEP argued that the rule should not require non-stranded cost utilities, such as Southwestern Electric Power Company (SWEPCO) and West Texas Utilities (WTU), to participate in the retail clawback. AEP claimed that PURA makes clear that the overall purpose of the true-up is to ensure that a utility may not over-recover stranded costs. Moreover, AEP stated that the retail clawback provision is designed to prevent over-recovery of stranded costs. AEP also noted that non-stranded cost utilities will have a PTB that is unlikely to exceed market prices by any appreciable extent.

The commission disagrees with AEP. The purpose of the retail clawback is to capture and return to customers the price differential between the market price of power and the PTB during the period between the start of competition and the time of the true-up. If there is little price differential between the market price and the PTB for non- stranded cost utilities, such as SWEPCO and WTU, then the amount returned to customers will simply be less.

Comments on specific sections of the rule:

§25.263(a)-Purpose

TXU recommended replacing the phrase "excess revenues" in subsection (a) with either "excess profits" or "excess net revenues" to recognize the costs an AREP incurs in providing service. TXU noted that an AREP's revenues cannot be considered until all costs incurred in producing the services that generated the revenues are covered. Accordingly, TXU recommended revising subsection (a) to refer to "the level of excess profits from customers" rather than "the level of excess revenues."

The commission agrees in part. The portion of the purpose statement discussed in TXU's comment concerns the retail clawback provisions of PURA §39.262(e), which provides that the AREP must credit to the affiliated TDU any positive difference between the PTB, reduced by the nonbypassable delivery charge, and the prevailing market price of electricity. However, because the statute addresses only nonbypassable charges, the commission does not believe that further adjustments to account for other AREP expenses are appropriate. The commission has revised subsection (a) to refer to revenues net of nonbypassable delivery charges. No other changes were made in response to this comment.

Reliant commented that, as currently written, the proposed rule could be interpreted to preclude the recovery of regulatory assets that are not already being recovered through a transition charge (TC). In its securitization case, Reliant was specifically permitted to seek in future proceedings stranded cost recovery of generation-related regulatory assets that it did not seek to recover in its initial securitization case. The true-up proceeding clearly involves the calculation of stranded costs, and this provision of the proposed rule should be written to comport with the financing order issued in Reliant's securitization case, PUC Docket Number 21665, *Application of Reliant Energy, Incorporated for a Financing Order to Securitize Regulatory Assets and Other Qualified Costs*, (June 1, 2000).

In its reply comments, ARM agreed with Reliant that the rule should not be read to preclude recovery of generation-related regulatory assets specifically permitted by the commission to be considered in a proceeding pursuant to a securitization case. ARM recommended a modification to Reliant's proposed language to ensure that it is not interpreted to include regulatory assets that have been approved for securitization but not securitized.

The commission agrees with Reliant and ARM that regulatory assets not previously approved for securitization are eligible for recovery in the true-up proceeding and amends the proposed rule as recommended by ARM.

§25.263(b)-Application

EPE requested that the rule be revised to clarify that it has no claim for cost recovery and is exempt from the provisions of PURA Chapter 39 pursuant to PURA §39.102(c) until the end of the ten-year base-rate freeze imposed under Docket Number 12700, *Application of El Paso Electric Company for Authority to Change Rates*. EPE further requested revisions to subsections (d)(2), (l)(1), and (l)(2) to reflect that EPE is not subject to the portions of the true-up that relate to stranded cost determination and recovery.

The commission does not believe any rule changes are needed to address EPE's concerns. First, the rule is written in a manner that provides for later true-ups for utilities that do not go to competition on January 1, 2002. For example, subsection (e)(4) provides that the commission may update orders issued in a generic true-up proceeding for any utility whose customers are not offered customer choice on January 1, 2002. Further, the provisions of subsection (d) explicitly address which components of the true- up proceeding apply to stranded and non-stranded cost utilities; specific provisions for EPE are unnecessary. Accordingly, no changes were made in response to these comments.

§25.263(c)-Definitions

§25.263(c)(1) (definition of capacity auction total price of power)

TXU suggested modifying the definition for "capacity auction total price of power" in order to account for the fact that the APGC will be financially responsible for any scheduled energy, regardless of whether it is actually delivered. ARM agreed with TXU's insertion of the word "scheduled" in this definition.

The commission agrees with TXU and ARM and has inserted the word "scheduled" into the definition of capacity auction total price of power.

Proposed §25.263(c)(3) (definition of mitigation)

Reliant stated that the current definition of mitigation includes the term "commission order," which is a vague term despite being intended in this context to incorporate the transition cases that utilities such as Reliant entered into. Therefore, Reliant recommended that the definition be rewritten to include "issued after 1996 that approved a utility's transition case" at the end of the definition.

The commission agrees that Reliant's language adds clarity to the definition of mitigation and adopts the revision.

Proposed §25.263(c)(4) (definition of net value realized)

TIEC argued that the definition of "net value realized" should reflect the value of any emissions credits and all other items from the PURA §39.251(3) statutory definition of "generation assets" that are associated with the sale. Also, any tax impacts of the asset sale should be included in the calculation of the net value realized. TXU agreed with TIEC's recommendation to include all items in PURA §39.251(3) in the definition of "net value realized." TXU stated that TIEC was unclear in its recommendation to include tax impacts of the asset sale in the calculation of net value realized. Nevertheless, TXU recommended that TIEC's recommendation be rejected because "net value realized" for an asset sale should be exclusive of taxes just as net value realized in a stock sale does not include tax impacts. Reliant responded that such a change is improper and unnecessary because the book value of the generation assets does not include any tax effects, and book value must be compared to a sales price, which is also not adjusted for tax effects. The terms generation assets, market value, and stranded cost are all clearly defined terms in PURA §39.251, and the concept of book value is a well known and clearly understood term in the utility context. None of these terms includes consideration of tax effects.

The commission believes that because "net value realized" refers to compensation paid by a buyer for generation assets, and generation assets are defined in PURA §39.251(3) and in PUC Substantive Rule §25.5, no additional definition of generation assets is necessary. With regard to the inclusion of tax effects, the commission agrees with TXU and Reliant that "net value realized" is exclusive of taxes and, accordingly, no change to the rule is necessary.

TIEC also argued that to the extent that a utility and its APGC or unaffiliated PGC encumber generation assets in a manner that reduces their value, such encumbrances might violate the statutory directive of PURA §39.252(d). TIEC recommended that the commission reserve the right to adjust the net value realized to reflect the impact of any limitations imposed by the seller on the purchaser's use of the acquired assets. TXU replied that PURA §39.262(h)(1) does not give the commission the authority to second-guess the outcome of the sale process and TIEC's recommendation should be rejected.

The commission declines to revise the definition as recommended by TIEC. The rule provides a mechanism for adjusting the book value of generation assets in the event that the requirements of PURA §39.252(d) are not met. No further mechanisms to address such an eventuality are required.

Proposed §25.263(c)(6)(definition of regulatory assets)

TNMP commented that the definition of "regulatory assets" contains an offset for the "applicable" portion of generation-related investment tax credits per the statute. TNMP argued that this off-set could result in a normalization violation of the Internal Revenue Code of 1986 and suggested adding "provided an offset by such applicable portion does not result in a violation of the normalization rules of the code" to the end of the definition. TIEC replied that a change to the definition would be appropriate only if the rule also requires utilities to seek private letter rulings from the Internal Revenue Service that allow them to treat their investment tax credits in a manner that minimizes ECOM and the likelihood of such normalization violations.

The commission does not believe TNMP's additional language is necessary. The definition of regulatory assets used in the rule is the same as that in the statute. Accordingly, no change to the rule has been made.

Proposed §25.263(c)(7), (c)(8), (c)(9), and (c)(10) (definitions of residential market price of electricity, residential net price to beat, small commercial price of electricity, and small commercial price to beat)

TNMP argued that if the commission does not abandon the use of a RFP, it needs to clarify the time period in the proposal. TNMP stated that the PTB, which includes a fuel component, would change over time. Therefore, TNMP was unclear why it would be appropriate to use the PTB on a single date as a point of comparison. TNMP also argued that it is unclear whether the three-year period runs from January 1, 2004 or runs from 2002 and includes January 1, 2004. Finally, TNMP commented that if the average is to be compared to the cost on a single day, it might be reasonable to clarify the rule to determine the simple average of costs on a daily basis. OPC, in conjunction with its response to Preamble Question #3, suggested that the definitions should be revised to delete the January 1, 2004, reference consistent with a change that would compare the PTB revenues in 2002 and 2003 to the product of PTB sales in 2002 and 2003 times the prevailing market prices (developed as specified in the PTB rule) during 2002 and 2003. AEP commented that the definition incorrectly compares PTB volumes from 2002 and 2003 to "market" prices obtained at the beginning of 2004 for the period 2004 to 2006. Entergy suggested that the definition of market price is based on a snapshot comparison with the price to beat on January 1, 2004, rather than a comparison over the years 2002 and 2003. Entergy suggested that the clawback reconciliation must be based on a periodic comparison of the price to beat and market price--perhaps on a quarterly basis-- during 2002 and 2003. TXU recommended modifying the definitions for residential and small commercial market price of electricity in proposed subsections (c)(7) and (c)(9), respectively, to compare the average weighted PTB rates in effect during the entire true- up period (i.e., from January 1, 2002 through January 1, 2004).

Several commenters, in conjunction with their responses to Preamble Question #3, suggested alternative definitions. TNMP contended that PURA §39.153(a) exempts entities such as TNMP from the capacity auction; therefore, it would only fit under a portion of the definition. TNMP suggested that the commission adopt a definition that uses data from actual sales occurring in the affiliated REPs' service areas; this would provide a reasonable estimate of the market price available to PTB customers if they chose to switch to a nonaffiliated REP from the affiliated REP. Entergy commented that the market price definition is not based exclusively on retail market price indicators, but instead is based on an average of the results of

RFPs to serve retail customers and wholesale capacity auction prices. Entergy argued that there would be significant costs to transform wholesale costs into retail costs. Entergy suggested using retail market indicators from the beginning. AEP argued that the prevailing market price should be measured in terms of prices offered to and accepted by customers in the retail electricity market. AEP maintained that the wholesale transactions do not incorporate all of the costs included in retail markets. AEP suggested that the weighted-average net market price of electricity should be computed from all price offers taken in the market, including PTB, POLR, and prices discounted for specific customer classes. Reliant commented that if capacity auction prices are to be used for estimating retail electric prices, these additional costs must be captured if a valid retail price comparison is to be made. Reliant recommended that actual, observable retail electric prices from the Electricity Facts Labels be used to compare PTB prices. In the alternative, Reliant commented that if the commission adopts a definition that is based on the estimated cost of providing retail service, all costs must be included and the estimated commodity cost must be calculated with appropriate consideration of the load shape of the PTB customers. TXU also commented that it does not make sense to make a comparison between a retail PTB and a wholesale market price, particularly because it ignores many of a REP's costs of providing service to customers. TXU suggested that an appropriate method for determining "market price" would be to calculate a weighted average of the prices charged by all REPs to their residential and small commercial customers within the AREP's service territory during the period covered by the true-up, including customers who choose to be served at the PTB and customers served by the POLR. TXU recommended that the average price per kWh for residential and small commercial customers should be calculated using the prices from the Electricity Facts Labels. ARM recommended deleting the definitions of residential market price of electricity and small commercial price of electricity and instead using a definition for market price of electricity that would equate to the baseload capacity auction price of wholesale electricity. TXU replied that using the capacity auction price does not reflect a retail-to- retail comparison. Reliant stated that ARM's recommendations do not make sense, and that they imply that REPs such as those represented by ARM will sell electricity to small commercial customers with varying load shapes at the energy cost to serve a high load factor industrial customer and with no markup for line losses, fees and taxes, administrative and selling costs, or profit. Reliant commented that ARM's recommendations also imply that REPs will sell electricity to residential customers at only a 7.0% markup to cover the costs of meeting variances in residential loads plus line losses, fees and taxes, administrative and selling costs, and profit. Reliant also commented that if, in fact, ARM does expect REPs to sell at essentially below-cost prices, then that will be reflected in the Electricity Facts Labels, which Reliant has recommended be used. TNMP replied that the proposed definition is inconsistent with the statute; the structure of the claw back provision depends on making a comparison between the PTB and the price of retail electric service. ARM strongly opposed recommendations that these prices be obtained either from the Electricity Facts Label or compiled by an independent third party from prices charged by REPs. ARM argued that the Electricity Facts Labels are not representative of all the prices charged to small commercial customer loads by REPs, because they ignore prices charged to commercial customers whose load approaches the 1,000 kW cutoff for PTB load. In addition, "the prices on the Electricity Facts Label are based on representative, not actual, consumption levels, and as such, do not reflect actual prices in the market." ARM objections to an independent third party administrator compiling pricing and customer load information included potentially large costs and administrative burdens on REPs to the benefit of the AREPs. Most important to REPs, ARM expressed concern that "there is no way the commission can ensure the confidentiality of competitive REPs' customer and pricing data provided to the commission." ARM also opposed inclusion of PTB or POLR rates in the determination of residential or small commercial market price of electricity. ARM argued that POLR and PTB rates are regulated rates, approved by the commission, and are not market rates.

Consistent with the commission's decisions with respect to Preamble Question #3 as previously discussed, the commission has modified the definitions of residential market price of electricity, residential net PTB, small commercial price of electricity, and small commercial PTB.

Proposed new §25.263(c)(14) (addition of definition for small commercial customer)

TXU recommended adding a definition for small commercial customer, which clarifies that unmetered guard and security light customers shall not be considered PTB customers for purposes of the true-up calculation in subsection (j)(5)(A). TXU noted that this is necessary to avoid the over-counting of customers because, under ERCOT procedures, a separate Electric Service Identifier (ESI ID) is assigned to unmetered guard and security lights instead of associating the lights with the service received by the customer. TXU added that the number of ESI IDs would far exceed the actual number of customers if ESI IDs are considered customers for the purposes of the true-up. Reliant agreed with TXU's recommended addition because there will be an over-counting of small commercial customers as of January 1, 2004 if a correction is not made.

The commission agrees with TXU and Reliant and has included additional language in subsection (j) to address the over-counting issue.

Proposed new definition of stranded costs

AEP commented that it believed that it would be appropriate for the rule to include a definition of stranded costs, which could track the statutory definition found in PURA §39.251(7).

The commission does not believe that a definition of stranded costs is necessary. Stranded costs are defined in PURA §39.251(7).

§25.263(d)-Obligation to file a true-up proceeding

Reliant commented that the rule should specify that Reliant's true-up application will be filed on January 12, 2004, as necessitated by its business separation plan previously approved by the commission in PUC Docket Number 21956, *Reliant Energy, Incorporated Business Separation Plan Filing Package*. Reliant stated that while it understands that the commission may desire to stagger the true-up application filing dates, particularly given the 150-day limitation in PURA §39.262(j), its AREP has been granted an option to purchase Reliant's generation assets at a market value determined under the Partial Stock Valuation Method based on the highest 30 consecutive trading days out of the 120 consecutive trading days prior to January 10, 2004. If Reliant were required to make its true-up filing on any day after January 12, 2004, there could be a difference between the value

that Reliant actually obtains for its generation assets if sold to Reliant Resources, Inc. (Reliant's AREP) and the value of those assets used in the true- up proceeding.

The commission acknowledges the timing issue associated with the filing of Reliant's true-up application. However, the commission does not believe there is a need to address that issue in this rule; it will be addressed in the true-up filing schedule to be issued by the commission at a later date.

TIEC commented that the rule should be clarified to require that the TDU, PGC, and REP jointly make the true-up filing regardless of whether they are affiliated on the date the true-up application is required to be filed. In particular, TIEC noted that some utilities contemplate spinning off certain affiliates and thus an affiliate relationship may not exist between components of the previously bundled utilities on the date the true-up application is filed.

The commission disagrees. The terms AREP and APGC are defined in §25.5 to include successors in interest of an electric utility. Therefore, the terms as used in the rule are sufficient to capture a REP that was initially affiliated with a utility and subsequently spun off.

AEP and EGSI argued that the proposed rule goes too far in that it requires non- stranded cost utilities to participate in the retail clawback portion of the true-up. Utilities without stranded costs should be required to participate only in the fuel reconciliation portion of the true-up, and PURA §39.262(a) supports this view because the overall purpose of PURA §39.262 is to ensure that a utility does not over-recover stranded costs. The retail clawback promotes the objective of avoiding over-recovery of stranded costs by ensuring that, to the extent the PTB exceeds retail market prices, the excess is used to offset stranded costs. Requiring utilities that are not seeking to recover stranded costs to participate in the retail clawback, which is intended to avoid double recovery of stranded costs, is unfair. AEP also recommended that an AREP be exempt from the clawback if customer switching has not exceeded a minimum threshold as of January 1, 2004. AEP recommended that this threshold should be set at 5.0%.

ARM generally disagreed with these comments. ARM stated that most, if not all, APGCs will have a final fuel factor to credit or bill to the TDU and all AREPs will be charging a PTB subject to the retail clawback provisions of PURA §39.262(e). ARM commented that, for AREPs charging a PTB so low that competition is not likely to develop in their TDU's service area, the obligation to participate in the retail clawback should apply only if a minimum threshold of switches is met. ARM recommended that the threshold be no greater than 5.0% of the PTB customers served by the AREP.

TIEC also disagreed with commenters who suggested that non-stranded cost utilities should not be required to participate in the retail clawback. TIEC argued that those commenters' claims that PURA §39.262 is intended to address stranded cost recovery only gloss over the fact that PURA §39.262 also addresses disposition of final fuel balances. The retail clawback is intended to protect PTB customers from paying excessive rates through the operation of the PTB.

The commission disagrees with commenters suggesting that the retail clawback applies only to non-stranded cost utilities. The commission interprets PURA §39.262(e) to be a mechanism that ensures utilities do not benefit if their rates during the first two years of competition exceed market rates. However, the commission agrees that in some cases the PTB may fall below market prices and few customers will have a financial incentive to switch providers. The number of customer switches is therefore likely to be very low, or none at all. As previously discussed in the commission's decisions with respect to Preamble Question #3, the commission may consider good cause exceptions, on a case-by-case basis, to the retail clawback provisions of the rule.

TXU recommended addition of a new subsection (d)(4), which appears intended to relieve TDUs, AREPs, and APGCs from having to make the filings required by subsection (f)-(k) of the proposed rule if a commission order provides otherwise. Presumably, this suggested additional language is intended to address situations where a utility settles all stranded cost issues prior to the initiation of the true-up proceeding.

The commission disagrees with TXU. Where a commission order contemplates a deviation of the specific requirements of this rule, that order will control over the provisions of this rule. No specific language to address such an eventuality is needed.

§25.263(e)-True-up filing procedures

Reliant objected to the portion of subsection (e)(1) stating that each TDU, APGC and AREP "shall file all testimony and schedules on which they intend to rely" to the extent it suggests that the applicants cannot file rebuttal testimony or otherwise respond to issues raised by other parties. While Reliant agreed that it has an obligation to make a *prima facie* case for stranded cost recovery in its initial filing, it should not be required to anticipate all issues that will be raised by the parties to the proceeding and to file every document that is conceivably relevant to those potential issues. Rather, the true-up proceeding should be conducted to allow the applicants to file rebuttal testimony or other documents to address issues raised by the commission staff and intervenors. This is consistent with the commission's rules and long-standing commission practice in contested cases.

TIEC and ARM countered by stressing that the accelerated time frame for processing the true-up cases required that the intervenors and staff obtain as much information as possible in the initial filing. TIEC stressed reducing the amount of data collected through the discovery process. ARM stressed meeting the utility's burden of proof at the time of the initial filing. To address Reliant's concern, TIEC and ARM suggested that the rule be clarified by adding language stating that a true-up applicant is not precluded from filing rebuttal testimony that specifically responds to issues raised by other parties to its true-up proceeding.

The commission agrees with Reliant that the rule should not be written in a manner to suggest that an applicant is prohibited from filing rebuttal testimony. However, the commission also agrees that the initial filing should be sufficient to state a prima facie case and to provide parties with the information supporting a true-up application. The commission has altered the wording of the rule to address these concerns.

TIEC commented that the rule should include detailed filing requirements. TIEC was supportive of the commission prescribing a thorough and detailed filing package. The filing package should include specific requirements for schedules and workpapers and make provisions for electronic filings: Word format for testimony and Excel format for numerically calculated schedules and workpapers. Files with PDF extensions should be disallowed. TXU commented in opposition to TIEC's recommendation that computer file types be prescribed by the filing package.

TXU claimed that PUC Procedural Rule §22.72(j) already adequately covers requirements for filing documents in electronic form.

The commission agrees with TXU that commission rules already adequately address requirements for electronic filings. The commission notes that it has not traditionally specified filing requirements in a rule and sees no reason to deviate from traditional practice here. The filing package for the true-up proceeding will therefore be developed after the completion of this rulemaking. No change was made in response to these comments.

AEP objected to the six-month advance notice of a utility's plan to use the ECOM model because the time period was overly lengthy and inflexible. For example, unforeseen events could require a utility to abandon an alternative closer to the true-up filing than six months. AEP proposed a 60-day notice and a good cause exception for a late filing.

The commission understands AEP's concerns about advance notice of an intention to rely on the ECOM model for stranded cost valuation. However, if an applicant intends to use the ECOM model, advance notice is required to ensure that sufficient time is available prior to the initiation of the true-up proceeding to determine whether updates to the model should be made and to quantify those updates if needed. To accommodate AEP's concerns to the degree possible, the commission has revised the rule to reduce the advance notice requirement to 90 days.

Reliant and TXU objected to proposed subsection (e)(3), claiming that the commission should not initiate generic proceedings to determine true-up issues, other than perhaps for certain standard inputs for the ECOM administrative model used to value nuclear assets under PURA §39.262(i). Consistent with the legislative intent expressed in Senate Bill 7, all the components of the stranded cost calculation are based on the individual applicants' circumstances. Cities, ARM, and OPC expressed support for the commission's retention of the ability to initiate generic proceedings where circumstances dictate. It is impossible to know, this far in advance of the true-up filings, exactly which issues will lend themselves to a generic hearing.

The commission agrees with Cities, ARM, and TIEC that the commission should retain the flexibility to conduct generic true-up proceedings in the event that common issues requiring common resolution develop. In particular, a generic proceeding will likely be appropriate in the event applicants intend to use the ECOM valuation method. The commission has not made any changes in response to these comments.

Reliant and AEP objected to the commission making a determination with respect to whether the APGC and AREP--in addition to the TDU--have complied with their responsibility under PURA §39.252(d) to reduce stranded costs and protect the value of their assets. They claim that the requirements of PURA §39.252(d) are limited to a bundled electric utility. Reliant, AEP, and TXU also maintained that PURA does not provide the commission with the authority to reduce the net book value of generation assets as proposed in the rule, and that this proviso must be stricken from the rule. AEP also argued that the rule should include a more definite statement of the standards against which compliance with PURA §39.252(d) would be measured. AEP recommended specifically that the rule state that the commission will evaluate whether "the electric utility's efforts demonstrate commercial reasonableness, good faith, and the use of normal business practices, as those terms are commonly understood in the context of commercial law." Finally, the utilities argued that the rule should include language prohibiting the commission from second-guessing a market valuation under PURA §39.262 (h) or (i).

ARM replied that because APGCs and AREPs are successors in interest of the former bundled utilities, they assumed the responsibilities of the former electric utility, including maintaining their asset values. ARM said it was absurd to believe that the legislature intended for these responsibilities to cease after 2001 and before the 2004 true-up proceeding. OPC disagreed with the utilities' comments concerning the commission's authority to reduce the net book value of generating assets. Because the definition of stranded costs is the net book value of generation assets over the market value of those assets, and the commission is not authorized to substitute its judgment for the market valuation of generation assets, PURA must intend for the commission to have the ability to adjust the net book value, the only other component of stranded costs.

The commission agrees with ARM that the responsibilities of the APGCs and AREPs continue through the true-up proceeding. The legislature could not reasonably have intended that the duty to safeguard asset values for the benefit of ratepayers be extinguished more than two years prior to the commencement of the true-up proceeding. Further, the commission agrees with OPC that reduction of the net book value of assets is a reasonable remedy for a violation of PURA §39.252(d). Nevertheless, the commission believes it appropriate to preserve the flexibility to impose another remedy if the circumstances at the time warrant. The commission disagrees with AEP that a more definite statement of the standards for assessing behavior of an electric utility and its affiliates is needed. The rule refers directly to PURA §39.252(d), which includes the "commercially reasonable" language advocated by AEP. Finally, the commission agrees with the utilities that the rule should include statutory language concerning the inability of the commission to substitute its judgment for a market valuation of generation assets determined under PURA §39.262(h) and (i).

TXU and Reliant objected to the required implementation of expedited discovery procedures in the true-up proceedings, arguing that administrative law judges (ALJs) already have the discretion to require such expedited procedures in individual cases. TIEC responded that an expedited discovery procedure is needed for intervenors and staff to effectively participate in the accelerated true-up procedures.

The commission agrees with TIEC that an expedited discovery procedure is necessary given the 150-day accelerated deadline for finalizing the true-up cases. While procedures for obtaining expedited discovery are available upon request under other rules, the commission believes that the short timelines in the true-up proceedings demand expedited discovery without the need for a specific request. No change was made in response to these comments.

AEP, TXU, and Reliant objected to granting the commission the discretion to extend the deadline for processing a true-up proceeding for good cause. Reliant emphasized that a staggered filing schedule is the appropriate way to address time constraints, assuming it is allowed to file its application on January 12, 2004, as required by its business separation plan. TIEC disagreed with AEP, TXU, and Reliant, asserting that the good cause exception may be needed to ensure thorough processing of the true-up cases, given the accelerated 150-day time frame allotted for finalizing each proceeding. Also, TIEC asserted that this approach is consistent with the commission's general operations.

The commission views the statutory requirement as directory rather than mandatory and therefore reserves the right to extend the 150-day deadline if circumstances warrant. However, the commission anticipates that the provisions of subsection (e)(6) will be used infrequently if at all and that most if not all true-up applications will be processed within a 150-day window. No change was made in response to these comments.

§25.263(f)-Quantification of market value of generation assets

EPE stated that it need not file any true-up application required under subsections (f), (g), (i), and (k) because it has made no claim for stranded costs, has undertaken no ECOM mitigation measures, and is currently exempt from PURA Chapter 30. EPE proposed language to accomplish its exclusion.

The commission believes that EPE is already excluded and does not feel there is a need to alter the wording of this subsection.

§25.263(f)(1)(A)

Reliant, TNMP, and AEP argued that the commission should eliminate the requirement to report a sale of assets 120 days prior to the transfer on the basis that the reporting requirement is unnecessary and could hinder the consummation of some transactions. TXU suggested that rather than deleting this requirement, it could be modified to require the reporting of such a transaction within 30 days of closing. AEP was opposed to any reporting other than with the true-up filing.

Reliant observed that a detailed explanation of the transaction is unnecessary because the sale of assets is by definition a third-party transaction under a competitive offering. Reliant also emphasized that if the commission imposes an after-the-fact requirement, a mechanism must be in place to ensure the confidentiality of competitively sensitive information. TNMP stressed that if this provision is retained in the final rule, the commission should try to accommodate four concerns. Specifically, TNMP was concerned that 120 days exposes the company to a lengthy period for markets to change, that some bidders may consider this an added risk factor, that some bidders may pay more for a quick turn around, and that delays might be experienced if ancillary items are not limited to material items. AEP also argued that no advance notice is provided with the other valuation methods.

TIEC and ARM argued that the reporting requirement should be retained because it allows the commission to collect important information regarding an asset sale that will be needed to perform an accurate calculation of the utility's final stranded cost balance. ARM was agreeable to reducing the requirement to 30 days prior to the transfer. TIEC did not oppose modifying this requirement to allow after-the-fact reporting as proposed by TXU.

TIEC proposed that ancillary components such as fuel contracts, water rights, and emission allowances be broken out and priced separately. According to TIEC, the commission must have enough information to accurately quantify the net value realized from the asset sale and to assure that all the ancillary items included in the definition of "generation assets" are addressed in the true-up filing.

Reliant replied to TIEC that, as a practical matter, such a break-out will not be available in most cases. Reliant also noted that TIEC did not explain why this level of detail was needed. TXU replied that this break-out would be burdensome, and might reduce the purchase price. TXU added that it should be sufficient for the sales contract to specify general categories of items that are included in the sale, such as a description of the unit, property boundaries, inclusions of fuel and parts, emission allowances, etc.

The commission acknowledges the concerns raised by Reliant, TNMP, and AEP. Therefore, the commission has deleted the requirement that it be provided with an advance copy of any proposed transaction. However, in order for the commission to remain abreast of the utilities' activities, the commission has included a requirement that the commission be provided a copy of a transaction within 30 days of closing. In addition, the rule has been revised to explicitly permit the utility to file the required information confidentially. The commission also believes that the general categories of items suggested by TXU will be useful to properly understand and review the transaction.

§25.263(f)(1)(B)(iii) and §25.263(f)(1)(C)(ix)

TIEC argued that there should be a separate appraisal of any non-utility or non- generation assets (that are deducted from the market value of generating assets) to make sure that the net book value of these assets does not exceed their market value. The purpose of this proposal is to make sure that the market value of generating assets is not negatively influenced by a non-generation or non-utility asset.

AEP and Reliant disagreed and AEP quoted PURA §39.262(h)(2) and (3), which state that "the market value of each transferee corporation's assets shall be reduced by the corresponding net book value of the assets acquired...." TXU agreed with AEP and Reliant that the acquired assets should not be appraised.

The commission interprets the wording of PURA §39.262(h)(2) and (3) to specifically provide that the net book value of assets acquired in an exchange be used as an offset to the market value of a transferee corporation's assets. Therefore, no change to the rule has been made.

§25.263(f)(1)(C)(iv)

Reliant and TXU maintained that the valuation panel convened to determine if a control premium exists should not exclude bankers that have worked for the companies in cases related to the implementation of Senate Bill 7. Reliant argued that there is no reason to assume that bankers cannot balance the conflicting goals that a utility might have in comparison to a competitor such as Enron. In addition, Reliant and TXU contend that this provision may disqualify so many of the top ten banks that it may be impossible to assemble the valuation panel in the manner required by law. Both Reliant and TXU proposed that this provision be deleted.

Cities replied that even if the bankers could balance the interests of utilities and REPs in all cases, their ability to balance the interests of rate payers is not addressed. In addition, TIEC and ARM argued that this provision should be retained to assure the objectivity of the valuation panel. However, to address the concerns of Reliant and TXU, both TIEC and ARM were amenable to modifying the rule to allow a utility to petition for a good-cause exception to this requirement if it can demonstrate that the operation of the rule prevents the formation of the valuation panel as prescribed by PURA §39.262(h)(3).

The commission believes that the policy established in this clause of the rule is needed to maintain the independence and integrity of the valuation panel. However, the commission acknowledges that a good-cause exception to this requirement may be sought in the event a utility determines it cannot meet the requirement of this provision of the rule.

§25.263(f)(1)(C)(v)

TXU objected to the rule's application of the control premium to assets and not to common equity based on the company's interpretation of PURA §39.262(h)(3). TXU added that no control premium should be applied to the preferred stock and debt amounts, which the proposed rule and PURA appropriately define as the book value of those securities. Reliant generally agreed with TXU, especially with respect to the application of the control premium to common equity. However, Reliant also argued that the word "market" must be added back to be consistent with PURA §39.262(h)(3).

The commission believes that financial theory alternatively applies control premiums either to common equity or to invested capital, i.e., debt plus common stock and preferred equity, which also equals total assets. The specific application depends primarily on whether the ultimate objective is to value the equity interest for the stockholders or to value the underlying assets for the business. To illustrate the financial consequence of this simple dichotomy, consider the following two choices. If the interpretation of TXU and Reliant is valid that the 10% control premium applies only to equity, the implied premium applicable to the valuation of generation assets is a nominal 4.0%, assuming the generic UCOS leverage of 60% for TDUs (equity of 40%). If the interpretation of TXU and Reliant is not appropriate, however, and the 10% control premium applies to total assets, the implied premium applicable to the valuation of equity is more consistent with an empirical market-based figure of 25% to 30%. Even if leverage is presumed to be a much lower figure of 50% to reflect the higher risk of generation assets, the comparable impacts are only 5.0% for assets and still 20% for common equity, respectively.

The commission believes that the legislature had the more realistic interpretation in mind when determining the market value of generating assets. The premium should apply to assets and not to equity. The commission's rationale is simply to assure that the market value of generating assets is not unreasonably penalized and stranded costs over- recovered. To demonstrate the magnitude of the potential penalty and under-recovery that is inherent in the position taken by TXU and Reliant, consider the following recent transaction. On September 27, 2001, the Wall Street Journal (p. A-4) and the New York Times (p. e-9) reported the proposed acquisition of Orion Power by Reliant for a 40% control premium applied to common equity, or a purchase price of $2.9 billion. Alternatively, if only a 10% control premium had been applied to the minority equity, as proposed by TXU and Reliant in this rulemaking, the purchase price of Orion stock would have been recorded at only $2.3 billion for regulatory purposes. Hence, this regulatory requirement would create an artificial reduction of over $600 million relative to the actual market price of the company's stock, in turn fostering an equal understatement in the real value of its assets and causing an over-recovery of the utility's stranded costs by that amount. In a true-up setting, this arbitrary windfall would flow to stockholders, and not to rate payers. Consequently, the commission retains the rule's application of the control premium to assets.

Additionally, the inclusion of the word "market" is not needed in the rule, and is deleted.

§25.263(f)(1)(C)(vii)

Reliant and AEP objected to the inclusion of the phrase "and other admitted evidence" regarding the commission's determination of value based on the finding of the valuation panel. Reliant and AEP argued that PURA is clear that only the panel's decision determines market value, and as such the phrase is superfluous and confusing.

The commission rejects the positions of Reliant and AEP that the language is overly restrictive on the commission and not intended by the legislature. Accordingly, no change to the rule has been made.

§25.263(f)(1)(D)(ii)

TIEC proposed that the commission receive a copy of the utility's RFPs for the asset offer, as well as documentation of any public notices or other means used to publicize the offer. The commission needs this information to ensure that the market valuation accurately reflects the true value of the assets in question.

The commission adopts TIEC's proposal to document the utility's sale proposal.

§25.263(f)(1)(D)

TXU proposed that in addition to appraisals in valuing the exchange of assets, two other valuation methods be made explicit. These include a bona fide third-party transaction under a competitive offering, followed by an appraisal, or the inclusion of the exchange assets in the stock valuation or partial stock valuation methods.

The commission disagrees. PURA §39.262(h) sets out four limited, detailed mechanisms for valuing generation assets. Given the specificity of this provision, the commission does not believe the legislature intended that alternative mechanisms be permitted. No change was made in response to this comment.

§25.263(f)(1)(D)(iv)

TIEC proposed that this section should specify that the burden of proof in the true-up proceedings is on the utility to demonstrate that the offer was properly conducted and produced a competitive result. Reliant and TNMP again raised their concerns about the 120-day period for advance notice of sales.

The commission disagrees that a specific designation of the party with the burden of proof is needed. The utility will be the true-up applicant and has the burden of proof. Further, as already noted, the commission has deleted the advance-period notice and replaced it with a filing to be made 30 days after closing. Additionally, the rule has been modified to provide for confidentially of filings. No changes were made in response to these comments.

§25.263(f)(2)(B)

TIEC urged that if the ECOM model is used to determine stranded costs, adjustments to the ECOM model from the UCOS proceeding should be limited to the greatest extent possible. Specifically, TIEC proposed that the ECOM model rely on previously approved inputs such as administrative and general (A&G) expenses, operations and maintenance expenses (O&M), taxes, rate of return (ROR), discount rate, and so forth. Furthermore, TIEC proposed that utilities should not be allowed to update their ECOM models at all unless they accompany each update request with detailed documentation and explanation.

AEP replied that these recommendations are contrary to PURA because no such limitations exist concerning ECOM updates. TXU did not oppose TIEC's proposal that utilities using the ECOM model needed to justify any changes from model inputs previously approved by the commission. However, TXU did

object to providing all computer runs because the output could be voluminous, most runs would not provide meaningful information, and in any case an electronic file would be provided.

The commission agrees with TIEC that if a utility requests an update to the ECOM model, proper documentation and explanation must accompany the true-up application. However, the commission also agrees with TXU that because an electronic version is provided, alternative runs do not also need to be provided. No change to the rule has been made.

§25.263(g)-Quantification of net book value of generation assets

§25.263(g)(2)(A)

TXU requested that the commission clarify the meaning of the phrase "plus generation-related asset additions as allowed in the ECOM model filed pursuant to the UCOS rate filing package." Reliant argued that the term "net book value of generation assets" should refer to the categories of asset additions included in the ECOM model and not the dollars allowed for asset additions in the UCOS cases. Reliant also urged that nuclear fuel be listed specifically as part of generation-related assets in this subsection. Reliant recommended that subsection (g)(2)(A) be rewritten accordingly. In addition, Reliant stated that the term "accumulated depreciation" in this subsection is prior to any mitigation.

The commission agrees with TXU that the phrase "plus generation-related asset additions as allowed in the ECOM model filed pursuant to the unbundled cost of service (UCOS) rate filing package" is unclear and has deleted it. The commission also agrees with Reliant that fuel inventories are appropriately included in this subparagraph and has modified the rule accordingly. Additionally, the commission agrees with Reliant regarding the term "accumulated depreciation" and adopts Reliant's suggested revision.

§25.263(g)(2)(A)(i)

TXU noted that if the net mitigation, as defined in subsection (c)(3), has already been applied by the utility to reducing the original cost of generating assets, subsection (g)(2)(A)(i) would double count these mitigation amounts. Accordingly, TXU recommended adding language to clarify that the net book value should be reduced by net mitigation, to the extent such net mitigation has not already served to reduce the net book value of generation assets.

The commission has clarified the potential confusion concerning net book value in its revision to §25.263(g)(2)(A) as described above.

§25.263(g)(2)(A)(iii)

TIEC proposed that this paragraph be deleted as unnecessary because the commission has not authorized any interim competition transition charges (CTCs). TXU recommended that the commission not adopt TIEC's recommendation to delete provisions of the proposed rule concerning reducing the book value of generation-related invested capital that is recovered through any CTC. TXU argued that this provision of the proposed rule is warranted given potential changes in the orders in the UCOS cases and the results of judicial appeals.

The commission agrees with TXU, and this subsection of the rule is adopted without changes to the subsection as proposed.

§25.263(g)(2)(B)

TXU proposed that the heading of this subsection be revised to match the definition of "existing purchased power contracts" under PURA §39.251(2). The definition of "existing purchased power contracts" in this section of PURA includes "any amendments and revisions to that contract resulting from litigation initiated before January 1, 1999." Reliant believes that the rule should use the language of the applicable statutes whenever possible.

The commission agrees and has made the requested change.

§25.263(g)(2)(B)(i)

TNMP indicated that subsection (g)(2)(B)(i) as proposed could be interpreted to require an actual sale, and argues that PURA §39.251(5) is not that restrictive. TIEC replied to TNMP that any market valuation of purchased power contracts in the true-up proceedings should be based on legitimate market offers that result in consummated power transactions. TIEC argued that a transaction involving a purchased power contract could not be considered "bona fide" unless it involves an actual sale of power. TIEC also argued that if potential parties to such a transaction believe that it may not be consummated, they may not participate in bidding for the rights to the contract, or they may not submit legitimate offers.

The commission agrees with TIEC. The wording in PURA §39.251(5), which states that purchased power market value means the value of demand and energy bought and sold in a bona fide third-party transaction, indicates that such transactions must involve an actual sale of power. Accordingly, the commission makes no change to the rule.

§25.263(g)(2)(C)

TIEC proposed that this paragraph be clarified to limit these generation-related regulatory assets only to those assets that have not been securitized.

The commission agrees, and adopts TIEC's proposal to specifically exclude securitized assets.

§25.263(g)(2)(D)

TIEC stated that cost recovery is strictly limited to capital costs, and consistent with §25.261(d)(4), relating to Stranded Cost Recovery of Environmental Cleanup Costs, does not include any operation and maintenance costs. TIEC also argued that this subsection of the rule should specify that the capital costs to improve air quality must have actually been spent before May 1, 2003 to qualify for inclusion in the book value of the utility's generating assets. Reliant and TXU replied that Substantive Rule §25.261 states that an "electric utility or affiliated power generation company has incurred costs if it has expended funds or has committed to expend funds under the terms of a written agreement." Reliant stated that this is the definition that should be used in the present rule.

The commission agrees with Reliant. Funds need not have been actually expended to be eligible for stranded cost recovery, provided the requirements of Substantive Rule §25.261 have been met. No change was made in response to this comment.

§25.263(g)(2)(E)

AEP, TXU, and Reliant opposed the concept that the commission is permitted to adjust the net book value of a utility's generation assets to reflect a lack of compliance with the utility's obligation to mitigate stranded costs. These utilities generally argued that

this aspect of the rule should be deleted because it is contrary to the market-based stranded cost valuation required by PURA.

OPC, TIEC, and ARM replied that PURA §39.252(d) specifically requires the commission to consider a utility's mitigation efforts in determining the amount of a utility's stranded costs. TIEC argued that adjustments to the net book value of the utility's generation assets are a logical means of complying with this statutory mandate. TIEC stressed that the proposed rule provides customers with protections to prevent excessive stranded cost payments that would limit competitive headroom beyond 2004. In addition, TIEC maintained that because any such adjustments would be applied to the book value rather than the market value of the utility's generation assets, the stranded cost mitigation provisions of the commission's published rule in no way interfere with the methods specified by PURA for determining the market value of the utility's assets.

The commission agrees with OPC, TIEC, and ARM that appropriate adjustments can be made to book value in determining ECOM because adjustments to the market value component of the equation are prohibited by PURA. No change to the rule has been made.

§25.263(h)-True-up of final fuel balance

TNMP stated that the term "final fuel balance" seems to reference different final fuel balances. TNMP recommended that the commission define final fuel balance as the final fuel balance determined under PURA §39.202(c). TNMP commented that if this term is defined as suggested, the last phrase of §25.263(h)(3) should delete the wording "calculated pursuant to this section," and §25.263(h)(4) should be modified to state: "the final fuel balance, as adjusted by subsection (*sic*) §25.263(h)(2)-(3) of this rule, shall include carrying costs on the positive or negative fuel balance...." TNMP also suggested that the last phrase of §25.263(h)(3) should be modified to state that, "... the surcharged utility shall add the amount of surcharges and any associated carrying costs paid after 2001 to its final fuel balance" to ensure that the amount a surcharged utility adds to its final fuel balance includes any carrying costs associated with the surcharge.

The commission finds that the recommendation of TNMP to define the final fuel balance as that determined under PURA §39.202(c) is unnecessary, as similar language to TNMP's suggestion appears in §25.263(h)(1). However, the commission agrees that TNMP's suggested modifications to §25.263(h)(3) and (4) provide clarity, and has modified the rule accordingly.

AEP argued that the language of this provision was overly broad. AEP stated that the only fuel surcharge collections that can properly be used to offset the final fuel balance are those that relate to the reconciliation period covered by the final fuel reconciliation. Any fuel surcharges that relate to a reconciliation period prior to that encompassed in the final fuel balance should not be used to reduce the final fuel balance because these surcharge collections have nothing to do with the reconcilable fuel costs at issue in the final fuel reconciliation.

The commission agrees and has made the requested change.

TIEC stated that it appears that §25.263(h)(2) and (3) are unnecessary because the commission has deferred collection of fuel under-recoveries until the final fuel reconciliations.

The commission agrees that it is unlikely that there will be any fuel surcharges imposed after the start of retail customer choice. However, that possibility cannot be foreclosed and this provision is therefore appropriate.

Reliant commented that in regard to §25.263(h)(4), all elements of the true-up should provide that the TDU be allowed to recover, or be liable for, carrying costs from the date that is 150 days after January 12, 2004 until fully recovered by the TDU or by the TDU's customers. As such, Reliant recommended changes to subsections (h)(4) and (l)(3) of the proposed rule. These changes are included in the discussion under Subsection (l)(3).

AEP stated that if the approach contemplated by §25.263(h) results in an extended period for recovery of an under-recovered fuel balance (longer than the one-year recovery period contemplated by the fuel rule), then the short term, debt-like interest rate provided by the fuel rule is inadequate, and interest should be calculated at the weighted-average cost of capital. In contrast, TIEC stated that it is important that the carrying charges associated with the final fuel balances be set at the levels traditionally imposed under §25.236(e), relating to Recovery of Fuel Costs. TIEC supported the proposed rule's imposition of carrying charges consistent with §25.236(e).

The commission agrees with AEP, and has changed the rule such that for recovery periods of one year or less, carrying costs on fuel balances will be at the interest rate determined by the fuel rule, and for periods exceeding one year, carrying costs will be computed using the utility's weighted-average cost of capital determined in its UCOS proceeding.

Subsection (i)-True-up of Capacity Auction Proceeds

"Load-shaping" issues

AEP suggested that the rule must recognize the fact that the capacity auction products cannot be directly entered into the ECOM model without further aggregation of the market price data, as the model was not designed to utilize capacity auction product market price data. That is, the market price must be adjusted to reflect the actual characteristics of the generating capacity used to support the capacity auction, especially firmness (discussed below), because the capacity auction rule assumes no forced outages, and also environmental standards, because the utility must comply with them in dispatching its power units. AEP also pointed out the proposed rule's reliance upon the use of average capacity auction market prices rather than product-specific market prices, with the possible result of stranded incremental fuel costs incurred in connection with the provision of energy associated with the capacity auction products. AEP believes that the use of average market prices could result in an estimate of an APGC's total market-based revenues that differs substantially from the revenues the APGC would actually earn in the marketplace.

Similarly, TIEC stated that the capacity auction true-up mechanism in the proposed rule should be modified to properly compare those prices with the ECOM market prices. TIEC opined that capacity auction prices are wholesale prices and ECOM prices are retail prices so the proper mix of capacity auction products that matches the respective load shape of each customer class must be selected.

Reliant stated that there are four products in the capacity auction: one is a baseload product consisting of nuclear, coal and lignite units, and the other three all represent gas units. The capacity auction will therefore provide one power price for nuclear, coal and lignite generation, and another price for gas generation from the other three products.

TXU disagreed with TIEC's recommendation that the capacity auction prices be modified because capacity auction prices are wholesale prices and the market prices in the ECOM model reflect retail prices. TXU expressed its view that TIEC's recommendation may result from confusion about the terminology associated with the ECOM model. While the ECOM model results represent retail stranded costs, that distinction does not imply that the market prices used in the model are retail but rather reflects the fact that the ECOM model predicts stranded costs associated with generation for retail customers.

AEP replied that TIEC's proposal that the capacity auction price should be "load- shaped" is off base because its intent is not to determine the price ultimately to be paid by a particular customer.

Reliant responded to TIEC's comment regarding Preamble Question #1 that "since the capacity auction prices are wholesale prices and the market prices in the ECOM model reflect retail prices, the proper mix of capacity auction products that matches the respective load shape of each of the three customer classes represented in the ECOM model market prices--residential, commercial and industrial--must be selected." In response to similar comments from OPC in the public hearing on July 25, 2001, Reliant stated that the ECOM model is a wholesale model, not a retail model. Reliant argued that if the model were a retail model, it would also include costs necessary to provide retail service (e.g., marketing costs), but it does not.

The commission finds that the alternative method it has adopted--using aggregated data to calculate the capacity auction true-up without the use of the ECOM model-- obviates concerns about "load-shaping." By using total, aggregated capacity auction revenues and actual sales amounts and fuel costs, a simple comparison can be made to the total contribution to fixed costs as estimated in the ECOM model. Therefore, other than changes already discussed with regard to Preamble Question #1, no further modification to the rule is required.

Timing issues related to the capacity auction true-up

TXU commented that although subsection (i)(1) of the rule states that one of the purposes of the proposed rule is to make a final reconciliation of the monthly capacity auction true-up adjustment amounts, neither the proposed rule nor §25.381 of this title, relating to Capacity Auctions, addresses how the monthly amounts are calculated.

TXU noted that the time period provided in §25.381(h)(1), which states that the calculation is performed monthly through the month following the issuance of a final appealable order in the true-up proceeding, does not match the time period proposed in subsection (i)(2), which states that the calculation is performed "for 2002 and 2003." TXU also requested that the rule clarify the time period for calculating the capacity auction total price of power, which the APGC is required to substitute for the projected ECOM market prices. TXU suggested that the capacity auction prices for the one-year strips would be appropriate. TXU also claimed that substituting actual 2002 and 2003 fuel expenses into the ECOM model may be cumbersome, as figures for 2003 will not be available until late January 2004. TXU pointed out that this timing could make it impossible to prepare a true-up application for filing before March or April of 2004. TXU stated that if actual 2003 data were required, depending upon how the requirements of §25.381(h)(1) are reconciled, the utility could supplement its filing as data become available.

Reliant agreed with TXU's observation regarding the mismatch that exists between the time period associated with the true-up of capacity auction proceeds as proposed in subsection (i)(2) and as exists in §25.381(h)(1). Proposed subsection (i)(2) states that the calculation should be performed "for 2002 and 2003" whereas the capacity auction rule requires a monthly calculation beginning February 1, 2002 through the month following the date a final order is issued in the true-up proceeding. Reliant proposed that §25.381(h)(1) be amended to conform to the true-up rule, which defines the true-up period as 2002-2003.

However, Reliant disagreed with TXU's comments that the timing of 2003 fuel expenses may make it impossible to file a true-up application until March or April 2004. Reliant disagrees that the delay contemplated by TXU will be necessary. Reliant stated it would make a special effort to make its fuel cost information available by January 12, 2004. As Reliant explained in its initial comments, it is very important to Reliant that it files its true-up application on January 12, 2004 because of commitments memorialized in its business separation plan.

With regard to the issue of monthly reconciliations, the commission will amend, as proposed by Reliant, §25.381(h)(1) to comply with this section. With regard to the availability of 2003 information in early 2004, the commission believes that the staggered schedule by which companies will file their true-up applications will allow adequate time for the collection of 2003 data. To the extent that precise data is unavailable by the time a company files its true-up application, the company can re-file the updated information as it becomes available and an adjustment to the company's rates can be made.

Applicability of the capacity auction true-up provision

TIEC stated that the difference between two negative ECOM numbers may result in an inequitable positive true-up adjustment, and that such positive adjustment would be collected from customers. TIEC further stated that because customers will not refund any amount prior to 2004, any collection of a positive capacity-auction true-up adjustment during the 2002-2003 time frame is inequitable. To rectify this, the word "any" should be removed from paragraph (1) and clarification should be made that the capacity auction true-up should apply only if the revised ECOM model produces a positive result *and* the commission-approved ECOM is no less than zero.

AEP replied that TIEC's argument that there should be no calculation of the capacity auction/ECOM price true-up unless the utility's ECOM estimate and final stranded cost balance are negative is not supported by PURA §39.262. PURA does not contemplate a refund of negative stranded costs so the results of the true-up process cannot lawfully be a stranded cost balance below zero. In any event, the capacity auction/ECOM price true-up is a stranded cost recovery tool and TIEC's concerns that a utility may realize a windfall are unfounded.

Reliant also disagreed with TIEC's comments on subsection (i) regarding the proposed rule's authorization of the true-up of "any difference between the capacity auction total price of power and the power cost projections for the same time period as used in the determination of ECOM for each utility in the proceeding under PURA §39.201." In response to TIEC claims that the word "any" should be stricken from the proposed rule because it purportedly would create an inequitable result in the true-up, Reliant replied that PURA §39.262(d)(2) expressly refers to "any difference" between the price of power obtained through the capacity auctions and the power cost projections that were employed for

the same time period in the ECOM model. Reliant replied that the commission should not reject statutory language.

Reliant also disagreed with TIEC's proposed remedy involving "clarifying that the capacity auction true-up should apply only if the revised ECOM model produces a positive result *and* the commission-approved ECOM is no less than zero." Reliant stated that if by "commission approved ECOM" TIEC means the ECOM result approved by the commission in the UCOS cases, the result of this proposed revision would be to ensure that neither Reliant, TXU, or Central Power and Light Company (CPL) could recover any amounts in the capacity auction true-up, because all of those utilities' approved ECOM amounts were negative. It would also ensure that those utilities owed no money in the capacity auction true-up, even if the capacity auction prices exceed the ECOM market prices. Reliant stated that, in fact, the statute does not contain the limitation proposed by TIEC; it requires a true-up regardless of the results of the UCOS ECOM model run. Reliant stated that TIEC's proposal is contrary to the statute and should be rejected.

TXU objected to TIEC's recommendation that this subsection should be clarified to reflect that the capacity auction true-up would only apply if the revised ECOM model produces a positive result and the commission-approved ECOM is no less than zero. TIEC's concern was that if the commission-approved ECOM was negative and the revised ECOM was also negative, then the difference between these two figures could be a positive number that ratepayers would have to return to the utilities. TXU argued that TIEC's recommendation was unfair because (1) its ECOM was initially under-valued by the commission, and (2) using the artificially low estimate of ECOM would deny TXU the possibility of receiving all that it may be owed under the wholesale claw-back if TIEC's recommendation were adopted.

Reliant also disagreed with TIEC's claim that "ratepayers will not receive any refund prior to 2004." In the UCOS cases the commission ruled that utilities must credit nonbypassable charges to reflect an "excess mitigation credit." Even though the credits are paid to REPs rather than being paid directly to ratepayers, the utilities nevertheless are refunding amounts, and those amounts are available to be paid to ratepayers if the REPs choose to do so. Reliant replied that it is therefore inappropriate for TIEC to suggest that utilities will be refunding no amounts before 2004.

TIEC's argument concerning the potential complications of computing the difference between two ECOM numbers pursuant to the capacity auction true-up adjustment is rendered moot by the commission's changes to subsection (i) of the rule, as indicated previously in the discussion regarding Preamble Question #1. Notwithstanding this fact, however, the commission disagrees with TIEC's assertion that no calculation of the capacity auction/ECOM price true-up is necessary unless the utility's ECOM estimate and final stranded cost balance are positive. As subsection (l) of the rule prescribes, the final true-up balance will reflect the netting of several items, including the capacity auction true-up. Even if the capacity auction true-up is positive, it will ultimately be collected from customers only if the netting results in a positive amount. Additionally, the commission agrees that certain utilities are refunding a portion of the negative ECOM amounts determined in the UCOS cases in the form of excess mitigation credits. In any event, the changes to subsection (i) of the rule eliminate the monthly crediting or billing by the APGC to the TDU during the years 2002 and 2003. Therefore, no change to the rule has been made with regard to this issue.

"Firmness" issue

Reliant and AEP stated that the rule should account for additional costs made necessary by capacity auction firmness obligations. In §25.381 of this title, the commission required that capacity auction products be sold as firm products. Reliant and AEP averred that even though the slices of system underlying the capacity auction entitlements are not actually firm, the entitlements themselves must be. Reliant opined that this firmness obligation imparts to the capacity auction products greater value than the underlying units actually possess, and the unit-contingent power that Reliant sells outside the capacity auction will reflect the reduced value. Reliant and AEP argued that because the capacity auction products are firm, the uncertainty associated with outages during periods of capacity shortages has been shifted from the entitlement holder to the APGC. An APGC would therefore find it necessary to purchase insurance or additional power to satisfy its capacity auction obligations. Thus, Reliant and AEP suggested that if abnormal capacity shortages occur, an APGC should have the opportunity to apply to the commission for relief and to obtain an adjustment upon a showing that the capacity auction revenues do not reflect the true value of the assets. Reliant proposed language reflecting these suggestions.

Cities replied that the claims of Reliant and AEP are disingenuous because it is not apparent how a product intended to represent a slice of the system that provides firm service can be more firm than the system itself. Cities claimed that the capacity calls of the auction were actually inferior to the entire system.

OPC argued that stranded costs will be overestimated if the auctioned entitlements have less value than the power historically sold by the utilities. OPC suggested that this will occur because the power cost projections that were employed for the same time period in the ECOM model are based on historical operation, not on the estimated cost of delivering power to holders of capacity auction entitlements. OPC noted that, if anything, comparing the value of the call options on wholesale power sold in the capacity auctions will overestimate ECOM, and therefore no adjustments should be made to the value of the capacity auction entitlements that would act to further overestimate ECOM.

In response to AEP, OPC claimed that the need for firmness issues in the capacity entitlements was fully discussed during the capacity auction rulemaking and should not be revisited.

In reply to OPC's comments that the capacity auction true-up should contain no adjustment for firmness, Reliant argued that the true-up of the capacity auction products is not to a full-requirements product; rather, the true-up is to the APGC's generation assets. Reliant claimed that OPC's argument is therefore wrong, and the APGC should have the opportunity during the true-up to establish the need for a firmness adjustment.

The commission finds that the issue of firmness was sufficiently debated in the capacity auction rule. In that rule, the commission determined the capacity auction products to be reasonable and reflective of wholesale market products. Reliant's proposed language could conceivably create incentives for affiliated REPs to incur additional costs that may not be necessary given the surplus of capacity in Texas. Accordingly, no provision has been included in the rule to allow for an adjustment related to the firmness of the capacity auction products.

Alternatives to the ECOM model

Reliant proposed two solutions for calculating the capacity auction true-up with the use of the ECOM model. For the first alternative, Reliant proposed that actual values be used for gas-

fired generation revenues and gas-fired generation sales. Reliant stated, however, that even if the inputs to the ECOM model are so revised, a concern remains that the "Plant Economics" sheet of the model will make an inappropriate economic adjustment. In order to avoid an economic adjustment in the model, the price of power must exceed not only the fuel variable costs, but also other variable additional costs (such as plant operators, maintenance personnel, property taxes, and depreciation expenses associated with incremental capital costs) that are not variable in the short run. However, because retirements are largely irreversible (i.e., it is impractical and very costly to retire a plant in one year and bring it back the next), in reality the decision is not based upon costs and revenues in a single year. If an owner does not expect to cover costs in a given year, but expects to make a profit in subsequent years, then it would not make sense to retire the plant. In a competitive market with fluctuating prices, it is unlikely that a plant owner will cover all costs of all plants in each and every year. Furthermore, the 15% capacity auction entitlements for 2002 and part of 2003 have been established based on APGCs' existing plant fleets. If the APGC is forced to shut down a plant to avoid an ECOM economic adjustment, the APGC will effectively be required to auction in excess of the 15%. Reliant commented that it is unfair to punish the APGC after the fact. Consequently, Reliant stated that the economic adjustment in the ECOM model would effectively disallow non-fuel operations and maintenance expenses under certain circumstances. Reliant therefore recommended that the APGC be provided an opportunity to challenge an economic adjustment it believes is inappropriate, and included suggested language to allow for that opportunity, assuming the capacity auction true-up remained within the context of the ECOM model.

The other method that Reliant proposed would freeze the economic adjustment amount at the level that appeared in the PURA §39.201 proceeding. Although this methodology modifies the ECOM model to some extent, Reliant believes it is entirely consistent with the purpose of the economic adjustment in the model. An entitlement owner will not exercise its option to purchase gas-based generation unless the entitlement can provide power cheaper than the alternative, which is the market price of power. If the market price is cheaper, the entitlement owner will instead go to the market to purchase the power. Thus, by definition, any time an APGC sells a gas-based generation product in the capacity auction, the cost of that product is lower than the market price and the economic adjustment should not disallow costs. Reliant offered revised language reflecting these suggestions.

The commission finds that the alternative method it has adopted--using aggregated data to calculate the capacity auction true-up without the use of the ECOM model--avoids concerns regarding the "Plant economics" adjustment in the model. Therefore, other than changes already discussed, no further modification to the rule is required.

Use of company-specific results from capacity auction

TIEC commented that the capacity auction prices used in each utility's reconciliation should be based on its specific capacity auction. TXU supported TIEC's recommendation that the rule specify that capacity auction prices used in each utility's price reconciliation should be based on results of that utility's capacity auction. TXU requested that the rule incorporate TIEC's recommendation.

AEP stated that §25.381(d) of the commission's capacity auction rule contemplated that divestiture of generating capacity would satisfy the capacity auction obligation under specified circumstances. Because CPL was subject to the requirement that it divest three of its generation facilities under the commission's order approving the merger between AEP and Central & South West Corporation, this provision was applicable to CPL. Once accomplished, the divestiture required by the merger approval order that will exceed 15% of CPL's generating capacity will fulfill CPL's capacity auction requirement. As a result of the divestiture, CPL would no longer have actual capacity auction prices that could be used in determining its ECOM/capacity auction true-up. By the time of the 2004 true-up, however, there will be ample information from numerous sources on prevailing capacity auction prices that would enable CPL to determine reasonable capacity auction prices for purposes of its own true-up calculation. Hence, CPL requested that it be allowed to propose in its true-up filing a methodology for arriving at an ECOM/capacity auction true-up that reflects it unique circumstances.

The commission agrees that, where possible, company-specific capacity auction prices should be used in companies' true-up applications. If a company has unique circumstances that result in its having no company-specific capacity auction data, the company may request in its true-up application a method using data from prevailing capacity auction prices to determine an appropriate surrogate to be used in its own capacity auction true-up. The rule has been changed to accommodate these situations.

§25.263(j)-True-up of price to beat revenues

§25.263(j)(2)

TXU and TNMP expressed concerns related to the timing of the determination of market price for the purposes of the retail clawback. These concerns and the commission responses are addressed under Preamble Question #3 and subsection (c), relating to Definitions.

§25.263(j)(5)(A)

ARM recommended adding language to subsection (j)(5)(A) to provide that residential and small commercial customers being served by the AREP as a POLR outside its affiliated TDU area not be counted in this calculation. ARM explained that customers served by the AREP as a competitor outside of its affiliated TDU area are subtracted from the customers it serves under the PTB in its affiliated TDU area in order to calculate the retail clawback. ARM emphasized that POLR service is not--and is not intended to be--a competitive service. ARM said that if customers served by the AREP as a POLR are included, it would contravene the intent of the Legislature to encourage AREPs to compete in other areas. ARM suggested that it would also encourage AREPs to game the POLR RFP, by under-bidding other non-affiliated REPs to reduce their exposure to the retail clawback. ARM claimed that the commission decided a similar issue in the PTB rulemaking, and excluded customers dropped to the POLR for the calculation of the 40% threshold for customer switches for §25.41(i).

The commission agrees that customers served by the POLR should not be counted in determining the number of customers served by an AREP outside the region of its affiliated TDU because POLR service is not considered to be a competitive retail option. The rule has been changed in accordance with the recommendation of ARM.

§25.263(k)-Regulatory assets

According to AEP, situations may arise in which regulatory assets are included in a financing order, but are ultimately not subject to securitization. These regulatory assets should be included in

the true-up balance to avoid understatement of that balance. In its Order Number 14 in Docket Number 22344, the commission anticipated that such an adjustment could be required as part of the true-up proceeding.

Reliant commented that subsection (k) of the proposed rule reflects only the provisions of PURA §39.262(f). AEP recommended that additional language be added to this subsection to recognize that regulatory assets included in a financing order but ultimately not subject to securitization should be included in the TDU/APGC true-up balance under subsection (l). Reliant agreed with AEP's proposed additional language. Reliant also believes that the language can be added either to subsection (k) or included elsewhere in the true-up rule.

The commission agrees with AEP and Reliant, and incorporates AEP's suggested language in the rule.

§25.263(l)-TDU/APGC true-up balance

§25.263(l)(1)

TIEC, ARM, OPC, and Cities commented that the netting of the final fuel reconciliation balance with other items of the stranded cost true-up is the correct interpretation of PURA §39.262, is not prohibited by PURA, and is consistent with the commission's explicit intent as evidenced by the deferral of the disposition of fuel under- recoveries to the true-up. TXU, Reliant, and AEP argued that PURA §39.201(l) and §39.262(g) are two separate but parallel true-up proceedings. These parties generally commented that it is inappropriate and contrary to PURA to net the final fuel reconciliation balance and capacity auction/ECOM reconciliation against other elements of the stranded cost determination and that §39.262(c) and (d) provide for different dispositions of these elements of the true-up.

The commission believes that the overriding factor in implementing PURA §39.262 is the requirement that a utility not be permitted to over-recover its stranded costs. PURA §39.262 establishes the process for conducting the final true-up. As part of the true-up, stranded costs are finalized, the wholesale and retail clawbacks are calculated, fuel costs are reconciled for a final time, and regulatory asset amounts are adjusted. At the conclusion of this process, nonbypassable charges are adjusted. PURA §39.201(g)-(h) sets out the process for calculating stranded costs and mechanisms for adjusting an excessive CTC. These include reducing the CTC, reversing redirected depreciation, reducing TDU rates, or a combination of any of these mechanisms. PURA §39.262 provides for further adjustments to one or more of these items. Thus, §39.262 calls for similar adjustments to nonbypassable charges to reflect the difference in projected and actual stranded costs, the retail and wholesale clawbacks, final fuel balance, and regulatory assets.

All the true-up items result in adjustments to the nonbypassable charges. It is therefore reasonable to assume that these adjustment items should be netted against one another prior to making adjustments to the nonbypassable charges. The statute does not require the commission to make successive adjustments to the nonbypassable charges for each of these items. The commission concludes that it is appropriate to net each of the true-up components because stranded costs may be over-recovered in violation of PURA if these items are not netted.

For example, consider a utility whose final determination of stranded costs under PURA §39.262(h) and (i) is negative $2 billion, but whose capacity auction true-up adjustment is a positive $100 million. If the capacity auction adjustment is not netted against stranded costs, the TDU will owe its APGC $100 million, because the negative $2 billion is considered to be $0 and the capacity auction adjustment of $100 million is then added to the $0 amount of stranded costs. On the other hand, if the capacity auction adjustment is netted against stranded costs, the amount owed to the APGC by the TDU, and vice versa, is $0. In the first example, over-recovery of stranded costs would occur because the utility would recover $100 million, even though its net stranded costs were negative $1.9 billion. Moreover, with regard to PURA §39.262(f), netting of regulatory asset amounts against stranded costs is the only reasonable approach to handling credits. If a utility has negative $500 million in stranded costs as determined under PURA §39.262(h) or (i), but the commission has denied regulatory asset treatment for $100 million of the utility's regulatory assets, it would not be appropriate to zero out the negative $500 million stranded cost amount and then credit ratepayers $100 million dollars. The $100 million should simply be netted against the negative $500 million amount, resulting in a negative $400 million amount, none of which would be returned to customers.

§25.263(l)(2)(A)

TNMP commented that the phrase "and greater than projected stranded costs" is not clear as to whether it means a projection of stranded costs as determined by the commission in various dockets resolved in 2001 or to stranded costs estimated in the 1998 report to the legislature. TNMP suggested that the commission clarify this point.

The term "projected stranded costs" is clearly defined in proposed §25.263(c)(5) of this section to mean the projected stranded costs as determined by the commission in the 2001 dockets and does not require further clarification.

§25.263(l)(2)(B)

TIEC commented that because stranded costs originally projected were uniformly negative, it appears that a positive true-up balance could never be less than a utility's projected stranded cost amount from the UCOS case so that this section would not be applicable to any Texas utility.

Because of the possibility that the final orders in the UCOS cases will not be issued prior to adoption of this rule, and consequently appeals to the courts will remain unresolved prior to adoption, this section should remain in the rule as proposed.

§25.263(l)(2)(C)(ii)

AEP noted that the commission had previously recognized the option of applying excess earnings to capital expenditures to improve or expand transmission and distribution (T&D) facilities or to improve air quality, and believes that these options should be available to utilities in the true-up. In response to AEP's proposal, TIEC argued that none of the methods listed in PURA §39.262 contemplates the use of excess mitigation funds for infrastructure or air quality projects and maintains that the statute envisions that any such balances owed to customers would be returned to them through mechanisms such as rate reductions. ARM and OPC voiced similar objections to this proposal.

Additionally, Reliant commented that the reference to the APGC in the sentence reading "mitigation reversed shall be returned to ratepayers by the APGC through an excess mitigation credit" (emphasis added) should be changed to the TDU because it is the TDU that will return amounts to ratepayers through changes to its nonbypassable charges.

The commission does not believe that the statute contemplates the option of using stranded costs as determined under PURA §39.262 for infrastructure improvements or air quality projects. This option was only available to non-stranded cost utilities with respect to excess earnings during the transition period ending December 31, 2001. The change from APGC to TDU proposed by Reliant is not necessary. It is understood that any reversal of excess mitigation by the APGC will be flowed through the TDU to ratepayers.

§25.263(l)(2)(C)(iii)

TIEC and ARM commented that the imposition of a negative CTC to return negative true-up balances to customers is appropriate because customers have borne all the costs associated with a utility's generation assets. They generally argued that if no negative CTC is allowed, the commission would be imposing asymmetric risks and rewards on the utility's shareholders and customers. Additionally, ARM stated that it is "right and just" that a negative CTC be implemented and believes that the commission is fully empowered by PURA to do so. Cities also argued that it is equitable to impose a negative CTC.

TIEC did not support the proposal to cap the negative CTC at the amount of securitized assets included in a utility's transition charges. According to TIEC's comments, such a cap would have the unjustifiable result of limiting negative CTC exposure to some utilities and not others because, under the proposed rule, a utility that has not securitized any stranded costs would be required to return the full amount of any negative true-up balance to customers while utilities with TCs may not be required to return all such negative balances.

Reliant and AEP commented that, while the legislature has expressly provided for the recovery of stranded costs (*see* PURA §39.001(b)(2) and §39.252(a)), it has clearly rejected the concept of "negative stranded costs" in each of the last two legislative sessions. Additionally, TXU and TNMP argued that the commission has no authority to establish a negative CTC and recommended deleting this section. Reliant also stated that TIEC is confused in its arguments against the "cap" in proposed Subsection (l)(2)(C)(iii). According to Reliant, contrary to what TIEC argued, the proposed cap would eliminate the possibility of a negative CTC for a utility that has not securitized regulatory assets or stranded costs because the cap would be based on "the lesser of the absolute value of the remaining negative true-up balance or the securitization amount on which any TCs are based."

The commission does not agree that a negative CTC is prohibited if a utility having negative stranded costs has securitized regulatory assets that are being recovered from ratepayers through a TC. This is consistent with the previously stated position that the overriding factor in implementing PURA §39.262 is the requirement that a utility not be permitted to over-recover its stranded costs. With respect to subsection (l)(2)(C)(iii), the commission intended that a negative CTC be imposed to the extent that negative stranded costs were available to offset a positive TC. Though the commission does not agree with TIEC that the proposed rule limits negative CTC exposure for some utilities and not others, it has nonetheless revised subsection (l)(2)(C)(iii) to clarify that no negative CTC will be imposed if the utility has not securitized regulatory assets.

§25.263(l)(2)(D)

TXU commented that it is not clear that §25.263(l)(2)(D), which provides for a CTC to collect any positive fuel balance, differs from §25.263(l)(2)(A) and (B), both of which allow securitization of positive balances. TXU stated that PURA Chapter 39, Subchapter G, is only for regulatory assets and stranded costs and does not apply to anything else. AEP commented that this section establishes a separate mechanism to ensure that a utility returns any over-recovered fuel balance to customers, even in the event of an overall negative true-up balance. AEP argued that if the final fuel balance is included as a component of one overall true-up balance, then the rule should include a parallel provision requiring that a fuel surcharge shall be implemented to recover the under-recovered fuel balance from ratepayers, without regard to whether the APGC has an overall negative stranded cost balance. AEP believes that fuel cost reconciliation and recovery should be a two-way street in the true-up process, and should result in making both customers and utilities whole.

Pursuant to the instructions in §25.263(l)(2) and §25.263(d)(3), §25.263(l)(2)(D) applies to utilities that were not reported to have stranded costs in the April 1998 Report to the Texas Legislature. Accordingly, the option to securitize a positive balance is not available to these utilities. Additionally, because it does apply only to the non-stranded costs companies, this provision is necessary to ensure that fuel over-recoveries are properly returned to ratepayers.

§25.263(l)(3)

Reliant noted that proposed subsection (l)(3) provides for carrying costs on both positive and negative true-up balances, but only from the date of the final true-up order forward. Proposed subsection (d)(1) states that the commission will establish a schedule to set forth when each utility will file its true-up application. Reliant commented that, presumably, the commission will use a staggered filing schedule. Therefore the final orders for each TDU will be issued on different dates, perhaps months apart. Reliant believes that it is unfair to have interest accrue to the ratepayers or TDUs at different dates depending on the filing schedule, and that all elements of the true-up should therefore provide that the TDU be allowed to recover, or be liable for, carrying costs from the date that is 150 days after January 12, 2004 until fully recovered by the TDU or by the TDU's customers. Reliant further commented that this change also would necessitate a similar change to proposed subsection (h)(4) to ensure that the carrying charges on fuel change from the rate approved in Substantive Rule §25.236, relating to Recovery of Fuel Costs, to the utility's cost of capital on the 150th day after January 12, 2004.

In response to Reliant's argument, TIEC replied that the published rule requires each TDU to file an application for a rate adjustment to reflect the results of its true-up proceeding within 60 days of the issuance of a final order in that individual utility's true- up case; therefore, there should be no difference in the carrying charges that will accrue for some utilities versus others simply by operation of a staggered filing schedule for the true-up cases. Moreover, TIEC argued that a utility's true-up balance appropriately becomes due upon the issuance of a final order in that utility's true-up case.

TXU disagreed with the concept of requiring the payment of carrying costs in connection with §25.263(l)(3).

The commission concurs with TIEC that a utility's true-up balance becomes due upon the issuance of a final order in that utility's true-up proceeding and that carrying charges should only accrue from that date forward. The additional change to §25.263(h) proposed by Reliant is therefore not necessary.

§25.263(m)-TDU/AREP true-up balance

§25.263(m)

TXU and Reliant proposed that the liability for any carrying costs associated with the PTB clawback should transfer from the AREP to the TDU once the AREP has paid any balance owed to the TDU for the retail clawback. TIEC did not object to this proposal; however, TIEC argued that the final rule should make it clear that *either* the AREP or the TDU will remain responsible for the payment of carrying charges on the true-up balance from the time of the final order in the true-up proceeding until any such balance is fully paid.

TXU argued that the references to carrying costs in the proposed rule should be omitted because they are inappropriate in this instance. TXU claimed that there will be no meaningful lag time between the time of the final order and full recovery of the clawback amount and, therefore, the affiliated REP should not be liable for any subsequent carrying costs.

The commission disagrees. The retail clawback is a one-way transfer of funds from the AREP to the TDU. It is appropriate for the TDU to recover carrying charges for any period of delayed payment from the AREP. Accordingly, no change to the rule has been made.

§25.263(n)-Rate case subsequent to the true-up proceeding

§25.263(n)

Subsection (n) mandates that a TDU "shall file an application to adjust its rates within 60 days following the issuance of a final, appealable order on its true-up proceeding." Reliant, TXU and AEP believe that it is unnecessary to require a full cost-of-service rate case following the true-up. Reliant commented that the legislature has provided the commission with the authority (PURA §39.262(g)) to adjust nonbypassable charges to reflect the results of the true-up, so a rate case is unnecessary. AEP agreed that PURA provides both the utility and other parties adequate recourse to request a full rate case should one become necessary. AEP also supported limiting the post-true-up rate adjustments to those arising from the proceeding.

The commission agrees that a full cost-of-service rate case, per PURA Chapter 36, is not necessary. PURA provides the commission the authority to adjust the TDU's rates without a PURA Chapter 36 proceeding. The commission will determine the details and nature of subsection (n) proceedings at the time of review. The "rate case" language has been removed.

Both TXU and Reliant believe that a separate proceeding to address any rate changes resulting from the true-up proceeding is not contemplated by PURA. TXU and Reliant agreed that the commission should adjust the TDU's rates in the PURA §39.262 true- up proceedings. Reliant also suggested that the TDU be required to file a compliance tariff within 30 days after the final order is issued in the true-up proceeding. For these reasons, TXU and Reliant proposed that subsection (n) be deleted.

TIEC disagreed with the above proposal and stated that injecting potentially controversial cost allocation and rate design issues into the true-up proceedings would unreasonably burden the resources of the commission and intervenors, and hinder the efficient processing of the true-up cases. ARM echoed TIEC's concerns and stated that a true-up case with a statutory time limit of only 150 days is not the appropriate vehicle to consider contested issues of cost allocation and rate design.

The commission disagrees with TXU and Reliant. A separate proceeding will enable the commission to properly address CTC related issues, allocation issues, etc.

Reliant suggested that subsection (n) should state that the TDU can apply for securitization of the amounts due to it at any time after the final order is issued in the true-up proceeding.

PURA Chapter 39 provides for such securitization. Therefore, it is not necessary to include Reliant's suggested language in this rule.

If the commission retains the requirements of subsection (n), TXU requested that all references to the calculation of carrying costs be modified "from the date of a true-up final order" to "from the date of an order implementing the true-up proceeding results in rates."

As discussed above, the commission has removed from subsection (n) the references to changes in rates and, accordingly, has not changed the language in the rule regarding the time period over which carrying costs are calculated.

Other Comments

TXU commented that the sole provision in PURA for adjusting the PTB is found in PURA §39.202(k). TXU argued that the true-up rule should confirm that if adjustments are made to the TDU's nonbypassable charges during the true-up proceeding that reduce headroom, the PTB should be adjusted to restore headroom to the levels set based on the headroom filing required by the PTB rule. TXU further argued that no adjustments to the PTB should be mandated if headroom increases as a result of the true- up because the competitive market will address such a situation.

In adjusting the PTB, the commission will take into account not only the results of the true-up proceeding, but also other factors that increase or decrease the PTB. Consequently, to maintain maximum flexibility in setting the PTB in 2004, the commission declines to include in the true-up rule specific criteria for adjustments to the PTB.

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, 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; and specifically, PURA §39.252 which addresses a utility's right to recover stranded costs and PURA §39.262 which requires the commission to conduct a true-up proceeding for each investor-owned electric utility after the introduction of customer choice.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.252 and 39.262

§25.263. True-up Proceeding.

(a) Purpose.

(1) The purpose of the true-up proceeding is to quantify and reconcile the amount of stranded costs, the differences in the price of power obtained through the capacity auctions and the power costs used in the excess costs over market (ECOM) model; the results of the annual reports; the level of excess revenues, net of nonbypassable delivery charges, from customers who continue to pay the price to beat (PTB);

the reasonable regulatory assets not previously approved in a rate order that are being recovered through competition transition charges (CTCs) or transition charges (TCs); and the final fuel balances. The purpose of the true-up proceeding is also to provide for the recovery of regulatory assets not already approved for securitization that were to be considered in future proceedings pursuant to a commission financing order in a securitization case.

(2) An electric utility, together with its affiliated retail electric provider (AREP), its affiliated power generation company (APGC), and its affiliated transmission and distribution utility (TDU), shall not be permitted to over- recover stranded costs through the application of the measures provided in the Public Utility Regulatory Act (PURA), Chapter 39, or under the procedures established in PURA §39.262 and this section.

(b) Application. This section applies to all investor-owned transmission and distribution utilities established pursuant to PURA §39.051, their APGCs, and their AREPs. In addition, the reporting requirements of subsection (j)(6) of this section apply to all retail electric providers (REPs) serving residential and small commercial customers.

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

(1) Capacity auction total price of power ($/MWh) - The total (fuel plus non- fuel) capacity auction revenues for entitlements to capacity for the years 2002 and 2003 divided by the total capacity auction energy (expressed in MWh) scheduled to be delivered for those entitlements over the same time period.

(2) Independent third party - The party designated by the commission to perform the duties described in subsection (j) of this section.

(3) Mitigation - The total excess earnings and redirected depreciation applied to generation assets pursuant to PURA §39.254 and §39.256 or a commission order issued after 1996 that approved a utility's transition case.

(4) Net mitigation - Any mitigation that has not been reversed or refunded as of the date of the final order in the true-up proceeding.

(5) Net value realized - All compensation paid by a buyer for generation assets, including the buyer's assumption of debt, less any costs of sale such as legal fees, broker fees, and other reasonable transaction costs.

(6) Projected stranded costs - The value produced by the ECOM model and approved by the commission in the proceeding conducted pursuant to PURA §39.201.

(7) Regulatory assets - The generation-related portion of the Texas jurisdictional portion of the amount reported by the electric utility in its 1998 annual report on Securities and Exchange Commission Form 10-K as regulatory assets and liabilities, offset by the applicable portion of generation-related investment tax credits permitted under the Internal Revenue Code of 1986.

(8) Residential market price of electricity - The volume-weighted average price, less average nonbypassable charges (each expressed in cents per kilowatt-hour (kWh)), calculated by the independent third party for residential electric service provided by non-affiliated retail electric providers and non-provider of last resort (POLR) service providers competing in the TDU region. The price determined by the independent third party shall be based upon pricing disclosures pursuant to §25.475(e) of this title (relating to Information Disclosures to Residential and Small Commercial Customers) and other information provided to the independent third party.

(9) Residential net price to beat - The average residential PTB rate (expressed in cents per kWh) less the average nonbypassable charges (expressed in cents per kWh) applicable to residential customers.

(10) Small commercial market price of electricity - The volume-weighted average price, less average nonbypassable charges (each expressed in cents per kWh), calculated by the independent third party for small commercial electric service provided by non-AREPs and non-POLR service providers competing in the TDU region. The price determined by the independent third party shall be based upon pricing disclosures pursuant to §25.475(e) of this title and other information provided to the independent third party.

(11) Small commercial net price to beat - The average small commercial PTB rate (expressed in cents per kWh) less the average nonbypassable charges (expressed in cents per kWh) applicable to small commercial customers.

(12) Transferee corporation - A separate affiliated or non-affiliated company to whom an electric utility or its APGC transfers generation assets.

(13) Transmission and distribution utility (TDU) - A transmission and distribution utility that, pursuant to PURA §39.051, is the successor in interest of an electric utility certificated to serve an area.

(14) Transmission and distribution utility region (TDU region) - The affiliated transmission and distribution utility's service territory.

(d) Obligation to file a true-up proceeding.

(1) Each TDU, its APGC, and its AREP shall jointly file after January 12, 2004, on a schedule to be determined by the commission, a true-up application pursuant to subsection (e) of this section.

(2) Each TDU that is a successor in interest of any utility that was reported by the commission to have positive ECOM, denoted as the "base case" for the amount of stranded costs before full retail competition in 2002 with respect to its Texas jurisdiction in the April 1998 Report to the Texas Senate Interim Committee on Electric Utility Restructuring entitled "Potentially Strandable Investment (ECOM) Report: 1998 Update," and such TDU's, APGC's, and AREP's, shall file the true-up application as required by subsections (f) - (k) of this section.

(3) All TDUs not described in paragraph (2) of this subsection, their APGCs, and their AREPs shall file the applications required by subsections (h) and (j) of this section.

(e) True-up filing procedures.

(1) Each TDU, APGC, and AREP shall file all testimony and schedules on which they intend to rely for their direct case in accordance with the true-up filing package prescribed by the commission.

(A) Within 20 calendar days of the filing of a true-up application, commission staff or any intervenor may file a motion stating that the filing is materially deficient. Any such motion shall include a detailed explanation of the claimed material deficiencies.

(B) If the presiding officer determines that an application is materially deficient, the TDU, APGC, and AREP shall correct the deficiencies within 30 calendar days. The deadline for final commission order shall be extended day for day from the date of initial filing until the corrections are filed with the commission.

(2) At least 90 days prior to the filing of the first true-up application scheduled by the commission, a utility's APGC shall file a notification of intent with the commission if it intends to utilize PURA §39.262(i) to determine the amount of its stranded costs for nuclear assets.

(3) The commission may initiate a generic proceeding to determine true-up issues that are common to multiple TDUs, APGCs, and AREPs. This proceeding may include updates to the ECOM model required by subsection (f)(2)(B) of this section, in the event a notification of intent is filed pursuant to paragraph (2) of this subsection. The commission may order further updates to any order approved in a generic proceeding pursuant to this section for any utility whose customers are not offered competition on January 1, 2002.

(4) As part of the true-up proceeding, the commission shall make a determination with respect to whether the TDU, the APGC, and the AREP have complied with PURA §39.252(d). If the commission finds that the TDU, the APGC, or the AREP have failed, individually or in combination, to fully comply with their obligations under PURA §39.252(d), the commission may reduce the net book value of the APGC's generation assets or take other measures it deems appropriate in the true-up proceeding filed under this section. In making a determination as to compliance with PURA §39.252(d), the commission shall not substitute its judgment for a market valuation of generation assets determined under PURA §39.262(h) or (i).

(5) The State Office of Administrative Hearings shall employ expedited procedures during discovery in the true-up proceedings.

(6) The commission shall issue the final order for each proceeding filed under this section not later than the 150th day after the filing of a complete, non- deficient application. Notwithstanding the foregoing, however, the 150- day deadline may be extended by the commission for good cause.

(f) Quantification of market value of generation assets.

(1) Market value of generation assets shall be quantified using one or more of the following methods:

(A) Sale of assets method. If an electric utility or its APGC sells some or all of its generation assets after December 31, 1999, in a bona fide third-party transaction under a competitive offering, the total net value realized from the sale shall establish the market value of the generation assets sold. Within 30 days of closing, the utility or its APGC shall provide to the commission a detailed explanation, which may be filed confidentially, of the transaction and a description of the generating unit, property boundaries, fuel and parts, emission allowances, and other general categories of items associated with the sale, including any ancillary items related to the assets.

(B) Stock valuation method. The following method of market valuation without using a control premium may be used to value generation assets.

(i) If, at any time after December 31, 1999, an electric utility or its APGC has transferred some or all of its generation assets, including, at the election of the electric utility or the APGC, any fuel and fuel transportation contracts related to those assets, to one or more separate affiliated or nonaffiliated corporations, not less than 51% of the common stock of each corporation is spun off and sold to public investors through a national stock exchange, and the common stock has been traded for not less than one year, the resulting average daily closing price of the common stock over 30 consecutive trading days chosen by the commission out of the last 120 consecutive trading days before the true-up filing required by this section establishes the market value of the common stock equity in each transferee corporation.

(ii) The average book value of each transferee corporation's debt and preferred stock securities during the 30-day period chosen by the commission to determine the market value of common stock shall be added to the market value of its stock.

(iii) The market value of each transferee corporation's assets that is determined as the sum of clauses (i) and (ii) of this subparagraph shall be reduced by the corresponding net book value of the assets acquired by the transferee corporation from any entity other than the affiliated electric utility or APGC.

(iv) The market value of the assets determined from the procedures required by clauses (i), (ii), and (iii) of this subparagraph establishes the market value of the generation assets transferred by the affiliated electric utility or APGC to each separate corporation.

(C) Partial stock valuation method. The following method of market valuation using a control premium may be used to value generation assets.

(i) If, at any time after December 31, 1999, an electric utility or its APGC has transferred some or all of its generation assets, including, at the election of the electric utility or the APGC, any fuel and fuel transportation contracts related to those assets, to one or more separate affiliated or nonaffiliated corporations, at least 19%, but less than 51%, of the common stock of each corporation is spun off and sold to public investors through a national stock exchange, and the common stock has been traded for not less than one year, the resulting average daily closing price of the common stock over 30 consecutive trading days chosen by the commission out of the last 120 consecutive trading days before the filing establishes the market value of the common stock equity in each transferee corporation.

(ii) The commission may accept the market valuation to conclusively establish the value of the common stock equity in each transferee corporation or convene a valuation panel of three independent financial experts to determine whether the per-share value of the common stock sold is fairly representative of the per-share value of the total common stock equity or whether a control premium exists for the retained interest.

(iii) Should the commission elect to convene a valuation panel, the panel must consist of financial experts chosen from proposals submitted in response to commission requests from the top ten nationally recognized investment banks with demonstrated experience in the United States electric industry, as indicated by the dollar amount of public offerings of long-term debt and equity of United States investor-owned electric companies over the immediately preceding three years as ranked by the publication "Securities Data" or "Institutional Investor."

(iv) None of the financial experts chosen for the panel shall have participated, or be employed by an investment house or brokerage house which has participated, in the business separation, securitization, or other activities related to the implementation of PURA Chapter 39 on behalf of the utility for which the market valuation is being determined.

(v) If the panel determines that a control premium exists for the retained interest, the panel shall determine the amount of the control premium, and the commission shall adopt the determination, but may not use the control premium to increase the value of the assets by more than 10%.

(vi) The costs and expenses of the panel, as approved by the commission, shall be paid by each transferee corporation.

(vii) The determination of the commission, based on the finding of the panel and other admitted evidence, conclusively establishes the value of the common stock of each transferee corporation.

(viii) The average book value of each transferee corporation's debt and preferred stock securities during the 30-day period chosen by the commission to determine the market value of common stock shall be added to the market value of its stock.

(ix) The market value of each transferee corporation's assets shall be reduced by the corresponding net book value of the assets acquired by the transferee corporation from any entity other than the electric utility or its APGC.

(x) The market value of the assets resulting from the procedures required by clauses (i) - (ix) of this subparagraph establishes the market value of the generation assets transferred by the electric utility or APGC to each transferee corporation.

(D) Exchange of assets method. If, at any time after December 31, 1999, an electric utility or its APGC transfers some or all of its generation assets, including any fuel and fuel transportation contracts related to those assets, in a bona fide third-party exchange transaction, the stranded costs related to the transferred assets shall be the difference between the net book value and the market value of the transferred assets at the time of the exchange, taking into account any other consideration received or given.

(i) The market value of the transferred assets may be determined through an appraisal by a nationally recognized independent appraisal firm, if the market value is subject to a market valuation by means of an offer of sale in accordance with this subparagraph.

(ii) To obtain a market valuation by means of an offer of sale, the owner of the asset shall offer it for sale to other parties under procedures that provide broad public notice of the offer and a reasonable opportunity for other parties to bid on the asset. The owner of the asset shall provide to the commission copies of all documentation explaining and attesting to the utility's sale proposal.

(iii) The owner of the asset may establish a reserve price for any offer based on the sum of the appraised value of the asset and the tax impact of selling the asset, as determined by the commission.

(iv) Within 30 days of closing, the utility or its APGC shall provide to the commission a detailed explanation, which may be filed confidentially, of the transaction and a description of the generating unit, property boundaries, fuel and parts, emission allowances, and other general categories of items associated with the transfer, including any ancillary items related to the assets.

(2) ECOM Method. Unless an electric utility or its APGC combines all its remaining generation assets into one or more transferee corporations pursuant to paragraph (1)(B) or (C) of this subsection, the electric utility shall quantify its stranded costs for nuclear assets using the ECOM method.

(A) The ECOM method is the estimation model prepared for and described by the commission's April 1998 Report to the Texas Senate Interim Committee on Electric Restructuring entitled "Potentially Strandable Investment (ECOM) Report: 1998 Update." The methodology used in the model must be the same as that used in the 1998 report to determine the "base case."

(B) As part of the filing specified in subsection (d) of this section, the electric utility shall rerun the ECOM model using updated company specific inputs required by the model, updating the market price of electricity, and using updated natural gas price forecasts and the capacity cost based on the long-run marginal cost of the most economic new generation technology then available, as approved by the commission pursuant to subsection (e)(3) of this section. Natural gas price projections used in the model shall be forward prices of Houston Ship Channel natural gas.

(C) Growth rates in generating plant operations and maintenance costs and allocated administrative and general costs shall be benchmarked by comparing those costs to the best available information on cost trends for comparable generating plants.

(D) Capital additions shall be benchmarked using the 1.5% limitation set forth in PURA §39.259(b).

(g) Quantification of net book value of generation assets.

(1) For purposes of this section, the net book value of generation assets shall be established as of December 31, 2001, or the date a market value is established through a market valuation method under subsection (f) of this section, whichever is earlier.

(2) Net book value of generation assets consists of:

(A) The generation-related electric plant in service, less accumulated depreciation (exclusive of depreciation related to mitigation), plus generation-related construction work in progress, plant held for future use, and nuclear, coal, and lignite fuel inventories, reduced by:

(i) net mitigation;

(ii) the net book value of nuclear generation assets if quantification of ECOM related to those nuclear generation assets is determined pursuant to PURA §39.262(i); and

(iii) any generation-related invested capital recoverable through a CTC, exclusive of related carrying costs, projected to be collected through the date of the final order in the true-up proceeding.

(B) Above-market purchased power costs arising from contracts in effect before January 1, 1999, including any amendments and revisions to such contracts resulting from litigation initiated before January 1, 1999.

(i) The purchased power market value of the demand and energy included in the purchased power contracts shall be determined by using the weighted average costs of the highest three offers from a bona fide third-party transaction or transactions on the open market.

(ii) The bona fide third-party transaction or transactions on the open market shall be structured so that the above-market purchased power costs are determined pursuant to subclause (I) or (II) of this clause.

(I) A transaction may be structured so the electric utility pays a third party to assume the utility's obligations under the purchased power contract. The weighted average of the three highest offers received in the transaction establishes the above-market purchased power costs.

(II) A transaction may be structured so a third party pays the utility to take power under the purchased power contract. The difference between the net present value of obligations under the existing contracts at the utility's cost of capital and the weighted average of the three highest offers received in the transaction establishes the above-market purchased power costs.

(C) Deferred debits, to the extent they have not been securitized, related to a utility's discontinuance of the application of SFAS No. 71 ("Accounting for the Effects of Certain Types of Regulation") for generation-related assets if required by PURA Chapter 39.

(D) Capital costs incurred before May 1, 2003 to improve air quality to the extent they have been approved by the commission pursuant to §25.261 of this title (relating to Stranded Cost Recovery of Environmental Cleanup Costs).

(E) Any adjustments resulting from the commission's review of the TDU's, APGC's, and AREP's efforts pursuant to subsection (e)(4) of this section.

(h) True-up of final fuel balance.

(1) An APGC shall reconcile the former electric utility's final fuel balance determined under PURA §39.202(c).

(2) The final fuel balance shall be reduced by any revenues collected by the AREP under any commission-approved fuel surcharge, from the date of introduction of competition to the utility's customers through the date of the true-up filing under this section, so long as the fuel surcharge is associated with fuel costs incurred during the time period covered by the final reconcilable fuel balance.

(3) If an electric utility or its TDU or APGC is assessed by another utility in Texas a fuel surcharge after 2001 for under-recoveries occurring through the end of 2001, the surcharged utility shall add the amount of surcharges and any associated carrying costs paid after 2001 to its final fuel balance.

(4) The final fuel balance, as adjusted by paragraphs (2) and (3) of this subsection, shall include carrying costs on the positive or negative fuel balance equal to:

(A) the weighted-average cost of capital approved in the company's unbundled cost of service (UCOS) proceeding, if the period until the date of the final true-up order is greater than one year; or

(B) the rate approved in §25.236 of this title (relating to Recovery of Fuel Costs) if the period until the date of the final true-up order is one year or less.

(i) True-up of capacity auction proceeds.

(1) For purposes of the true-up required by PURA §39.262(d)(2), and as provided for under §25.381(h)(1) of this title (relating to Capacity Auctions), the APGC shall compute the difference between the price of power obtained through the capacity auctions conducted for the years 2002 and 2003 and the power cost projections for the same time period as used in the determination of ECOM for that utility in the proceeding under PURA §39.201. The difference shall be calculated according to the following formula: (ECOM market revenues - ECOM fuel costs) - ((capacity auction price x total 2002 and 2003 busbar sales) - actual 2002 and 2003 fuel costs). For purposes of this paragraph:

(A) "ECOM market revenues" shall be the sum of rows 12 through 14 for the years 2002 and 2003 in the "Plant Economics" worksheet of the ECOM model underlying the commission-approved ECOM estimate in the company's UCOS proceeding;

(B) "ECOM fuel costs" shall be the sum of rows 33 through 35 for the years 2002 and 2003 in the "Cost Partition" worksheet of the ECOM model underlying the commission-approved ECOM estimate in the company's UCOS proceeding;

(C) The "capacity auction price" shall be the APGC's total capacity auction revenues derived from the capacity auctions conducted for the years 2002 and 2003 divided by that APGC's total MWh sales of capacity auction products for the years 2002 and 2003.

(2) If, as a result of not having participated in capacity auctions pursuant to §25.381(h)(1) of this title, an APGC is unable to determine a company- specific capacity auction price, the APGC may request in its true-up application a method using prevailing capacity auction prices from other APGCs for the calculation in paragraph (1) of this subsection.

(j) True-up of PTB revenues. This subsection specifies how the PTB will be compared to prevailing market prices pursuant to PURA §39.262(e). For purposes of this subsection, the term "small commercial customer" does not include unmetered lighting accounts unless such an account has historically been treated as a separate customer for billing purposes.

(1) An AREP is not required to perform the reconciliation described in PURA §39.262(e) for the residential or small commercial customer class if the commission has determined that the AREP has reached the applicable 40% threshold requirements prior to January 1, 2004, pursuant to filing requirements listed in §25.41(l) of this title (relating to Price to Beat) applicable to that class.

(2) If an AREP has not reached the applicable 40% threshold requirements prior to January 1, 2004, for either the residential or the small commercial class, or both, the net PTB for each such class must be compared to the market price of electricity for that class in the TDU region for the period January 1, 2002 through January 1, 2004 as provided in paragraphs (3) and (4) of this subsection.

(3) The independent third party shall compute the difference between the residential net PTB and the residential market price of electricity on the last day of each calendar-year quarter for the years 2002 and 2003. The price differential for each quarter shall be multiplied by the total kWh consumed by residential PTB customers of the AREP for that quarter. The results shall be summed over the eight quarters within the period from January 1, 2002 through January 1, 2004.

(4) The independent third party shall compute the difference between the small commercial net PTB and the small commercial market price of electricity on the last day of each calendar-year quarter for the years 2002 and 2003. The price differential for each quarter shall be multiplied by the total kWh consumed by small commercial PTB customers of the AREP for that quarter. The results shall be summed over the eight quarters within the period from January 1, 2002 through January 1, 2004.

(5) For each of the residential and small commercial classes, the AREP shall credit the TDU the lesser of the amounts calculated in subparagraphs (A) and (B) of this paragraph:

(A) $150 multiplied by (the difference between the number of residential or small commercial customers, as applicable, in the TDU Region taking PTB service from the AREP on January 1, 2004 and the number of residential or small commercial customers, as applicable, outside the TDU region being served by the AREP on January 1, 2004, provided that such customers are not receiving POLR service from the AREP); or

(B) the total differential between the net PTB and the market price of electricity calculated for the applicable class under paragraph (3) or (4)of this subsection.

(6) All REPs shall provide information to the independent third party as needed for the performance of calculations set forth in paragraphs (3) and (4) of this subsection. All data used in the calculations performed by the independent third party will remain confidential but shall be subject to audit by the commission.

(7) The functions of the independent third party shall be funded by the AREPs through one or more assessments made by the commission.

(k) Regulatory assets. To the extent that any amount of regulatory assets included in a TC or CTC exceeds the amount of regulatory

assets approved in a rate order which became effective on or before September 1, 1999, the commission shall conduct a review during the true-up proceeding to determine any such amounts that were not appropriately calculated or that did not constitute reasonable and necessary costs. In addition, to the extent that any amount of regulatory assets approved for securitization in a commission financing order was not subsequently included in an issuance of transition bonds, that amount of regulatory assets shall be included in the TDU/APGC true-up balance under subsection (l) of this section.

(l) TDU/APGC True-up balance.

(1) The formula to establish the true-up balance between the TDU and APGC is shown in the following table. TDUs described in subsection (d)(3) of this section and their APGCs shall insert zero for all inputs in this equation except the input entitled "Final fuel balance calculated pursuant to subsection (h)."
Figure: 16 TAC §25.263(l)(1)

(2) For TDUs described in subsection (d)(2) of this section, the TDU/APGC true- up balance shall be compared to projected stranded costs as provided in subparagraphs (A) - (C) of this paragraph. For TDUs described in subsection (d)(3) of this section, the TDU/APGC true-up balance shall be treated as provided in subparagraph (D) of this paragraph.

(A) If the TDU/APGC true-up balance is positive, and greater than projected stranded costs, then the commission shall increase the CTC (or establish a CTC, if no CTC has previously been approved for the utility), extend the time for the collection of the CTC, or both, to enable the TDU to collect the TDU/APGC true-up balance. The utility may seek to securitize any or all of the amounts determined under this subparagraph under PURA Chapter 39, Subchapter G.

(B) If the TDU/APGC true-up balance is positive, but less than projected stranded costs, then the commission shall reduce nonbypassable delivery rates in the amount of the difference by:

(i) reducing any CTC established under PURA §39.201;

(ii) reversing, in whole or in part, the depreciation expense that has been redirected under PURA §39.256;

(iii) reducing the TDU's rates; or

(iv) any combination of clauses (i), (ii), and (iii) of this subparagraph.

(C) If the TDU/APGC true-up balance is negative, then

(i) any CTC established under PURA §39.201 shall be eliminated;

(ii) net mitigation shall be reversed until exhausted or until a zero true-up balance is achieved, and the amount of net mitigation reversed shall be returned to ratepayers by the APGC through an excess mitigation credit; and

(iii) if net mitigation is exhausted and some amount of the negative true-up balance remains, then for companies that have securitized regulatory assets, a negative CTC shall be established based upon the lesser of the absolute value of the remaining negative true-up balance or the securitization amount on which any TCs are based. If the company has been issued a financing order by the commission authorizing the securitization of regulatory assets but securitization has not yet occurred, then the negative CTC will be implemented at the time the securitization bonds are issued. If the company has not received a financing order from the commission authorizing securitization of regulatory assets, then no negative CTC shall be established for purposes of this subsection.

(D) If the TDU/APGC true-up balance is positive, then a CTC shall be imposed to enable the APGC to recover any positive fuel balance. If the TDU/APGC true-up balance is negative, then a fuel credit shall be implemented to return the over-recovered fuel balance to ratepayers.

(3) The TDU shall be allowed to recover, or shall be liable for, carrying costs on the true-up balance. Carrying costs shall be calculated using the utility's cost of capital established in the utility's UCOS proceeding, and shall be calculated for the period of time from the date of the true-up final order until fully recovered.

(m) TDU/AREP true-up balance. The TDU shall bill the AREP for, and the AREP shall remit to the TDU, the amount calculated pursuant to subsection (j) of this section, plus carrying costs. Carrying costs shall be calculated using the utility's cost of capital established in the utility's UCOS proceeding, and shall be calculated for the period of time from the date of the true-up final order until fully recovered. The commission may reduce the TDU's rates to reflect the amounts due from the AREP.

(n) Proceeding subsequent to the true-up.

(1) The TDU shall file an application to adjust its rates within 60 days following the issuance of a final, appealable order on its true-up proceeding. In the proceeding, the commission may adjust the TDU's rates and any CTC, in accordance with PURA §39.262(g), and any excess mitigation credit. The commission may also allocate the recovery responsibility for such rates and any CTC to the TDU's customer classes.

(2) In the proceeding, the commission shall also consider adopting remittance standards, if necessary, with respect to the credits or bills as among the TDU, the APGC, and the AREP.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 4, 2001.

TRD-200107566
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: December 24, 2001
Proposal publication date: June 15, 2001
For further information, please call: (512) 936-7308

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 79. WEATHER MODIFICATION

16 TAC §§79.1, 79.10 - 79.13, 79.15, 79.17, 79.18, 79.20 - 79.22, 79.31 - 79.33, 79.41 - 79.44, 79.51 - 79.55, 79.61, 79.62

The Texas Department of Licensing and Regulation (Department) adopts new rules §§79.1, 79.10-79.13, 79.15, 79.17, 79.18, 79.20-79.22, 79.31-79.33, 79.41-79.44, 79.51-79.55, 79.61 and 79.62 regarding the licensing and permitting of the weather modification program. Sections 79.1, 79.10-79.13, 79.15, 79.17, 79.20, 79.21, 79.31-79.33, 79.41-79.44, 79.51-79.55, 79.61 and 79.62 are adopted without changes to

the proposed text as published in the November 9, 2001, issue of the *Texas Register* (26 TexReg 8963) and will not be republished. Sections 79.18 and 79.22 are adopted with changes to the proposed text as published in the November 9, 2001 issue of the *Texas Register* (26 TexReg 8963). The changes to §§79.18 and 79.22 are for clarification and are summarized below under "Summary of Comments Received on the Proposed Rules and the Department's Responses to Comments".

Purpose of Adoption

These rules are necessary to implement Senate Bill 1175, Acts of the 77th Legislature and to establish procedures and requirements necessary for the licensing and permitting of weather modification programs in Texas.

Rulemaking Process

The Department drafted and distributed the proposed new rules to persons internal and external to the agency and has received written comments regarding the proposed new rules. The Department received written comments from North Plains Groundwater Conservation District and the Oklahoma Water Resources Board, who are in favor of adoption of the rules. The Department wishes to thank these persons and organizations who participated in its rulemaking process and submitted comments. Below is a summary of comments received and the Department's response.

Summary of Comments Received on the Proposed Rules and the Department's Responses to Comments

Comments on proposed rule §79.12 *License and Permit Exemptions*: The Oklahoma Water Resources Board commented that a provision is needed that would allow the Department to enter into cooperative agreements with another state agency in an adjoining state, whereby weather-modification operations within that state requiring access to adjoining airspace in Texas would be deemed permissible, without that agency having to obtain a permit from the Department. A provision is also needed to facilitate cooperative agreements between the Department and government agencies in adjoining states that provide for joint weather-modification research endeavors.

Agency Response: Disagree.

Subsection (a)(3) provides for the exemption of weather-modification operations sponsored by governmental agencies in other states. Thus, no changes are warranted.

Comments on proposed rule §79.18 *Permit Application*: The North Plains Groundwater Conservation District commented that subsection (4) is redundant and repetitive of subsection (3).

Agency Response: Agree.

The rule has been changed by deleting subsection (4).

Comment on proposed rule §79.22 *Description of Permit*: The North Plains Groundwater Conservation District commented that there is a need for rewording of subsection (1)(C) for the sake of clarification.

Agency Response: Agree.

The rule has been rewritten to clarify its meaning.

Comment on proposed rule §79.22 *Description of Permit*: The North Plains Groundwater Conservation District commented that an additional provision is needed in subsection (5) to more accurately reflect the requirements of the law.

Agency Response: Agree.

Subsection (5) has been rewritten to accomplish this.

The new rules are adopted under Senate Bill 1175, 1st Called Session, 77th Texas Legislature, and the code sections in which it may be codified, that authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of this legislation.

The statute affected by the adoption is Senate Bill 1175, 1st Called Session, 77th Texas Legislature, and the code sections in which it may be codified, and Texas Occupations Code, Chapter 51.

§79.18. Permit Application.
An application for a Texas weather modification permit must be filed with the Department and must include the following.

(1) A permit fee of $75.00.

(2) Proof that the applicant holds a valid weather modification license or has a pending application for one.

(3) Supporting data for the application in a form prescribed by the Department, including:

(A) a plan of operation that details the type of weather modification activity proposed,

(B) equipment and personnel involved in the operation,

(C) a description of climate and hazardous weather in the operational area,

(D) the weather modification methodology that will be used, and

(E) a description of the technique that will be used to evaluate the overall effect of the proposed operation.

(4) All contracts, letters of intent, or proposals that pertain to conducting the proposed operation for a client;

(5) An illustration of the operational and target areas that is plotted on a map;

(6) Sufficient information to satisfy the Department that the applicant is able to pay damages for liability which might reasonably arise as a result of the proposed operation, such as a copy of a comprehensive liability insurance policy or a certificate from an insurer guaranteeing coverage for the proposed operation during the proposed term.

(7) A notice of intention.

§79.22. Description of Permit.
A Texas weather modification permit shall include the following:

(1) the effective period of the permit, which shall not exceed four years, and

(A) if the permit is for more than one year, the permit shall contain a statement that it shall remain valid for so long as the permittee continues to operate in successive years during all or part of the months authorized;

(B) if a weather modifier is authorized to conduct an operation on behalf of a sponsoring entity, the term of the permit shall be limited to the duration of the contract in effect between the weather modifier and the sponsor at the date that the Department issues the permit; and

(C) if a weather modifier and client include in their initial contract that their agreement should be renegotiated during the term

of a multi-year permit, the permit shall contain a statement that the weather modifier must submit a copy of any modified contract to the Department for review and approval before the start of operations under that modified contract;

(2) a description of the boundaries of the operational and target areas and a map that depicts those areas;

(3) the weather modification method(s) that may be employed;

(4) a requirement that the permittee maintain insurance coverage or other financial assurance of the types and amounts satisfactory to the Department for the term of the permit;

(5) a requirement that the permittee maintain a valid license and that the operation be directed only by those individuals named on the license or as amended under §79.51 of this title (relating to Application for License Amendment) and §79.52 of this title (relating to Issuance of License Amendment);

(6) a statement that the operation must be conducted during each year of a multi-year permit, as set forth in the plan of operations, and that the plan is incorporated in the permit;

(7) a requirement that the permittee notify the Department of any changes to the list required by §79.18 (8) of this title (relating to Permit Application);

(8) a statement that the Department shall have immediate access to any information the permittee maintains that is pertinent to day-to-day weather modification operations; and

(9) other terms, requirements, and conditions that the Department deems advisable.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107636
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: December 30, 2001
Proposal publication date: November 9, 2001
For further information, please call: (512) 463-7348

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PART 8. TEXAS RACING COMMISSION

CHAPTER 303. GENERAL PROVISIONS
SUBCHAPTER D. TEXAS BRED INCENTIVE PROGRAMS
DIVISION 3. PROGRAMS FOR GREYHOUNDS

16 TAC §303.102

The Texas Racing Commission adopts an amendment to §303.102, relating to greyhound rules, without changes to the proposed text as published in the October 26, 2001, issue of the *Texas Register* (26 TexReg 8452) and will not be republished.

The amendment serves multiple purposes. First, the amendment states the eligibility and filing requirements for registering a greyhound as accredited Texas-bred. Next, the amendment states the procedures for calculating and distributing owners' awards for accredited Texas-bred greyhounds. Next, the amendment sets forth how the Commission and the Attorney General's office interpret the section in the Texas Racing Act regarding how much of the breakage must be allocated to Texas-bred stakes races. In addition, the amendment clarifies the Texas Greyhound Association's (TGA) responsibilities to develop conditions for the stakes races and pay the purse money for the stakes races. The amendment also requires TGA to prepare a proposed allocation, considering certain factors, and present the allocation to the Commission for approval. Finally, the amendment requires the executive secretary to ensure the greyhound tracks have adequate notice to participate in the meeting at which the proposed allocation will be considered. This amendment was necessary to clarify eligibility and ensure a fair allocation of purse money.

No comments have been received regarding adoption of this amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to regulate every race meeting in this state involving wagering on the result of greyhound or horse racing; §3.021 which authorizes the Commission to regulate all aspects of greyhound and horse racing in the State; §6.09 which authorizes the disposition of pari-mutuel pools at greyhound races; §6.091 which authorizes the Commission to adopt rules relating to deductions from simulcast pari-mutuel pools; §10.04 which authorizes the Commission to adopt rules related to the establishment of qualifications for Texas-bred greyhounds; and §10.05 which authorizes the Texas Greyhound Association to adopt rules related to the use of breakage received under §6.09(d) of the Racing Act.

The amendment implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 4, 2001.

TRD-200107531
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: January 1, 2002
Proposal publication date: October 26, 2001
For further information, please call: (512) 833-6699

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CHAPTER 307. PRACTICE AND PROCEDURES

The Texas Racing Commission adopts the repeal of Chapter 307, §§307.1-307.8, 307.51-307.56, 307.71-307.74, 307.76-307.82, 307.101-307.105, 307.121-307.135, 307.151-307.162, 307.182-307.187, 307.201, 307.202, 307.205-307.208, 307.221-307.222, 307.241-307.247, 307.261-307.263, 307.271-307.272, 307.301 -307.310, relating to practice and procedure in accordance with the requirements of Chapter 1275, Acts of the 75th Legislature, 1997, Section 55

and Government Code § 2001.039 as published in the October 26, 2001 issue of the *Texas Register* (26 TexReg 8464). The Commission's review included an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist.

As a result of the Commission's review, it was determined that a complete replacement was necessary to delete duplicative language and reflect the role of the State Office of Administrative Hearings role in contested cases. Consequently, the Commission adopts the repeal of Chapter 307 and new Chapter 307. Further details of the new Chapter 307 can also be found in the "Adoptions" section of this issue.

As part of the replacement of the Commission rules, the agency is complying with the Government Code § 2001.039 requirements, repealing rules that are redundant with other statutes or rules, and updating existing rules to ensure that they are consistent with current agency application and interpretation.

No comments have been received regarding adoption of this repeal.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §§307.1 - 307.8

The repeal of these sections is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act.

The adoption implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2001.

TRD-200107506
Judith L. Kennison
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Proposal publication date: October 26, 2001
For further information, please call: (512) 833-6699

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SUBCHAPTER B. ADJUDICATIVE PROCEDURES

DIVISION 1. GENERAL PROVISIONS

16 TAC 307.51 - 307.56

The repeal of these sections is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act.

The proposal implements Texas Civil Statutes, Article 179e.

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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Judith L. Kennison
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Texas Racing Commission
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For further information, please call: (512) 833-6699

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DIVISION 2. PLEADINGS

16 TAC §§307.71 - 307.74, 307.76 - 307.82

The repeal of these sections is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act.

The proposal implements Texas Civil Statutes, Article 179e.

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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Judith L. Kennison
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Texas Racing Commission
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For further information, please call: (512) 833-6699

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DIVISION 3. PREHEARING PROCEDURES

16 TAC §§307.101 - 307.105

The repeal of these sections is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act.

The repeal implements Texas Civil Statutes, Article 179e.

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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Judith L. Kennison
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For further information, please call: (512) 833-6699

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DIVISION 4. HEARINGS

16 TAC §§307.121 - 307.135

The repeal of these sections is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act.

The repeal implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200107510
Judith L. Kennison
General Counsel
Texas Racing Commission
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For further information, please call: (512) 833-6699

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DIVISION 5. EVIDENCE

16 TAC §§307.151 - 307.162

The repeal of these sections is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act.

The repeal implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2001.

TRD-200107511
Judith L. Kennison
General Counsel
Texas Racing Commission
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For further information, please call: (512) 833-6699

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DIVISION 6. ORDERS

16 TAC §§307.182 - 307.187

The repeal of these sections is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act.

The repeal implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200107512
Judith L. Kennison
General Counsel
Texas Racing Commission
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For further information, please call: (512) 833-6699

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SUBCHAPTER C. PROCEEDINGS BY STEWARDS AND RACING JUDGES

DIVISION 1. GENERAL PROVISIONS

16 TAC §§307.201, 307.202, 307.205 - 307.208

The repeal of these sections is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act.

The repeal implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2001.

TRD-200107513
Judith L. Kennison
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For further information, please call: (512) 833-6699

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DIVISION 2. OBJECTIONS AND PROTESTS

16 TAC §307.221, §307.222

The repeal of these sections is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act.

The repeal implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200107514

Judith L. Kennison
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For further information, please call: (512) 833-6699

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DIVISION 3. DISCIPLINARY HEARINGS

16 TAC §§307.241 - 307.247

The repeal of these sections is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act.

The repeal implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2001.

TRD-200107515
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: January 1, 2002
Proposal publication date: October 26, 2001
For further information, please call: (512) 833-6699

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DIVISION 4. APPEALS TO COMMISSION

16 TAC §§307.261 - 307.263

The repeal of these sections is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act.

The repeal implements Texas Civil Statutes, Article 179e.

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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DIVISION 5. EXCLUSION AND EJECTION

16 TAC §307.271, §307.272

The repeal of these sections is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act.

The repeal implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. RULEMAKING

16 TAC §§307.301 - 307.310

The repeal of these sections is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act.

The repeal implements Texas Civil Statutes, Article 179e.

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 307. PROCEEDINGS BEFORE THE COMMISSION

The Texas Racing Commission adopts new Chapter 307, §§307.1-307.7, 307.31-307.39, 307.61-307.69, 307.101-307.105, Proceedings before the Commission. The new chapter is adopted as part of a rule review conducted pursuant to Chapter 1275, Acts of the 75th Legislature, 1997, §55 and Government Code, §2001.039, as added by Chapter 1499, Acts of the 76th Legislature, 1999, §1.11(a) as published in the October 26, 2001, issue of the *Texas Register* (26 TexReg 8458). The chapter outlines the Commission's adjudicatory, rulemaking, and other decision-making administrative procedures. The chapter also contains the administrative procedures

for proceedings conducted by the stewards and racing judges at pari-mutuel horse and greyhound racetracks.

No comments have been received regarding adoption of this chapter.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §§307.1 - 307.7

The new sections are adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of the stewards and racing judges; and Government Code, §2001.004, which requires the Commission to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

The sections implement Texas Civil Statutes, Article 179e and Government Code, Chapter 2001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-200107598
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Effective date: January 1, 2002
Proposal publication date: October 26, 2001
For further information, please call: (512) 833-6699

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SUBCHAPTER B. CONTESTED CASES

16 TAC §§307.31 - 307.39

The new sections are adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of the stewards and racing judges; and Government Code, §2001.004, which requires the Commission to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

The sections implement Texas Civil Statutes, Article 179e and Government Code, Chapter 2001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. PROCEEDINGS BY STEWARDS AND RACING JUDGES

16 TAC §§307.61 - 307.69

The new sections adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of the stewards and racing judges; and Government Code, §2001.004, which requires the Commission to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

The sections implement Texas Civil Statutes, Article 179e and Government Code, Chapter 2001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-200107600
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Texas Racing Commission
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For further information, please call: (512) 833-6699

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SUBCHAPTER D. RULEMAKING

16 TAC §§307-101 - 307.105

The new sections are adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of the stewards and racing judges; and Government Code, §2001.004, which requires the Commission to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

The sections implement Texas Civil Statutes, Article 179e and Government Code, Chapter 2001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200107601

Judith L. Kennison
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Texas Racing Commission
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For further information, please call: (512) 833-6699

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CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER A. RACETRACK LICENSES

16 TAC §309.10

The Texas Racing Commission adopts new §309.10, relating to notice and curative rights of debt holders, without changes to the proposed text as published in the October 26, 2001, issue of the *Texas Register* (26 TexReg 8463) and will not be republished.

The new section was previously found in Chapter 307. Its more appropriate placement is in Chapter 309, which relates to racetrack matters. The rule requires notice to persons who hold debt on a racetrack facility if the Commission institutes disciplinary action against the racetrack. This new section will ensure that all interested parties are aware of proceedings which may impact on the debt holder.

No comments have been received regarding adoption of the new section.

The new section is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §6.06, which authorizes the Commission to adopt rules relating to all aspects of pari-mutuel tracks.

The new section implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 4, 2001.

TRD-200107532
Judith L. Kennison
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Texas Racing Commission
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Proposal publication date: October 26, 2001
For further information, please call: (512) 833-6699

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CHAPTER 311. OTHER LICENSES

SUBCHAPTER A. LICENSING PROVISIONS

DIVISION 1. OCCUPATIONAL LICENSES

16 TAC §311.8

The Texas Racing Commission adopts new §311.8, relating to correction of incorrect information, without changes to the proposed text as published in the October 26, 2001, issue of the *Texas Register* (26 TexReg 8464) and will not be republished.

The new rule requires the agency to inform persons that have provided information to the Commission that they have the right to have access to that information and to have incorrect information held by an agency corrected. This rule was created to comply with agency requirements as set forth in new legislation under the Texas Government Code.

No comments have been received regarding adoption of the new section.

The new rule is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §6.06, which authorizes the Commission to adopt rules relating to all aspects of pari-mutuel tracks.

The adopted rule implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200107533
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General Counsel
Texas Racing Commission
Effective date: January 1, 2002
Proposal publication date: October 26, 2001
For further information, please call: (512) 833-6699

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SUBCHAPTER B. SPECIFIC LICENSES

16 TAC §311.103

The Texas Racing Commission adopts an amendment to §311.103, relating to kennel owners, without changes to the proposed text as published in the October 26, 2001, issue of the *Texas Register* (26 TexReg 8464) and will not be republished.

Currently, there is a prohibition against "dual ownership" in kennels--that is, a person cannot own more than one kennel under contract at a particular greyhound racetrack. This amendment clarifies the intent of the rule by prohibiting ownership of multiple kennels by persons who are residentially domiciled together.

No comments have been received regarding adoption of this amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §6.06, which authorizes the Commission to adopt rules relating to all aspects of pari-mutuel tracks.

The amendment implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200107534

Judith L. Kennison
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Texas Racing Commission
Effective date: January 1, 2002
Proposal publication date: October 26, 2001
For further information, please call: (512) 833-6699

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CHAPTER 313. OFFICIALS AND RULES FOR HORSE RACING

SUBCHAPTER B. ENTRIES, SCRATCHES, AND ALLOWANCES

DIVISION 1. ENTRIES

16 TAC §313.112

The Texas Racing Commission adopts new §313.112, relating to objections to entries of horses, without changes to the proposed text as published in the October 26, 2001, issue of the *Texas Register* (26 TexReg 8465) and will not be republished.

The procedure to object to an entry was previously found in Chapter 307. The appropriate placement for the procedure is with entry procedures for horses. By moving this section, the new rule will more accessible to trainers and those that refer to these rules most often.

No comments have been received regarding adoption of this new rule.

The new section is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §6.06, which authorizes the Commission to adopt rules relating to all aspects of pari-mutuel tracks.

The new section implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 4, 2001.

TRD-200107535
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Effective date: January 1, 2002
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For further information, please call: (512) 833-6699

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CHAPTER 315. OFFICIALS AND RULES FOR GREYHOUND RACING

SUBCHAPTER B. ENTRIES AND PRE-RACE PROCEDURES

16 TAC §315.109

The Texas Racing Commission adopts new §315.109, relating to objection to entries of greyhounds, without changes to the proposed text as published in the October 26, 2001, issue of the *Texas Register* (26 TexReg 8466) and will not be republished.

The procedure to object to an entry was previously found in Chapter 307. The appropriate placement for the procedure is with entry procedures for greyhounds. By moving this section, this rule will be more accessible to kennel owners, trainers and others who refer to these rules most often.

No comments have been received regarding adoption of the new section.

The new section is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §6.06, which authorizes the Commission to adopt rules relating to all aspects of pari-mutuel tracks.

The new section implements Texas Civil Statutes, Article 179e.

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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Judith L. Kennison
General Counsel
Texas Racing Commission
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CHAPTER 321. PARI-MUTUEL WAGERING

SUBCHAPTER C. REGULATION OF LIVE WAGERING

DIVISION 2. DISTRIBUTION OF PARI-MUTUEL POOLS

16 TAC §321.311

The Texas Racing Commission adopts an amendment to §321.311, relating to twin trifecta wagers, without changes to the proposed text as published in the October 26, 2001, issue of the *Texas Register* (26 TexReg 8466) and will not be republished.

The amendment clarifies how exchange tickets are to be used when there are no tickets selecting the correct three finishers in the first leg of either pool, and define the situations when exchange tickets were issued from the first half which select the correct three finishers in exact order, is eligible for the capped carryover pool in the second half.

No comments have been received regarding adoption of this amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering

the Texas Racing Act; and §6.06, which authorizes the Commission to adopt rules relating to all aspects of pari-mutuel tracks; §11.01, which authorizes the Commission to adopt rules to regulate pari-mutuel wagering; and §11.011, which authorizes the Commission to adopt rules to regulate pari-mutuel wagering on simulcast races.

The amendment implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 4, 2001.

TRD-200107537
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: January 1, 2002
Proposal publication date: October 26, 2001
For further information, please call: (512) 833-6699

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16 TAC §321.315

The Texas Racing Commission adopts an amendment to §321.315, relating to tri-superfecta wagers, without changes to the proposed text as published in the October 26, 2001, issue of the *Texas Register* (26 TexReg 8467) and will not be republished.

The amendment clarifies how exchange tickets are to be used when there are no tickets selecting the correct three finishers in the first leg of either pool, and define the situations when exchange tickets were issued from the first half that select the correct three finishers in exact order, is eligible for the capped carryover pool in the second half.

No comments have been received regarding adoption of this amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §6.06, which authorizes the Commission to adopt rules relating to all aspects of pari-mutuel tracks; §11.01, which authorizes the Commission to adopt rules to regulate pari-mutuel wagering; and §11.011, which authorizes the Commission to adopt rules to regulate pari-mutuel wagering on simulcast races.

The amendment implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200107538
Judith L. Kennison
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For further information, please call: (512) 833-6699

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CHAPTER 323. DISCIPLINARY ACTION AND ENFORCEMENT

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §§323.1 - 323.5

The Texas Racing Commission adopts amendments to §§323.1 - 323.4, relating to disciplinary action and new §323.5, concerning complaints. Sections 323.2 and 323.4 are adopted with changes to the proposed text as published in the October 26, 2001, issue of the *Texas Register* (26 TexReg 8469). Sections 323.1, 323.3 and 323.5 are adopted without changes and will not be republished. The sections are adopted as part of a rule review conducted pursuant to Chapter 1275, Acts of the 75th Legislature, 1997, §55 and the General Appropriations Act of 1997, Article IX, Acts of the 76th Legislature, 1999, §9-10.13. The sections conforms terminology to current Commission rule style and clarify time limits for filing and responding to complaints.

No comments were received regarding these sections.

The sections are adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.12, which relates to the reporting of violations of the Texas Racing Act and the Rules; and, §15.04, which relates to the institution of complaints.

The sections implement Texas Civil Statutes, Article 179e.

§323.2. Complaints.

(a) A person may report an alleged violation by filing a written complaint with the Commission on a form prescribed by the Commission.

(b) In receiving complaints under this section, the Commission may not require the complainant to:

(1) reveal the complainant's name; or

(2) pay a fee for filing the complaint.

(c) The form must:

(1) contain the name and address, if known, of the person alleged to have committed the violation; and

(2) specify the provision of the Act or rule number alleged to have been violated, if known, and all facts and circumstances relating to the alleged violation.

(d) An association shall include in the official program a statement that describes the procedure for filing a complaint with the Commission. The executive secretary shall approve the form of the statement. The statement must include the name, mailing address, e-mail address, facsimile, and telephone number of the Commission.

(e) An association shall prominently post signs in the racetrack facility that describe the procedure for filing a complaint with the Commission. The executive secretary shall approve the form and location of the signs.

§323.4. Action on Complaints.

(a) On receipt of a complaint under this subchapter, if the executive secretary determines that a violation has occurred, the executive secretary may, in the executive secretary's sole discretion:

(1) issue a preliminary report to the licensee assessing an administrative penalty;

(2) order a hearing be held to suspend or revoke the licensee's license based on the alleged violation; or

(3) take other action that the executive secretary considers necessary.

(b) A hearing held under this section shall be conducted in accordance with Chapter 307 of this title (relating to Practice and Procedure).

(c) At a hearing under this section, the person filing the complaint may be designated a nonparty participant, but may not be designated a party.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200107539
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: January 1, 2002
Proposal publication date: October 26, 2001
For further information, please call: (512) 833-6699

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SUBCHAPTER B. CIVIL REMEDIES

16 TAC §323.101

The Texas Racing Commission adopts an amendment to §323.101, relating to administrative penalties, without changes to the proposed text as published in the October 26, 2001, issue of the *Texas Register* (26 TexReg 8470). The amendment is adopted as part of a rule review conducted pursuant to Chapter 1275, Acts of the 75th Legislature, 1997, §55 and the General Appropriations Act of 1997, Article IX, Acts of the 76th Legislature, 1999, §9-10.13. The amendment deletes repetitive language found in the Act and conforms terminology to current Commission rule style.

No comments were received regarding this amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.12, which relates to the reporting of violations of the Texas Racing Act and the Rules; and §15.03, which relates to administrative penalties.

The amendment implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200107542
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: January 1, 2002
Proposal publication date: October 26, 2001
For further information, please call: (512) 833-6699

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SUBCHAPTER C. CRIMINAL ENFORCEMENT

16 TAC §323.201

The Texas Racing Commission adopts an amendment to §323.201, without changes to the proposed text as published in the October 26, 2001, issue of the *Texas Register* (26 TexReg 8471). The amendment is part of a rule review conducted pursuant to Chapter 1275, Acts of the 75th Legislature, 1997, §55 and the General Appropriations Act of 1997, Article IX, Acts of the 76th Legislature, 1999, §9-10.13. The amendment requires Commission employees to report any arrest for criminal charges. In addition, Commission employees and applicants to those who are required to report any observed criminal activity related to pari-mutuel and racing to law enforcement officials. These amendments will ensure that all persons associated with pari-mutuel racing are cooperative in enforcement efforts. Finally, the amendment also conforms terminology to current Commission rule style.

No comments were received regarding this amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §3.12, which relates to the reporting of violations of the Texas Racing Act and the Rules.

The amendment implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200107543
Judith L. Kennison
General Counsel
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Effective date: January 1, 2002
Proposal publication date: October 26, 2001
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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

19 TAC §61.1031

The Texas Education Agency (TEA) adopts the repeal of §61.1031, concerning the school facility assistance program, with no changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8274) and will not be republished. The repeal deletes a rule concerning state assistance to school districts for construction of new instructional sites. The 75th Texas Legislature repealed the authority for this section in 1997 and replaced the School Facility Assistance Program with the Instructional Facilities Allotment Program.

The 74th Texas Legislature established the School Facility Assistance Program to help public school districts pay for the cost of constructing new facilities. This program was repealed by actions of the 75th Texas Legislature and replaced with the Instructional Facilities Allotment Program. The existing rule for the School Facility Assistance Program was not immediately repealed because some districts continued to receive funding pursuant to its parameters and requirements for a period of time following the establishment of the new program.

No comments were received regarding adoption of the repeal.

The repeal is adopted under the Texas Education Code (TEC), §42.004, which authorizes the commissioner of education, in accordance with rules of the State Board of Education, to take such action and require such reports as may be necessary to implement and administer the Foundation School Program. TEC, §§42.401-42.410, authorizing the School Facility Assistance Program, was repealed by actions of the 75th Texas Legislature in 1997 and replaced with the Instructional Facilities Allotment Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107696
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Effective date: December 30, 2001
Proposal publication date: October 19, 2001
For further information, please call: (512) 463-9701

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CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING SPECIAL EDUCATION SERVICES

DIVISION 7. RESOLUTION OF DISPUTES BETWEEN PARENTS AND SCHOOL DISTRICTS

19 TAC §89.1151, §89.1185

The Texas Education Agency (TEA) adopts amendments to §89.1151 and §89.1185, concerning resolution of disputes between parents and school districts. Section 89.1151 is adopted without changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8274) and will not be republished. Section 89.1185 is adopted with changes to the proposed text as published. The sections delineate provisions relating to special education hearings. The amendments reflect changes that clarify the commissioner of education's intent regarding the timeline for requesting a special education due process hearing and appealing the decision of a hearing officer.

In response to comments, the following changes were made to §89.1185 since published as proposed.

Language in subsection (p) was modified to revise the initiation deadline for a civil action to appeal a hearing officer's decision from 45 to 90 days.

Language in the last sentence of subsection (p) was also modified to delete the reference to "federal court" by replacing the phrase "state or federal court" with "a court of competent jurisdiction."

A statewide public hearing was held in Austin on October 29, 2001, and the public also was given the opportunity to submit written/electronic comments. Advocates generally do not want rules that stipulate shortened timelines for bringing due process hearings and appeals and would prefer that any timeline be imposed by the state legislature or courts through legal precedent. School administrators generally would prefer that commissioner's rules establish specific timelines that limit the period for bringing due process hearings and appeals so that they will know with some degree of certainty when an action can or will be brought. Changes based on comments from the public hearing and written comments from the public have been incorporated into the commissioner's rules.

The following comments were received regarding adoption of the amendments.

§89.1151. Due Process Hearings.

Comment. An attorney who represents school districts and an elementary school principal requested that the rule not be changed.

Agency Response. The agency disagrees. The change is necessary to clarify rulemaking intent and give interested parties explicit guidance regarding the delayed implementation of timelines for bringing due process hearings.

Comment. One superintendent, six special education administrators, and one school district coordinator support the proposed changes.

Comment. Two special education administrators supported the one-year limitation for filing a due process hearing but requested that additional information be included in the rule that would limit the number of years a parent can bring up in a hearing.

Agency Response. The agency disagrees and believes that the current rule wording is appropriate. Current rule wording specifies that due process hearing requests must be filed within one year of when the complainant knew or should have known about an alleged action that serves as the basis for the hearing request.

The relevancy of evidence presented in a due process hearing is an issue for the hearing officer to decide.

Comment. One school district coordinator of monitoring and complaints suggested that the rule wording be expanded to require a parent to notify the local education agency of concerns prior to filing a request for due process hearing.

Agency Response. The agency disagrees. Any rule revisions related to this suggestion are beyond the scope of the current rule changes and would have to be addressed in another rulemaking process.

Comment. One superintendent suggested that a phrase be added to the rule requiring all local complaint, grievance, and appeals processes to be exhausted prior to filing for a due process hearing.

Agency Response. The agency disagrees. Any rule revisions related to this suggestion are beyond the scope of the current rule changes and would have to be addressed in another rulemaking process.

Comment. One parents' attorney commented that the rules violate federal law, are invalid under the Texas Constitution under the separation of powers doctrine, are inconsistent with the goals of Congress related to parental involvement, and are inconsistent with the nature of measuring educational progress.

Agency Response. The agency disagrees. The agency believes that it has statutory authority to promulgate rules governing due process hearings. The agency also believes that the rule meets federal requirements. The rule allows an aggrieved party the opportunity to request a due process hearing within one year of the date the complainant knew or should have known about the alleged action that serves as the basis of the complaint. The agency believes that this time period is sufficient to support parental involvement and allow educational progress to be measured.

Comment. An attorney representing Advocacy, Inc., commented that the rules violate the Texas Constitution under the separation of powers doctrine, asserting that only the Legislature can establish a statute of limitations. Additionally, the attorney commented that the rules present a concern regarding children's access to the due process hearing system since children and parents are uneducated about when a violation of the Individuals with Disabilities Education Act has occurred. The attorney further comments that the rules are inconsistent with the goals of Congress related to parental involvement and provide a disincentive for parents to participate in the collaborative process.

Agency Response. The agency disagrees. The agency believes that it has statutory authority to promulgate rules governing due process hearings. The rule allows an aggrieved party the opportunity to request a due process hearing within one year of the date the complainant knew or should have known about the alleged action that serves as the basis of the complaint. The agency believes that this time period is sufficient to support parental involvement and allow parents to gather additional information as appropriate. A one-year time period also provides parents and school districts the opportunity to try to solve problems in a collaborative fashion.

Comment. An individual representing Advocacy, Inc., commented that the rules solve only one small part of a very big problem related to the due process hearing system. The problem as asserted is that parents can't seem to win in the current due process system, and despite this, the agency continues to make changes favorable to school districts. The representative also commented that most parents don't have any idea of their rights to begin with, and that the current system is not effective for parents.

Agency Response. The agency disagrees. The agency believes that the one-year statute of limitations meets federal requirements, which include requirements related to the role of parents in the due process hearing system.

Comment. The Governor's Continuing Advisory Committee for Special Education commented that the language regarding "knew or should have known" should be changed to reflect wording suggesting "sufficient evidence to have known."

Agency Response. The agency disagrees. The term "knew or should have known" is a commonly used and understood legal standard that has frequently been applied in case law. The agency believes that it is unnecessary to introduce a new legal standard.

§89.1185. Hearing.

Comment. An attorney who represents school districts and an elementary school principal requested that the rule not be changed.

Agency Response. The agency disagrees. Changes are necessary to clarify rulemaking intent and give interested parties explicit guidance regarding the delayed implementation of timelines for appealing the decision of a hearing officer.

Comment. One superintendent and six special education directors support the proposed changes.

Comment. The Office of Special Education Programs (OSEP), Department of Education, commented that consideration should be given to expanding the 45-day timeline for appealing the decision of a hearing officer. In addition, OSEP commented that consideration should be given to deleting the reference to federal court in the last sentence of §89.1185(p).

Agency Response. The agency agrees that some wording revisions are necessary to provide additional time for appeal so that aggrieved parties can receive and review the decision of the hearing officer and obtain counsel as appropriate and has revised the number of days for appealing the decision of a hearing officer to 90 days. Also, the agency has deleted the reference to "federal court" in the last sentence of §89.1185(p) by replacing the phrase "state or federal court" with "a court of competent jurisdiction."

Comment. The Governor's Continuing Advisory Committee for Special Education commented that the 45-day timeline for appealing the decision of a hearing officer should be expanded to a number of days that is greater than 45 but not exceeding 90.

Agency Response. The agency agrees and has revised the number of days for appealing the decision of a hearing officer to 90 days.

Comment. One parents' attorney commented that the rules violate federal law, are invalid under the Texas Constitution under the separation of powers doctrine, are inconsistent with the goals of Congress related to parental involvement, do not provide parents with sufficient time to obtain counsel or attorneys with sufficient time to determine whether an appeal has merit, and do not allow time for the gathering of additional evidence.

Agency Response. The agency agrees in part and disagrees in part. The agency believes that it has statutory authority to

promulgate rules governing due process hearings. In relation to other concerns, the agency has revised the number of days for appealing the decision of a hearing officer to 90 days to provide additional time to initiate an appeal so that aggrieved parties can receive and review the decision of the hearing officer, gather additional evidence, and obtain counsel as appropriate. The agency further believes that this expanded time period is sufficient to support parental involvement.

Comment. An attorney representing Advocacy, Inc., commented that the rules violate the Texas Constitution under the separation of powers doctrine, asserting that only the Legislature can establish a statute of limitations. Additionally, the attorney comments that the rules present a concern regarding children's access to the due process hearing system, do not provide parents with sufficient time to obtain counsel or attorneys with sufficient time to get cases together, and do not allow time for additional evaluations. The attorney further comments that the rules are inconsistent with the goals of Congress related to parental involvement.

Agency Response. The agency agrees in part and disagrees in part. The agency believes that it has statutory authority to promulgate rules governing due process hearings. In relation to other concerns, the agency has revised the number of days for appealing the decision of a hearing officer to 90 days to provide additional time to initiate an appeal so that aggrieved parties can receive and review the decision of the hearing officer, gather additional evaluations, and obtain counsel as appropriate. The agency further believes that this expanded time period is sufficient to support parental involvement.

Comment. An individual representing Advocacy, Inc., commented that the rules solve only one small part of a very big problem related to the due process hearing system. The problem as asserted is that parents can't seem to win in the current due process system, and despite this, the agency continues to make changes favorable to school districts. The representative also commented that most parents don't have any idea of their rights to begin with, and that the current system is not effective for parents.

Agency Response. The agency disagrees. The agency believes that the rules meet federal requirements, which include requirements related to the role of parents in the due process hearing system.

The amendments are adopted under 34 Code of Federal Regulations (CFR), §300.507, which specifies provisions for an impartial due process hearing and parent notice to the public agency; 34 CFR, §300.600, which outlines the responsibilities of TEA for all educational programs; and Texas Education Code, §§29.001, which authorizes the commissioner of education to adopt rules related to delivering special education services.

§89.1185. Hearing.

(a) The hearing officer shall afford the parties an opportunity for hearing after reasonable notice of not less than ten days, unless the parties agree otherwise.

(b) Each hearing shall be conducted at a time and place that are reasonably convenient to the parents and child involved.

(c) All persons in attendance shall comport themselves with the same dignity, courtesy, and respect required by the district courts of the State of Texas. All argument shall be made to the hearing officer alone.

(d) Except as modified or limited by the provisions of 34 Code of Federal Regulations (CFR), §§300.507-300.514, 300.521, or 300.528, or the provisions of §§89.1151-89.1191 of this subchapter, the Texas Rules of Civil Procedure shall govern the proceedings at the hearing and the Texas Rules of Evidence shall govern evidentiary issues.

(e) Before a document may be offered or admitted into evidence, the document must be identified as an exhibit of the party offering the document. All pages within the exhibit must be numbered, and all personally identifiable information must be redacted from the exhibit.

(f) The hearing officer may set reasonable time limits for presenting evidence at the hearing.

(g) Upon request, the hearing officer, at his or her discretion, may permit testimony to be received by telephone.

(h) Granting of a motion to exclude witnesses from the hearing room shall be at the hearing officer's discretion.

(i) Hearings conducted under this subchapter shall be closed to the public, unless the parent requests that the hearing be open.

(j) The hearing shall be recorded and transcribed by a reporter, who shall immediately prepare and transmit a transcript of the evidence to the hearing officer with copies to each of the parties. The hearing officer shall instruct the reporter to delete all personally identifiable information from the transcription of the hearing.

(k) Filing of post-hearing briefs shall be permitted only upon order of the hearing officer and only upon a finding by the hearing officer that the legal issues involved in the hearing are novel or unsettled in the State of Texas or the Fifth Circuit. Any post-hearing briefs permitted by the hearing officer shall be limited to the legal issues specified by the hearing officer.

(l) The hearing officer shall issue a final decision, signed and dated, no later than 45 days after a request for hearing is received by the Texas Education Agency, unless the deadline for a final decision has been extended by the hearing officer as provided in subsection (o) of this section. A final decision must be in writing and must include findings of fact and conclusions of law separately stated. Findings of fact must be based exclusively on the evidence presented at the hearing. The final decision shall be mailed to each party by the hearing officer. The hearing officer, at his or her discretion, may render his or her decision following the conclusion of the hearing, to be followed by written findings of fact and written decision.

(m) At the request of either party, the hearing officer shall include, in the final decision, specific findings of fact regarding the following issues:

(1) whether the parent or the school district unreasonably protracted the final resolution of the issues in controversy in the hearing; and

(2) if the parent was represented by an attorney, whether the parent's attorney provided the school district the appropriate information in the due process complaint in accordance with 34 CFR, §300.507(c).

(n) In making a finding regarding the issue described in subsection (m)(1) of this section, the hearing officer shall consider the extent to which each party had notice of, or the opportunity to resolve, the issues presented at the due process hearing prior to the date on which the due process hearing was requested. If, after the date on which a request for a due process hearing is filed, either the parent or the school district requests that a meeting of the admission, review, and dismissal (ARD) committee of the student who is the subject of the due process hearing be convened to discuss the issues raised in the request for a

due process hearing, the hearing officer shall also consider the extent to which each party participated in the ARD committee meeting in a good faith attempt to resolve the issue(s) in dispute prior to proceeding to a due process hearing.

(o) A hearing officer may grant extensions of time for good cause beyond the 45-day period specified in subsection (l) of this section at the request of either party. Any such extension shall be granted to a specific date and shall be stated in writing by the hearing officer to each of the parties.

(p) The decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States, as provided in 20 United States Code (USC), §1415(i)(2), and 34 CFR, §300.512. Effective with hearing officer decisions issued on or after August 1, 2002, a civil action brought in a court of competent jurisdiction under 20 USC, §1415(i)(2), and 34 CFR, §300.512, must be initiated no more than 90 days after the date the hearing officer issued his or her written decision in the due process hearing.

(q) In accordance with 34 CFR, §300.514(c), a school district shall implement any decision of the hearing officer that is, at least in part, adverse to the school district in a timely manner within ten school days after the date the decision was rendered. School districts must provide services ordered by the hearing officer, but may withhold reimbursement during the pendency of appeals.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107697
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
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Proposal publication date: October 19, 2001
For further information, please call: (512) 463-9701

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CHAPTER 109. BUDGETING, ACCOUNTING, AND AUDITING
SUBCHAPTER C. ADOPTIONS BY REFERENCE

19 TAC §109.41

The Texas Education Agency (TEA) adopts an amendment to §109.41, concerning the *Financial Accountability System Resource Guide*, with changes to the proposed text as published in the August 31, 2001, issue of the *Texas Register* (26 TexReg 6531). The section adopts by reference the *Financial Accountability System Resource Guide* (Resource Guide) as the TEA's official rule. The Resource Guide describes rules for financial accounting such as financial reporting, budgeting, purchasing, auditing, site-based decision making, data collection and reporting, and management. Public school districts use the Resource Guide to meet the accounting, auditing, budgeting, and reporting requirements as set forth in the Texas Education Code (TEC) and other state statutes relating to public school finance. The Resource Guide is available at www.tea.state.tx.us/school.finance/ on the TEA website.

Under §109.41(b), the commissioner of education shall amend the Resource Guide, adopting it by reference, as needed. The adopted amendments to the Resource Guide include changes to auditing and financial accounting and reporting guidelines for management of public funds by school districts and charter schools and other minor edits. These adopted amendments constitute Version 8.1 of the Resource Guide.

The following change was made to §109.41 since published as proposed.

Subsection (a) was modified to reflect December 2001 instead of November 2001 as the effective date of the amendments to the Resource Guide. The later effective date was needed to allow additional time to incorporate changes made to the Resource Guide and the *Special Supplement to the Financial Accountability System Resource Guide, Charter Schools* (Charter School Special Supplement) in response to public comments.

Two technical corrections were made to Modules Nine and Ten of the Resource Guide since the amendment to §109.41 was published as proposed. The corrections reconcile conflicting language for consistency throughout the modules.

In response to public comments, the following changes were made to the Charter School Special Supplement since the amendment to §109.41 was published as proposed.

Introduction, page 1, was revised to indicate that the requirements discussed in the Charter School Special Supplement might not apply to the non-charter school programs, functions, services, and/or activities of the charter holder.

Section 1.2.4.10, Fixed Asset Exhibit, page 5, was revised to indicate that a fixed asset exhibit would not be required for fiscal years starting prior to September 1, 2001.

Section 3.3, Competitive Bidding on Certain Public Works Contracts, page 15, was revised to indicate that competitive bidding requirements on certain public works contracts apply to charter schools unless the charter school's charter otherwise describes additional procedures for purchasing and contracting, and the procedures are approved by the State Board of Education (SBOE).

Section 3.4, Competitive Procurement, page 16, was revised to specifically identify the requirements applicable to charter schools pursuant to federal statutes and regulations.

Appendix 5, page 34, was revised to add note 10 in order to clarify the reporting requirement regarding the footnote disclosure regarding group health insurance.

The following comments were received regarding the Charter School Special Supplement. The comments were made by participants of a stakeholder's meeting conducted on October 15, 2001, to discuss the contents contained in the special supplement.

Comment. An individual commented that the TEA should: "Clarify that the annual financial statement due 12/1/01 does not have to include accounting of all property acquired since inception; not until 12/1/02."

Agency Response. The agency agrees and the Charter School Special Supplement was appropriately revised to indicate that a

fixed asset exhibit would not be required for fiscal years starting prior to September 1, 2001. (See Section 1.2.4.10, Fixed Asset Exhibit, page 5.)

Comment. An individual commented that the TEA should: "Clarify that charter/SBOE approved policies may substitute for competitive bidding requirements in LGC."

Agency Response. The agency agrees and the Charter School Special Supplement was appropriately revised to indicate that competitive bidding requirements on certain public works contracts apply to charter schools unless the charter school's charter otherwise describes additional procedures for purchasing and contracting, and the procedures are approved by the SBOE. (See Section 3.3, Competitive Bidding on Certain Public Works Contracts, page 15.)

Comment. An individual commented that the TEA should: "Clarify requirements applicable to non-charter activities."

Agency Response. The agency agrees and the Charter School Special Supplement was appropriately revised to indicate that the requirements discussed in the special supplement might not apply to the non-charter school programs, functions, services, and/or activities of the charter holder. (See Introduction, page 1.)

Comment. An individual commented that the TEA should: "Clarify requirements that flow from federal law."

Agency Response. The agency agrees and the Charter School Special Supplement was appropriately revised to specifically identify the requirements applicable to charter schools pursuant to federal statutes and regulations. (See Section 3.4, Competitive Procurement, page 16.)

Comment. An individual commented that the TEA should: "Clarify that if any portion of funds are public, then purchasing and contracting requirements are triggered."

Agency Response. The agency disagrees and the Charter School Special Supplement was not revised to address this comment because House Bill (HB) 6, 77th Texas Legislature, 2001, did not state that the requirements discussed in the Local Government Code, Chapter 271, Subchapter B, applied only to public funds.

Comment. An individual commented that the TEA should: "Please add a statement that says rules adopted under HB 6 control."

Agency Response. The agency disagrees and the Charter School Special Supplement was not revised to address this comment. As regulatory provisions are added to the Texas Administrative Code (TAC), the special supplement will be amended to ensure that it does not conflict with TAC requirements.

Comment. An individual commented that the TEA should: "Please provide a grace period for letting of contracts under HB 6; please adopt this period in a formal rule for all matters for which rules had not been adopted as of 9/1/01."

Agency Response. This comment did not clearly identify the issue that the individual wanted to have addressed. The Charter School Special Supplement was not revised to address this comment. HB 6 does not authorize the TEA to grant grace periods or extensions or in any manner waive the statutory requirements effective on September 1, 2001. As regulatory provisions are added to the TAC to address the mandates discussed in HB 6, the special supplement will be amended to ensure consistency with TAC rules.

Comment. An individual commented that the TEA should: "Please send follow-up letter to 10/9/2001 letter saying that as a result of this stakeholder meeting the financial statement due 12/1/01 does not have to include audit of all property acquired since inception of charter. Although prudent, not required until statement provided on 12/1/02."

Agency Response. This comment did not appear to address any specific provisions discussed in the special supplement. Consequently, the Charter School Special Supplement was not revised to address this comment.

Comment. Several individuals noted some confusion regarding the footnote disclosure regarding group health insurance, as required by HB 3343, 77th Texas Legislature, 2001.

Agency Response. The agency agrees and in order to clarify the reporting requirement, note 10 was added to Appendix 5 of the Charter School Special Supplement. (See Appendix 5, page 34.)

The amendment is adopted under the Texas Education Code, §§7.055, 44.001, 44.007, and 44.008, which authorizes the commissioner of education to establish advisory guidelines relating to fiscal management of a school district and the State Board of Education to establish a standard school fiscal accounting system in conformity with generally accepted accounting principles.

§109.41. Financial Accountability System Resource Guide.

(a) The rules for financial accounting are described in the official Texas Education Agency publication, Financial Accountability System Resource Guide, as amended December 2001, which is adopted by this reference as the agency's official rule. A copy is available for examination during regular office hours, 8:00 a.m. to 5:00 p.m., except holidays, Saturdays, and Sundays, at the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

(b) The commissioner of education shall amend the Financial Accountability System Resource Guide and this section adopting it by reference, as needed. The commissioner shall inform the State Board of Education of the intent to amend the Resource Guide and of the effect of proposed amendments before submitting them to the Office of the Secretary of State as proposed rule changes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

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CHAPTER 176. DRIVER TRAINING SCHOOLS
SUBCHAPTER BB. COMMISSIONER'S RULES ON MINIMUM STANDARDS FOR

OPERATION OF LICENSED TEXAS DRIVING SAFETY SCHOOLS AND COURSE PROVIDERS

The Texas Education Agency (TEA) adopts amendments to §§176.1101, 176.1103, 176.1105-176.1108; the repeal of §§176.1109-176.1116; and new §§176.1109-176.1118, concerning driver training schools. The amendment to §176.1106, repeals of §§176.1109-176.1116, and new §§176.1113-176.1118 are adopted without changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8276) and will not be republished. The amendments to §§176.1101, 176.1103, 176.1105, and 176.1107-176.1108 and new §§176.1109-176.1112 are adopted with changes to the proposed text. The sections establish minimum standards for operating a licensed driving safety school or course provider in Texas. The sections specify definitions, requirements, and procedures relating to driving safety school licensure; driving safety school and course provider responsibilities; administrative staff members; driving safety instructor license; courses of instruction; student enrollment contracts; cancellation and refund policy; facilities and equipment; student complaints; records; names and advertising; uniform certificate of course completion; and application fees and other charges. The adopted amendments, repeals, and new sections define and set forth requirements for the new legislatively-mandated specialized driving safety course and amend technical standards for alternative delivery method (ADM) courses in both driving safety and specialized driving safety.

Fiscal implications for the first five-year period the amendments, repeals, and new sections are in effect were delineated in the October 19, 2001, issue of the *Texas Register*; however, in response to public comment, additional implications have been identified. Amended language has been incorporated clarifying the requirement that course owners that have a driving safety or specialized driving safety course that is offered in a language other than English must have the course evaluated by an accredited translator to ensure that the course materials are the same as the English version. The cost for this type of service may vary depending on the volume of course materials and the language being evaluated. Also, as a result of changes made in response to public comment to remove the requirement that facilities and equipment be relocated to be within the State of Texas, there is no longer fiscal implication for relocation costs associated with an ADM. There will be, however, costs to individuals and businesses that choose or are required to obtain a SysTrust third-party audit.

In response to public comments, to clarify existing rule language, and to incorporate technical edits, the following revisions were made to the amendments to 19 TAC §§176.1101, 176.1103, 176.1105, and 176.1107- 176.1108 and new §§176.1109-176.1112 since published as proposed.

The term "driver's license" was changed to "drivers license" throughout applicable sections (§§176.1101 and 176.1107-176.1112) as a technical edit for consistency and to correspond with the term as referenced by the Department of Public Safety.

In §176.1101, language defining ADM classroom was deleted in response to public comment. Subsequent definitions were renumbered accordingly.

Section 176.1103(a)(3), was deleted because the requirement originally proposed in §176.1110(a)(1)(J) was revised to reflect that the classroom be located in the United States, rather than only in Texas and, therefore, §176.1103(a)(3) was inappropriate.

In §176.1105(a), language referring to locations in Texas was modified in response to public comment.

In §176.1107(c)(2)(A), language was added, in response to public comment, to require a current driving safety instructor license or National Highway Traffic Safety Association Child Passenger Safety technician or instructor certification.

In §176.1107(c)(4)(A), language was added, in response to public comment, to require the specialized driving safety instructor trainer to possess a current National Highway Traffic Safety Association Child Passenger Safety technician or instructor certificate.

In §176.1107(c)(4)(A)(iv), language was added, in response to public comment, to clarify that 150 hours of verifiable experience or an approved equivalent will be acceptable.

In §176.1107(c)(6)(A), language was added, in response to public comment, to require the instructor development course specialized driving safety instructor trainer to possess a current National Highway Traffic Safety Association Child Passenger Safety technician or instructor certificate.

In §176.1108(a)(1)(B), language was added, as a technical edit for clarification, to correctly refer to the translator as accredited instead of licensed or certified.

In §176.1109(a)(1)(B), language was added, as a technical edit for clarification, to correctly refer to the translator as accredited instead of licensed or certified.

In §176.1109(a)(1)(I), language was modified, in response to public comment, to require the author of a specialized driving safety course to be a licensed driver training instructor who possesses a current National Highway Traffic Safety Association Child Passenger Safety technician or instructor certificate.

In §176.1110(a)(1)(A)(ix), language was added, in response to public comment, to clarify that technical support personnel shall be knowledgeable of course completion requirements instead of course content.

In §176.1110(a)(1)(A)(xiii), language was added, in response to public comment, to clarify that the student must have adequate access (on the average, within two minutes) to both a licensed instructor and telephonic technical assistance (help desk). In addition, language was added to require course owners, upon request, to provide written documentation of response times.

In §176.1110(a)(1)(A)(xiv), language was added, in response to public comment, to ensure that course owners develop and maintain a course infrastructure that facilitates effective validation and positively contributes to the student learning experience. Subsequent clauses were renumbered.

In §176.1110(a)(1)(C)(v), language was revised, in response to public comment, to provide clarification of what the Agency considers "other means that are as secure."

In §176.1110(a)(1)(D)(i)(II), language was added, in response to public comment, to clarify that the third- party personal validation questions should be discrete items of information drawn from databases of at least two sources and verified for accuracy.

In §176.1110(a)(1)(D)(i)(III), language was added, in response to public comment, to clarify that the 14 personal third-party validation questions shall not be based solely on drivers license information and that the personal validation failure criteria should ensure that students are not allowed to pass if they are only able to correctly answer questions drawn from one third-party database.

In §176.1110(a)(1)(D)(i)(IV), language was added, in response to public comment, to clarify that at least six TEA-provided personal validation questions shall be asked during the course in addition to the third-party validated questions.

In §176.1110(a)(1)(D)(ii), language was added, in response to public comment, to clarify that a copy of the student's drivers license or an equivalent type of photo identification would be acceptable.

In §176.1110(a)(1)(F), language was revised, in response to public comment, to correct the cross-referenced section.

In §176.1110(a)(1)(G), language was added, in response to public comment, to clarify that the ADM failure criteria must be consistent with the course owner's risk management plan.

In §176.1110(a)(1)(H), a redundant word was deleted as a technical edit.

In §176.1110(a)(1)(I)(v)-(vi), language was modified, in response to public comment, to clarify the requirements for audits whether state conducted or third party in lieu of a state-conducted audit.

In §176.1110(b), language regarding termination of course operations was deleted and added as §176.1110(c) as a technical edit for clarity.

In §176.1110(a)(1)(J), language was modified, in response to public comment, to change "State of Texas" to "United States" and a redundant word was deleted as a technical edit.

The following input has been received from the driving safety school industry and other interested parties regarding adoption of the amendments, new sections, and repeals.

Comment. An individual representing the National Traffic Safety Institute commented that the proposed definition of a classroom for an alternative delivery method (ADM) found in §176.1101(1) is flawed and needs revision.

Agency Response. The Agency has modified §176.1101 by removing the definition.

Comment. An individual commented that rural areas might have difficulty finding specialized instructors since the requirements for these instructors are difficult to attain.

Agency Response. The Agency disagrees. The requirements to become a specialized driving safety instructor are parallel to the requirements that have been long-standing rule for traditional driving safety instructors. The training will be offered by course owners and should be readily available to anyone who chooses to pursue instructor licensure in this area. The rule language stands as proposed.

Comment. An individual representing Texas A&M's Texas Transportation Institute commented that the course author for the specialized driving safety course should be a certified National Highway Traffic Safety Association Child Passenger Safety (NHTSA-CPS) technician. The comment continues that there needs to be a mechanism to assure that NHTSA-CPS technicians keep current in their certification. The individual questions using hours of experience rather than the number of child safety systems examined and asserts that instructors who are not certified NHTSA-CPS technicians may face liability if they demonstrate installing a child safety system during the class.

Comment. An individual representing the National Traffic Safety Institute commented that the specialized driving safety course is too similar in content and curriculum to the traditional driving safety course and recommends that a minimum of 60% of the curriculum of the specialized course be unique to the field of child passenger safety and occupant restraint systems. The specialized driving safety instructor training requirements have been reduced for applicants who hold a NHTSA-CPS certificate as a technician or instructor and recommends that the same reductions be applied to applicants that hold a driving safety instructor license.

Comment. A municipal judge commented that the specialized driving safety course should include the traditional driving safety course curriculum, thereby requiring a course length of between nine and ten hours.

Agency Response. The Agency agrees with the course authorship comment. Language was modified in §176.1109(a)(1)(I) to require the author of a specialized driving safety course to be a TEA-licensed driver training instructor who possesses a current NHTSA-CPS technician or instructor certificate. The language regarding verifiable hours of experience remains, but language was added in §176.1107(c)(4)(A)(iv) to accept an approved equivalent. The Agency believes that the issue of liability to an instructor is not absolved by certification. The Agency agrees that instructors and trainers who hold NHTSA-CPS technician or instructor certification should be current. Therefore, language was modified in §176.1107(c)(2)(A), (4)(A), and (6)(A) to reflect that current NHTSA-CPS is required. The Agency disagrees that the curricula of the courses are too similar. The curriculum and course management requirements, as written, require a minimum of 67% of course material regarding child passenger safety and occupant restraint systems and courses presented for approval will be held to this requirement. The issue of instructor training requirements is already addressed in rule; therefore, the language was not modified. The Agency believes that the legislative mandate for the specialized driving safety course is met with a six-hour course; therefore, the language was not modified.

Comment. Individuals representing DefensiveDriving.com, Txdriving.com, and the National Traffic Safety Institute commented in support of placement of technical support and application servers in Texas, believing that these requirements are fair and provide the support TEA requires to successfully audit and regulate the industry.

Comment. Individuals representing A Cool Defensive Driving, ContinuedEd.com, and All-Pro Defensive Driver course stated that the requirement to place application servers and technical support in Texas is a restraint of trade in violation of the commerce clause of the U. S. Constitution and therefore illegal. The A Cool Defensive Driving representative stated that limiting servers to a geopolitical region is arbitrary, unreasonable, and unresponsive to the nature of the Internet medium. In addition, the A Cool Defensive Driving representative stated that requiring them to set up a second and separate application server in a location distant to their technical personnel would result in lower standards of service. The A Cool Defensive Driving

representative stated that locating servers and technical support out-of-state poses no jurisdictional problems since TEA controls their ability to do business in Texas. In response to the proposed rule, the A Cool Defensive Driving representative offered course provider payment of TEA expenses for out-of-state monitoring as an alternative solution to requiring course owners to locate technical support, application server host, and data storage facilities in Texas. Finally, representatives from ContinuedEd.com suggested that a less burdensome alternative for potential course providers whose servers and/or technical support staff are not located in the State of Texas would be to allow the course provider the option of locating the server and technical support staff in Texas and allowing a state audit or obtaining a third-party audit according to existing audit standards such as SysTrust.

Agency Response. The Agency agrees that allowing the course providers the option of obtaining a third-party audit according to specific audit standards may be a less burdensome alternative that may achieve the local purpose of providing security. The Agency has changed portions of the rules as a result. Section 176.1101(1) was deleted because it was no longer necessary to define the term. Section 176.1103(a)(3) was deleted because the requirement originally proposed in §176.1110(a)(1)(J) was revised to reflect that the classroom be located in the United States, rather than only in Texas and, therefore, §176.1103(a)(3) was inappropriate. Section 176.1105(a) was revised to delete the requirement that the instruction be performed in Texas. Section 176.1110(a)(1)(I)(v) was revised and clause (vi) was added to allow the submission of a SysTrust audit encompassing all SysTrust principles in lieu of a state-conducted audit or when the technical support, application server, or data storage facilities are located outside the State of Texas. Section 176.1110(a)(1)(J) was revised to reflect that the technical support, application host server, and data storage facilities be located in the United States.

Comment. An individual representing DefensiveDriving.com recommended that TEA require documentary proof of response time for instructor and technical support requests which will aid in monitoring the course owner's ability to adhere to rule. The comment also included moving the deadline for submission of the required security policies and procedures forward from July 1, 2002, to May 1, 2002. Finally, the DefensiveDriving.com representative commented in support of the requirement for validating student identity data against two separate databases and allowing course providers to establish reasonable failure criteria based on risk assessment.

Agency Response. The Agency agrees with the comment regarding documentary proof of response time. Language was modified in §176.1110(a)(1)(A)(xiii) to allow the Agency to request documentation to determine whether course providers are meeting the two-minute rule for student support in the ADM environment. The Agency disagrees with changing the submission deadline to May 1, 2002. The July 1, 2002, deadline in §176.1110(a)(1)(B) for submission of a security program appears to be reasonable. The student validation question in conjunction with failure criteria is addressed below based on the comments of another industry representative.

Comment. An individual representing A Cool Defensive Driving commented that the requirement that technical support personnel be knowledgeable of course content and technical issues is an unreasonable duplication of services. So long as both technical support and instructional support are available within two minutes, on average, it should not matter whether the same or different persons provide that support. The comment continued that if third- party validation is required, then it must be time-limited or it is a sham and the comment suggests a four-minute limit for response.

Agency Response. The Agency agrees that licensed instructors are available to answer content questions. Language was modified §176.1110(a)(1)(A)(ix) to require technical support to be knowledgeable of course completion requirements. The Agency also agrees that effective validation methods concerning time-limits on questions is necessary and has modified language in §176.1110(a)(1)(A)(xiv) to require course owners to develop and maintain a course infrastructure that facilitates effective validation and positively contributes to the student learning experience.

Comment. An individual representing USA Training Company, Inc. commented that the proposed rules replace detailed user validation failure criteria that ensure security in favor of more flexible standards. To assure security, they propose language requiring a bank of third-party validation questions (minimum of 20) of which 14 must be asked and that the questions asked be selected on a random basis. Further, they request that the language in §176.1110(a)(1)(D)(i)(III) prohibit the third-party validation questions asked from being based solely on drivers license information and suggest adding failure criteria that prohibits passing the personal validation test if the correct answers are only to questions drawn from drivers license-related questions.

In proposed §176.1110(a)(1)(D)(i)(IV), they request that the rule clarify that the six TEA-provided questions be in addition to the questions asked under §176.1110(a)(1)(D)(i)(III).

In provisions relating to third-party validated information, they are concerned about the possibility of "gaming" the rules because there are no requirements regarding what kind of information the question may ask. They propose that §176.1110(a)(1)(D)(i)(II) require that information be structured so that only discrete units of information, and not parts of the information, are verified. For example, the street name may be asked, but not the second letter in the street name. Also in proposed §176.1110(a)(1)(D)(i)(II), they suggest a return to the language in existing rule that requires that third-party database information be "drawn from databases of at least two different sources."

In proposed §176.1110(a)(1)(C)(v) they ask that language be added for clarity purposes that states, "other means as secure as the methods described in clauses (i) through (iv) that are based on one or more emerging technologies that have not previously been presented for approval by TEA and that allow for reasonable assurance that the students are authenticated."

In proposed §176.1110(a)(1)(F) they believe that the cross-reference is in error and suggest changing the cross-reference to "Section 176.1108(D)(ii) through (xi)."

In proposed §176.1110(a)(1)(A)(xiii) they believe that access to both an instructor and technical support within two minutes is necessary and feasible, both technically and economically. They believe the rule should make clear that both types of assistance must be available, on average, within two minutes.

Agency Response. The Agency agrees and the rule language in the specified areas of interest was modified accordingly. Also in response to these comments, language was modified in §176.1110(a)(1)(G) to clarify that failure criteria must be consistent with the course owner's risk management plan.

Comment. An individual asked for clarification about how to handle verification of identification for a student who does not have a drivers license.

Agency Response. The Agency agrees that there is a need for clarification on this issue. Language in §176.1110(a)(1)(D)(ii) was modified to provide that an equivalent type of photo identification would be acceptable.

Comment. Individuals representing Txdriving.com and DefensiveDriving.com commented that the rules achieve a balanced system for ADM courses of all types and describe an environment where all ADM course providers on a reasonably equivalent basis must meet high standards.

Comment. An individual representing Txdriving.com commented that the 20 personal validation question requirement distracts the student by interrupting the flow of the course when combined with all of the required course content questions. One question per session in conjunction with the currently required course content questions should be sufficient to confirm the students' identity while allowing for a more consistent course flow and means to check the course.

The Txdriving.com representative also stated that the TEA-provided questions that are not verified will cause undue phone calls from irate students and diminish the seriousness and authoritative aspects of the questions that are verified. They requested that TEA reconsider requiring these questions in rule.

Agency Response. The Agency disagrees and feels that the personal validation requirements, including the number and types of questions, are reasonable and necessary to adequately authenticate the identity of the student. The language was not modified.

Comment. An individual representing the National Traffic Safety Institute commented that there is a concern that there is no time frame for the review and approval of ADM courses. They feel there should be a policy or a rule requiring a specific time frame, after which an ADM should be either approved or denied.

They concur that the provider should be located in Texas and recommend that the rule be modified in such a way that TEA has access to course provider operations and the course provider has an office that is accessible to the public. They believe that the extension of an inactive course through the year 2003 is inappropriate and question why this was done. They feel that TEA should not extend the deadline and should immediately revoke any courses that have been inactive. They also believe that the requirement for a statement from a licensed or certified translator should be time sensitive so that courses already teaching in languages other than English will not have to go back and have already approved curriculum certified as English-equivalent. This requirement was not addressed as to how it impacts small business and was not fully analyzed in rule. Further, they believe the requirements regarding examination difficulty are non-homogenous and that the cultural, religious, and other values vary widely enough to make such a rule subjective and non-enforceable. Further, they believe that existing rule should be modified to allow true-false questions because this requirement was levied as a result of alleged misuse by Internet course providers and classroom courses should not have to pay the price.

Agency Response. The Agency disagrees with the comments. Requiring a deadline for approval or denial of a course could result in course providers being denied and having to pay a $9,000 reapplication fee. The Agency is aware that the amount of time required to determine that an ADM meets all the requirements of law and rule can be extensive. Rather than risk imposing additional financial burdens on applicants, the Agency will continue to work with applicants toward approval rather than denying applicants based on an arbitrary deadline. The Agency believes that the extension of the deadline for inactive courses until 2003 is reasonable and necessary to allow course owners to bring inactive courses into an active status. Rule language in §176.1108(a)(1)(B) and §176.1109(a)(1)(B) regarding "certified" translators was modified to read "accredited" translators for clarity purposes and all course materials in languages other than English will need to submit a statement from an accredited translator, including those that already have approved curriculum. The fiscal impact of this requirement has been outlined in the fiscal impact statement supporting these adopted rules. Final examinations are the Agency's best yardstick for determining whether the student has successfully completed a course and the issue of accountability is well addressed in the level of difficulty. The language was not modified.

Comment. An individual representing The Safe Drivers Centre Course commented that TEA has a responsibility to balance the legal responsibility of making sure that fraud is minimized against the ultimate goal of promoting safer driving. The TEA should consider a sort of golden rule in thinking about rules themselves, and that the goal should be to promote safer driving. If any rules, however well intentioned, keep people out of the course, or from finishing the course, or distract them from learning, the rules go against this golden rule and are inappropriate. The minimization of fraud must be done within reasonable limits.

Agency Response. The Agency agrees and has reasonably addressed this statement in the amended rules as adopted.

Comment. Two legislators commented in support of the proposed rules, expressed appreciation for agency efforts, and encouraged adoption.

Comment. An individual representing Locke Liddell and Sapp LLP commented in support of the proposed rules.

19 TAC §§176.1101, 176.1103, 176.1105 - 176.1118

The amendments and new sections are adopted under Texas Civil Statutes, Article 4413(29c), §6, as amended by Senate Bill 777, 76th Texas Legislature, 1999, which authorizes the commissioner of education to adopt rules necessary to implement the Texas Driver and Traffic Safety Education Act.

§176.1101. Definitions.

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

(1) Advertising--Any affirmative act, whether written or oral, designed to call public attention to a school and/or course in order to evoke a desire to patronize that school and/or course. This includes Meta tags and search engine listings.

(2) Break--An interruption in a course of instruction occurring after the course introduction and before the comprehensive exam and course summation.

(3) Change of ownership of a school or course provider--A change in the control of the school or course provider. Any agreement to transfer the control of a school or course provider is considered to be a change of ownership. The control of a school or course provider is considered to have changed:

(A) in the case of ownership by an individual, when more than 50% of the school or course provider has been sold or transferred;

(B) in the case of ownership by a partnership or a corporation, when more than 50% of the school or course provider or of the owning partnership or corporation has been sold or transferred; or

(C) when the board of directors, officers, shareholders, or similar governing body has been changed to such an extent as to significantly alter the management and control of the school or course provider.

(4) Clock hour--50 minutes of instruction in a 60-minute period for a driving safety course.

(5) Course validation question--A question designed to establish the student's participation in the course and comprehension of the course material by requiring the student to answer a question regarding a fact or concept taught in the course.

(6) Division--The division of the Texas Education Agency (TEA) responsible for administering the provisions of the law, rules, regulations, and standards as contained in this chapter and licensing driver training programs.

(7) Division director--The person designated by the commissioner of education to carry out the functions and regulations governing the driving safety schools and course providers and designated as director of the division responsible for licensing driver training programs.

(8) Final examination question--A question designed to measure the student's comprehension and knowledge of course material presented after the instruction is completed.

(9) Good reputation--A person is considered to be of good reputation if:

(A) there are no felony convictions related to the operation of a school or course provider, and the person has been rehabilitated from any other felony convictions;

(B) there are no convictions involving crimes of moral turpitude;

(C) within the last ten years, the person has never been successfully sued for fraud or deceptive trade practice;

(D) the person does not own or operate a school or course provider currently in violation of the legal requirements involving fraud, deceptive trade practices, student safety, quality of education, or refunds; has never owned or operated a school or course provider with habitual violations; and has never owned or operated a school or course provider which closed with violations including, but not limited to, unpaid refunds or selling, trading, or transferring a driver education certificate or uniform certificate of course completion to any person or school not authorized to possess it;

(E) the person has not withheld material information from representatives of TEA or falsified instructional records or any documents required for approval or continued approval; and

(F) in the case of an instructor, there are no misdemeanor or felony convictions involving driving while intoxicated over the past seven years.

(10) Inactive course--A driving safety or specialized driving safety course for which no uniform certificates of completion have been purchased for 36 months or longer.

(11) Instructor trainer--A driving safety instructor or specialized driving safety instructor who has been trained to prepare instructors to give instruction in a specified curriculum.

(12) Moral turpitude--Conduct that is inherently immoral or dishonest.

(13) New course--A driving safety or specialized driving safety course is considered new when it has not been approved by TEA to be offered previously; or has been approved by TEA and offered and then discontinued; or the content, lessons, or delivery of the course have been changed to a degree that a new application is requested and a complete review of the application and course presentation is necessary to determine compliance.

(14) Personal validation question--A question designed to establish the identity of the student by requiring an answer related to the student's personal information such as a drivers license number, address, date of birth, or other similar information that is unique to the student.

(15) Public or private school--For the purpose of these rules, a public or private school is an accredited public or non-public secondary school.

(16) Specialized driving safety course--A six-hour driving safety course that includes at least four hours of training intended to improve the student's knowledge, compliance with, and attitude toward the use of child passenger safety seat systems and the wearing of seat belt and other occupant restraint systems.

(17) Uniform certificate of course completion--A document that is printed, administered, and supplied by TEA to owners or primary consignees for issuance to students who successfully complete an approved driving safety or specialized driving safety course and that meets the requirements of Transportation Code, Chapter 543, and Code of Criminal Procedure, Article 45.0511. This term encompasses all parts of a uniform certificate of course completion with the same serial number. It is a government record.

§176.1103. Driving Safety School Licensure.

(a) Application for driving safety school. An application for a license for a driving safety school shall be made on forms supplied by the Texas Education Agency (TEA) and submitted to TEA by the course provider. The application shall:

(1) include individual requests for approval for each multiple classroom of the school. The applications shall be made on forms provided by TEA. The driving safety school shall receive TEA approval for each location prior to advertising or offering a driving safety course at the location; and

(2) include verification from the licensed course provider that the school is authorized to provide the approved driving safety or specialized driving safety course and that the school will operate in compliance with all course provider policies and procedures.

(b) Verification of ownership for driving safety school.

(1) In the case of an original or change of owner application for a driving safety school, the owner of the school shall provide verification of ownership that includes, but is not limited to, copies of stock certificates, partnership agreements, and assumed name registrations. The division director may require additional evidence to verify ownership.

(2) With the renewal application, the owner of the school shall provide verification that no change in ownership has occurred. The division director may require additional evidence to verify that no change of ownership has occurred.

(c) Effective date of the driving safety school license. The effective date of the driving safety school license shall be the date the license is issued. Exceptions may be made if the applicant was in full compliance on the effective date of issue.

(d) Purchase of driving safety school.

(1) A person or persons purchasing a licensed driving safety school shall obtain an original license.

(2) In addition, copies of the executed sales contracts, bills of sale, deeds, and all other instruments necessary to transfer ownership of the school shall be submitted to TEA. The contract or any instrument transferring the ownership of the driving safety school shall include the following statements.

(A) The purchaser shall assume all refund liabilities incurred by the seller or any former owner before the transfer of ownership.

(B) The sale of the school shall be subject to approval by TEA.

(C) The purchaser shall assume the liabilities, duties, and obligations under the enrollment contracts between the students and the seller, or any former owner.

(e) New location.

(1) The division director shall be notified in writing of any change of address of a driving safety school at least three working days before the move.

(2) The school must submit the appropriate fee and all documents designated by the division director as being necessary. The documents shall be submitted to TEA by the course provider on behalf of the school. A driving safety school license may be issued after the required documents are approved.

(3) If the move is beyond ten miles and, as determined by the division director, a student is prevented from completing the training at the new location, a full refund of all money paid and a release from all obligations are due.

(4) The school must maintain a current mailing address at the division.

(f) Renewal of driving safety school license. A complete application for the renewal of a license for a driving safety school shall be postmarked or hand-delivered by the school to the course provider at least 30 days before the expiration of the license and shall include the following:

(1) completed application form for renewal;

(2) current list of instructors;

(3) current list of classrooms;

(4) annual renewal fee, if applicable; and

(5) any other revision or evidence of which the school has been notified in writing that is necessary to bring the school's application for a renewal license to a current and accurate status.

(g) Denial, revocation, or conditional license. For schools approved to offer only one driving safety course, the authority to operate a driving safety school shall cease if the course provider license is denied or revoked or if the course provider removes all authorization to teach the course. The license of the driving safety school may continue for 60 calendar days to allow the school owner to obtain approval to operate under a different course provider license. At the end of the 60-day period, the school license shall be revoked unless the school will offer an approved course. A current driving safety school license shall not be renewed without an approved course. A driving safety school license may be denied, revoked, or conditioned separately from the license of the course provider.

(h) Notification of legal action. A school shall notify the division director in writing of any legal action that is filed against the school, its officers, any owner, or any school instructor that might concern the operation of the school within five working days after the school, its officers, any owner, or any school instructor has commenced the legal action or has been served with legal process. Included with the written notification, the school shall submit a file-marked copy of the petition or complaint that has been filed with the court.

(i) School closure.

(1) The school owner shall notify TEA and the course provider at least 15 business days before the anticipated school closure. The school owner shall provide written notice to TEA and the course provider of the actual discontinuance of the operation within five working days after the cessation of classes. A school shall forward all records to the course provider responsible for the records within five days.

(2) The course provider shall provide TEA with written notice of a school closure within five working days after knowledge of cessation of classes.

(3) The division director may declare a school to be closed:

(A) as of the last day of attendance when written notification is received by TEA from the school owner or course provider stating that the school will close;

(B) when TEA staff determine by means of an on-site visit that the school facility has been vacated without prior notification of change of address given to TEA and without TEA approval of future plans to continue to operate;

(C) when an owner with multiple school locations transfers all students from one school location to another school location without written notification and TEA approval of future plans to continue to operate;

(D) when the school owner allows the school license to expire; or

(E) when the school does not have the facilities and equipment to operate pursuant to this subchapter.

(j) Course at public or private school. A school shall receive approval from TEA prior to conducting a course at a public or private school, and approval may be granted by TEA upon review of the agreement made between the licensed driving safety school and the public or private school. The course shall be subject to the same rules that apply at the licensed driving safety school, including periodic inspections by TEA representatives. An on-site inspection is not required prior to approval of the course.

§176.1105. Driving Safety School and Course Provider Responsibilities.

(a) Course providers must be located in the State of Texas. All instruction in a driving safety or specialized driving safety course shall be performed in locations approved by the Texas Education Agency (TEA) and by TEA-licensed instructors. However, a student instructor may teach the 12 hours necessary for licensing in a TEA-approved location under the direction and in the presence of a licensed driving safety or specialized driving safety instructor trainer who has been trained in the curriculum being instructed. If a licensed instructor leaves the employment of any driving safety school, the school administrative staff

member shall notify the course provider in writing within five days, indicating the name and license numbers of the school and the instructor, the termination date, and a statement about the termination. The course provider shall provide the information to TEA in writing within five working days of receipt of notification.

(b) Each course provider or employee shall:

(1) ensure that instruction of the course is provided in schools currently approved to offer the course, and in the manner in which the course was approved;

(2) ensure that the course is provided by persons who have a valid current instructor license with the proper endorsement issued by the division, except as provided in subsection (a) of this section;

(3) ensure that schools and instructors are provided with the most recent approved course materials and relevant data and information pertaining to the course within 60 days of approval. Instructor training may be required and shall be addressed in the approval notice;

(4) not falsify driver training records;

(5) ensure that applications for licenses or approvals are forwarded to TEA within ten days of receipt at the course provider facilities;

(6) ensure that instructor performance is monitored. A written plan describing how instructor performance will be monitored and evaluated shall be provided to the schools. The plan shall identify the criteria upon which the instructors will be evaluated, the procedure for evaluation, the frequency of evaluation (a minimum of once a year), and the corrective action to be taken when instructors do not meet the criteria established by the course provider. The instructor evaluation forms must be kept on file either at the course provider or school location for a period of one year;

(7) develop and maintain a means to ensure the security and integrity of student information, especially financial and personal information, in transit and at rest; and

(8) develop and maintain a means to ensure the privacy of student data, including personal and financial data, and make the corporate privacy policy available to all course students.

(c) Each driving safety school owner-operator or employee shall:

(1) ensure that each individual permitted to give instruction at the school or any classroom location has a valid current instructor's license with the proper endorsement issued by the division, except as provided in subsection (a) of this section;

(2) prohibit an instructor from giving instruction or prohibit a student from securing instruction in the classroom or in a motor vehicle if that instructor or student is using or exhibits any evidence or effect of an alcoholic beverage, controlled substance, drug, abusable glue, aerosol paint, or other volatile chemical as those terms are defined in the Alcoholic Beverage Code, §1.04(1); and the Health and Safety Code, §§481.002, 484.002, and 485.001;

(3) provide instruction or allow instruction to be provided only in courses that are currently on the school's list of approved courses;

(4) complete, issue, or validate a verification of course completion only for a person who has successfully completed the entire course;

(5) not falsify driver training records;

(6) ensure that instructors give students the opportunity to evaluate the course and instructor on an official evaluation form;

(7) evaluate instructor performance in accordance with the course provider plan;

(8) develop and maintain a means to ensure the security and integrity of student information, especially financial and personal information, in transit and at rest; and

(9) develop and maintain a means to ensure the privacy of student data, including personal and financial data, and make the corporate privacy policy available to all course students.

(d) For the purposes of Texas Civil Statutes, Article 4413(29c), and this chapter, each person employed by or associated with any driving safety school shall be deemed an agent of the driving safety school, and the school may share the responsibility for all acts performed by the person which are within the scope of the employment and which occur during the course of the employment.

§176.1107. Driving Safety Instructor License.

(a) Application for licensing as a driving safety or specialized driving safety instructor shall be made on forms supplied by the Texas Education Agency (TEA). A person is qualified to apply for a driving safety or specialized driving safety instructor license who:

(1) is of good reputation; and

(2) holds a valid drivers license for the preceding five years in the areas for which the individual is to teach, which has not been suspended, revoked, or forfeited in the past five years for traffic-related violations.

(b) A person applying for an original driving safety or specialized driving safety instructor's license shall submit to the course provider, who shall submit to TEA the following:

(1) complete application as provided by TEA;

(2) processing and annual instructor licensing fees;

(3) documentation showing that all applicable educational requirements have been met. Original documentation shall be provided upon the request of the division director;

(4) a clear and legible photocopy of the current, valid drivers license issued to the applicant; and

(5) any other information necessary to show compliance with applicable state and federal requirements.

(c) A person applying for a driving safety or specialized driving safety instructor license may qualify for the following endorsements.

(1) Driving safety instructor.

(A) The application shall include evidence of completion of 24 hours of training covering techniques of instruction and in-depth familiarization with material contained in the driving safety curriculum in which the individual is being trained and 12 hours of practical teaching in the same driving safety course and a statement signed by the course provider recommending the applicant for licensing.

(B) The responsibilities of a driving safety instructor include instructing a TEA-approved driving safety course specific to the curriculum in which the instructor is endorsed and for which the certificate is issued.

(2) Specialized driving safety instructor.

(A) The application shall include evidence of completion of 24 hours of training and 12 hours of practical teaching. The 24 hours of training shall cover techniques of instruction and in-depth familiarization with material contained in the specialized driving safety curriculum. The 12 hours of practical teaching shall be in the same specialized driving safety curriculum and shall be accompanied by a statement signed by the course provider recommending the applicant for licensing. Alternatively, the applicant may submit a copy of a current driving safety instructor license or current certification as a National Highway Traffic Safety Association Child Passenger Safety technician or instructor and 12 hours of training and 12 hours of practical teaching. The 12 hours of training shall cover techniques of instruction and in-depth familiarization with material contained in the specialized driving safety curriculum. The 12 hours of practical teaching shall be in the same specialized driving safety curriculum and shall be accompanied by a statement signed by the course provider recommending the applicant for licensing.

(B) The responsibilities of a specialized driving safety instructor include instructing a TEA- approved specialized driving safety course specific to the curriculum in which the instructor is endorsed and for which the certificate is issued.

(3) Driving safety instructor trainer.

(A) The application shall include a statement signed by the driving safety course provider (if different than the applicant) recommending the instructor as an instructor trainer and evidence of one of the following:

(i) a Texas teaching certificate with driver education endorsement and 60 hours of experience, exclusive of the 36-hour instructor development course, in the same driving safety course for which the individual is to teach;

(ii) a teaching assistant certificate and 60 hours of experience, exclusive of the 36- hour instructor development course, in the same driving safety course for which the individual is to teach; or

(iii) completion of all the requirements of a driving safety instructor and 150 hours of verifiable experience as a licensed driving safety instructor, of which the most recent 30 hours shall be in the same driving safety course for which the individual is to teach.

(B) The responsibilities of a driving safety instructor trainer include instructing a TEA- approved driving safety course, supervising instructor trainees, and signing as a driving safety instructor trainer for the 12 hours of practice teaching required for driving safety instructor trainees.

(4) Specialized driving safety instructor trainer.

(A) The application shall include a statement signed by the driving safety course provider (if different than the applicant) recommending the instructor as an instructor trainer, a copy of a current certificate as a National Highway Traffic Safety Association Child Passenger Safety technician or instructor, and evidence of one of the following:

(i) a Texas teaching certificate with driver education endorsement and 60 hours of experience, exclusive of the 36-hour instructor development course, in the same specialized driving safety course for which the individual is to teach;

(ii) a teaching assistant certificate and 60 hours of experience, exclusive of the 36- hour instructor development course, in the same specialized driving safety course for which the individual is to teach;

(iii) completion of all the requirements for a specialized driving safety instructor license and 150 hours of verifiable experience as a licensed driving safety instructor, of which the most recent 30 hours shall be in the same specialized driving safety course for which the individual is to teach; or

(iv) completion of all the requirements for a specialized driving safety instructor license and 150 hours verifiable experience or an approved equivalent as a certified National Highway Traffic Safety Association Child Passenger Safety technician or instructor, of which the most recent 30 hours shall be in the same specialized driving safety course for which the individual is to teach.

(B) The responsibilities of a specialized driving safety instructor trainer include instructing a TEA-approved specialized driving safety course, supervising instructor trainees, and signing as a specialized driving safety instructor trainer for the 12 hours of practice teaching required for the specialized driving safety instructor trainees.

(5) Instructor development course driving safety instructor trainer.

(A) The application shall include evidence of:

(i) completion of all the requirements for a driving safety instructor trainer plus an additional 150 hours of verifiable experience as a licensed driving safety instructor, of which the most recent 60 hours shall be in the same driving safety course for which the individual is to teach, or proof of authorship of an approved driving safety course. The applicant who will provide the initial instructor training for a newly approved course shall demonstrate to the division director the ability to teach the course prior to being licensed; and

(ii) a statement signed by the driving safety course provider, if different than the applicant, recommending the individual as an instructor development course instructor trainer in driving safety.

(B) The responsibilities of an instructor development course driving safety instructor trainer include instructing a TEA-approved driving safety course, supervising instructor trainees, training individuals to teach a TEA-approved driving safety course, and signing student instruction records for driving safety trainees.

(6) Instructor development course specialized driving safety instructor trainer.

(A) The application shall include a copy of a current certification as a National Highway Traffic Safety Association Child Passenger Safety technician or instructor and evidence of:

(i) completion of all the requirements for a specialized driving safety instructor trainer plus an additional 150 hours of verifiable experience as a licensed specialized driving safety instructor, of which the most recent 60 hours shall be in the same specialized driving safety course for which the individual is to teach, or proof of authorship of an approved specialized driving safety course. The applicant who will provide the initial instructor training for a newly approved course shall demonstrate to the division director's designees the ability to teach the course prior to being licensed; and

(ii) a statement signed by the driving safety course provider, if different than the applicant, recommending the individual as an instructor development course instructor trainer in specialized driving safety.

(B) The responsibilities of an instructor development course specialized driving safety instructor trainer include instructing a TEA-approved specialized driving safety course, supervising instructor trainees, training individuals to teach a TEA-approved specialized

driving safety course, and signing student instruction records for specialized driving safety trainees.

(d) A renewal application for a driving safety or specialized driving safety instructor license must be prepared using the following procedures.

(1) Application for renewal of an instructor license shall be made on a form provided by TEA and submitted by the course provider. The annual instructor licensing fee and evidence of continuing education shall accompany the application.

(2) A complete license renewal application shall be postmarked or hand-delivered to the course provider by the instructor at least 30 days before the date of expiration or a late instructor renewal fee shall be imposed. A complete application includes:

(A) completed application for renewal;

(B) annual renewal fee; and

(C) evidence of continuing education for each driving safety or specialized driving safety course endorsement.

(e) Continuing education requirements include the following.

(1) Evidence of completion of continuing education shall be provided for each instructor during the individual license renewal period on forms approved by TEA. A verification form indicating completion shall be provided to TEA by the course provider on behalf of the instructors. The form shall be signed by the instructor receiving the training and the course provider or designee.

(2) Carryover credit of continuing education hours shall not be permitted.

(3) A licensee may not receive credit for attending the same course more than once during the same licensing period.

(4) A licensed individual who teaches an approved continuing education course may receive credit for attending continuing education.

(5) A driving safety or specialized driving safety continuing education course shall not be used for the continuing education requirement for a driver education instructor license.

(f) An instructor who has allowed a previous license to expire shall file an original application on a form provided by TEA that is submitted by the course provider. The application shall include the processing and annual instructor licensing fees and evidence of continuing education completed within the last year. Evidence of educational experience may not be required to be resubmitted if the documentation is on file at TEA.

(g) All driving safety and specialized driving safety instructor license endorsement changes shall require the following:

(1) written documentation showing all applicable educational requirements have been met to justify endorsement changes;

(2) the annual instructor licensing fee; and

(3) completion of renewal requirements for current endorsements.

(h) All other license change requests, including duplicate instructor licenses or name changes, shall be made in writing by the course provider and shall include payment of the duplicate instructor license fee.

(i) The course provider shall notify the TEA of an instructor's change of address in writing. Address changes shall not require payment of a fee.

(j) All instructors shall notify the division director, school owner, and course provider in writing of any criminal complaint other than a minor traffic violation filed against the instructor within five working days of commencement of the criminal proceedings. The division director may require a file-marked copy of the petition or complaint that has been filed with the court.

(k) All instructors shall provide training in an ethical manner so as to promote respect for the purposes and objectives of driver training as identified in Texas Civil Statutes, Article 4413(29c), §2.

(l) An instructor shall not make any sexual or obscene comments or gestures while performing the duties of an instructor.

(m) An instructor shall not falsify driver training records.

(n) The commissioner of education may suspend, revoke, or deny a license to any driving safety or specialized driving safety instructor trainer or instructor under any of the following circumstances.

(1) The applicant or licensee has been convicted of any felony, or an offense involving moral turpitude, or an offense of involuntary or intoxication manslaughter, or criminally negligent homicide committed as a result of the person's operation of a motor vehicle, or an offense involving driving while intoxicated or driving under the influence of drugs, or an offense involving tampering with a governmental record.

(A) These particular crimes relate to the licensing of instructors because such persons, as licensees of TEA, are required to be of good moral character and to deal honestly with courts and members of the public. Driving safety and specialized driving safety instruction involves accurate record keeping and reporting for court documentation and other purposes. In determining the present fitness of a person who has been convicted of a crime and whether a criminal conviction directly relates to an occupation, TEA shall consider those factors stated in Texas Civil Statutes, Article 6252-13c and Article 6252- 13d.

(B) In the event that an instructor is convicted of such an offense, the instructor's license will be subject to revocation or denial. A conviction for an offense other than a felony shall not be considered by TEA under this paragraph if a period of more than ten years has elapsed since the date of the conviction or of the release of the person from the confinement, conditional release, or suspension imposed for that conviction, whichever is the later date. For seven years after an instructor is convicted of an offense involving driving while intoxicated, the instructor's license shall be recommended for revocation or denial.

(C) For the purposes of this paragraph, a person is convicted of an offense when a court of competent jurisdiction enters an adjudication of guilt on an offense against the person, whether or not:

(i) the sentence is subsequently probated and the person is discharged from probation; or

(ii) the person is pardoned for the offense, unless the pardon is expressly granted for subsequent proof of innocence.

(2) The applicant, licensee, any instructor, or agent is addicted to the use of alcoholic beverages or drugs or becomes incompetent to safely operate a motor vehicle or conduct classroom or behind-the-wheel instruction properly.

(3) The license was improperly or erroneously issued.

(4) The applicant or licensee fails to comply with the rules and regulations of TEA regarding the instruction of drivers in this state or fails to comply with any section of Texas Civil Statutes, Article 4413(29c).

(5) The instructor fails to follow procedures as prescribed in this chapter.

(6) The applicant or licensee has a personal driving record showing that the person has been the subject of driver improvement or corrective action as cited in Transportation Code, Chapter 521, Subchapter N or O, during the past two years or that such action is needed to protect the students and motoring public.

(7) If an instructor or applicant has received deferred adjudication of guilt from a court of competent jurisdiction, a determination can be made upon satisfactory review of evidence that the conduct underlying the basis of the deferred adjudication has rendered the person unworthy to provide driver training instruction.

§176.1108. Driving Safety Courses of Instruction.

(a) This section contains requirements for driving safety, continuing education, and instructor development courses. For each course, the following curriculum documents and materials are required to be submitted as part of the application for approval. Except as provided by paragraph (1)(I) of this subsection, all course content shall be delivered under the direct observation of a licensed instructor. Any changes and updates to a course shall be submitted and approved prior to being offered. Approval of any course that is inactive as of January 1, 2003, will be revoked.

(1) Driving safety courses.

(A) Educational objectives. The educational objectives of driving safety courses shall include, but not be limited to: promoting respect for and encouraging observance of traffic laws and traffic safety responsibilities of drivers and citizens; reducing traffic violations; reducing traffic-related injuries, deaths, and economic losses; and motivating continuing development of traffic-related competencies.

(B) Driving safety course content guides. A course content guide is a description of the content of the course and the techniques of instruction that will be used to present the course. For courses offered in languages other than English, the course owner shall provide a copy of the student verification of course completion document and/or enrollment contract, student instructional materials, final exam, and evaluation in the proposed language accompanied by a statement from an accredited translator that the materials are the same in both languages. To be approved, each course owner shall submit as part of the application a course content guide that includes the following:

(i) a statement of the course's traffic safety goal and philosophy;

(ii) a statement of policies and administrative provisions related to instructor conduct, standards, and performance;

(iii) a statement of policies and administrative provisions related to student progress, attendance, makeup, and conduct. The policies and administrative provisions shall be used by each school that offers the course and include the following requirements:

(I) progress standards that meet the requirements of subparagraph (F) of this paragraph;

(II) appropriate standards to ascertain the attendance of students. All schools approved to use the course must use the same standards for documenting attendance to include the hours scheduled each day and each hour not attended;

(III) if the student does not complete the entire course, including all makeup lessons, within the timeline specified by the court, no credit for instruction shall be granted;

(IV) any period of absence for any portion of instruction will require that the student complete that portion of instruction. All make-up lessons must be equivalent in length and content to the instruction missed and taught by a licensed instructor; and

(V) conditions for dismissal and conditions for reentry of those students dismissed for violating the conduct policy;

(iv) a statement of policy addressing entrance requirements and special conditions of students, such as the inability to read, language barriers, and other disabilities;

(v) a list of relevant instructional resources, such as textbooks, audio and visual media and other instructional materials, and equipment that will be used in the course; and the furniture deemed necessary to accommodate the students in the course, such as tables, chairs, and other furnishings. The course shall include a minimum of 60 minutes of videos, including audio; however, the videos and other relevant instructional resources cannot be used in excess of 150 minutes of the 300 minutes of instruction. The resources may be included in a single list or may appear at the end of each instructional unit;

(vi) written or printed materials that shall be provided for use by each student as a guide to the course. The division director may make exceptions to this requirement on an individual basis;

(vii) instructional activities to be used to present the material (lecture, films, other media, small-group discussions, workbook activities, written and oral discussion questions, etc.). When small-group discussions are planned, the course content guide shall identify the questions that will be assigned to the groups;

(viii) instructional resources for each unit;

(ix) techniques for evaluating the comprehension level of the students relative to the instructional unit. If oral or written questions are to be used to measure student comprehension levels, they shall be included in the course guide. The evaluative technique may be used throughout the unit or at the end; and

(x) a completed form cross-referencing the instructional units to the topics identified in subparagraph (D) of this paragraph. A form to cross-reference the instructional units to the required topics and topics unique to the course will be provided by the division.

(C) Course and time management. Approved driving safety courses shall be presented in compliance with the following guidelines.

(i) A minimum of 300 minutes of instruction is required.

(ii) The total length of the course shall consist of a minimum of 360 minutes.

(iii) Sixty minutes of time, exclusive of the 300 minutes of instruction, shall be dedicated to break periods or to the topics included in the minimum course content. All break periods shall be provided after instruction has begun and before the comprehensive exam and summation.

(iv) Administrative procedures, such as enrollment, shall not be included in the 300 minutes of the course.

(v) Courses conducted in a single day in a traditional classroom setting shall allow a minimum of 30 minutes for lunch, which is exclusive of the total course length of 360 minutes.

(vi) Courses taught over a period longer than one day shall provide breaks on a schedule equitable to those prescribed for one-day courses. However, all breaks shall be provided after the course

introduction and prior to the last unit of the instructional day or the comprehensive exam and summation, whichever is appropriate.

(vii) The order of topics shall be approved by Texas Education Agency (TEA) as part of the course approval, and for each student, the course shall be taught in the order identified in the approved application.

(viii) Students shall not receive a uniform certificate of course completion unless that student receives a grade of at least 70% on the final examination.

(ix) The TEA shall produce and supply to course providers, at no cost to the course providers, copies of a short video that will provide information about the requirements for completing a six-hour driving safety course and the penalties involved for accepting a uniform certificate of course completion for a course that was not six hours in length. The course provider shall ensure that the video is shown to all students of each class prior to the final examination. Alternative methods for providing the required information to the students may be submitted by the course provider and approved at the discretion of the division director.

(x) In a traditional classroom setting, no more than 50 students per class are permitted in driving safety courses if any student in the class receives a uniform certificate of completion.

(xi) The driving safety instructor or school shall make a material effort to establish the identity of the student.

(D) Minimum course content. A driving safety course shall include, as a minimum, materials adequate to address the following topics and to comply with the minimum time requirements for each unit and the course as a whole.

(i) Course introduction--minimum of ten minutes (instructional objective--to orient students to the class). Instruction shall address the following topics:

(I) purpose and benefits of the course;

(II) course and facilities orientation;

(III) requirements for receiving course credit; and

(IV) student course evaluation procedures.

(ii) The traffic safety problem--minimum of 15 minutes (instructional objectives--to develop an understanding of the nature of the traffic safety problem and to instill in each student a sense of responsibility for its solution). Instruction shall address the following topics:

(I) identification of the overall traffic problem in the United States, Texas, and the locale where the course is being taught;

(II) death, injuries, and economic losses resulting from motor vehicle crashes in Texas; and

(III) five leading causes of motor vehicle crashes in Texas as identified by the Department of Public Safety (DPS).

(iii) Factors influencing driver performance--minimum of 20 minutes (instructional objective--to identify the characteristics and behaviors of drivers and how they affect driving performance). Instruction shall address the following topics:

(I) attitudes, habits, feelings, and emotions;

(II) alcohol and other drugs;

(III) physical condition;

(IV) knowledge of driving laws and procedures; and

(V) understanding the driving task.

(iv) Traffic laws and procedures--minimum of 30 minutes (instructional objectives-- to identify the requirements of, and the rationale for, applicable driving laws and procedures and to influence drivers to comply with the laws on a voluntary basis). Instruction shall address the following topics:

(I) passing;

(II) right-of-way;

(III) turns;

(IV) stops;

(V) speed limits;

(VI) railroad crossings safety;
(-a-) statistics;
(-b-) causes; and
(-c-) evasive actions;

(VII) categories of traffic signs, signals, and highway markings;

(VIII) pedestrians;

(IX) improved shoulders;

(X) intersections;

(XI) occupant restraints;

(XII) anatomical gifts;

(XIII) litter prevention;

(XIV) law enforcement and emergency vehicles (this category will be temporary until the need is substantiated by documentation from the DPS on the number of deaths or injuries involved because of improper procedures used by a citizen when stopped by a law enforcement officer); and

(XV) other laws as applicable (i.e., financial responsibility/compulsory insurance).

(v) Special skills for difficult driving environments--minimum of 20 minutes (instructional objectives--to identify how special conditions affect driver and vehicle performance and identify techniques for management of these conditions). Instruction shall address the following topics:

(I) inclement weather;

(II) traffic congestion;

(III) city, urban, rural, and expressway environments;

(IV) reduced visibility conditions--hills, fog, curves, light conditions (darkness, glare, etc.), etc.; and

(V) roadway conditions.

(vi) Physical forces that influence driver control--minimum of 15 minutes (instructional objective--to identify the physical forces that affect driver control and vehicle performance). Instruction shall address the following topics:

(I) speed control (acceleration, deceleration, etc.);

(II) traction (friction, hydroplaning, stopping distances, centrifugal force, etc.); and

(III) force of impact (momentum, kinetic energy, inertia, etc.).

(vii) Perceptual skills needed for driving--minimum of 20 minutes (instructional objective--to identify the factors of perception and how the factors affect driver performance). Instruction shall address the following topics:

(I) visual interpretations;

(II) hearing;

(III) touch;

(IV) smell;

(V) reaction abilities (simple and complex); and

(VI) judging speed and distance.

(viii) Defensive driving strategies--minimum of 40 minutes (instructional objective-- to identify the concepts of defensive driving and demonstrate how they can be employed by drivers to reduce the likelihood of crashes, deaths, injuries, and economic losses). Instruction shall address the following topics:

(I) trip planning;

(II) evaluating the traffic environment;

(III) anticipating the actions of others;

(IV) decision making;

(V) implementing necessary maneuvers;

(VI) compensating for the mistakes of other drivers;

(VII) avoiding common driving errors; and

(VIII) interaction with other road users (motorcycles, bicycles, trucks, pedestrians, etc.).

(ix) Driving emergencies--minimum of 40 minutes (instructional objective--to identify common driving emergencies and their countermeasures). Instruction shall address the following topics:

(I) collision traps (front, rear, and sides);

(II) off-road recovery, paths of least resistance; and

(III) mechanical malfunctions (tires, brakes, steering, power, lights, etc.).

(x) Occupant restraints and protective equipment--minimum of 15 minutes (instructional objective--to identify the rationale for having and using occupant restraints and protective equipment). Instruction shall address the following topics:

(I) legal aspects;

(II) vehicle control;

(III) crash protection;

(IV) operational principles (active and passive); and

(V) helmets and other protective equipment.

(xi) Alcohol and traffic safety--minimum of 40 minutes (instructional objective--to identify the effects of alcohol on roadway users). Instruction shall address the following topics related to the effects of alcohol on roadway users:

(I) physiological effects;

(II) psychological effects;

(III) legal aspects;

(IV) synergistic effects; and

(V) countermeasures.

(xii) Comprehensive examination and summation--minimum of 15 minutes (this shall be the last unit of instruction).

(xiii) The remaining required 20 minutes of instruction shall be allocated to the topics included in the minimum course content or to additional driving safety topics that satisfy the educational objectives of the course.

(E) Instructor training guides. An instructor training guide contains a description of the plan, training techniques, and curriculum to be used to train instructors to present the concepts of the approved driving safety course described in the applicant's driving safety course content guide. Each course provider shall submit as part of the application an instructor training guide that is bound or hole-punched and placed in a binder and that has a cover and a table of contents. The guide shall include the following:

(i) a statement of the philosophy and instructional goals of the training course;

(ii) a description of the plan to be followed in training instructors. The plan shall include, as a minimum, provisions for the following:

(I) instruction of the trainee in the course curriculum;

(II) training the trainee in the techniques of instruction that will be used in the course;

(III) training the trainee about administrative procedures and course provider policies;

(IV) demonstration of desirable techniques of instruction by the instructor trainer;

(V) a minimum of 15 minutes of instruction of the course curriculum by the trainee under the observation of the instructor trainer as part of the basic training course;

(VI) time to be dedicated to each training lesson; and

(VII) a minimum of 600 minutes of instruction of the course in a regular approved course under the observation of a licensed instructor trainer. The instructor trainee shall provide instruction for two full courses. It is not mandatory that the two courses be taught as two complete courses; however, every instructional unit shall be taught twice; and

(iii) instructional units sufficient to address the provisions identified in clause (ii)(I)- (V) of this subparagraph. The total time of the units shall contain a minimum of 24 instructional hours. Each instructional unit shall include the following:

(I) the subject of the unit;

(II) the instructional objectives of the unit;

(III) time to be dedicated to the unit;

(IV) an outline of major concepts to be presented;

(V) instructional activities to be used to present the material (i.e., lecture, films, other media, small-group discussions, workbook activities, written and oral discussion questions). When small-group discussions are planned, the course guide shall identify the questions that will be assigned to the groups;

(VI) instructional resources for each unit; and

(VII) techniques for evaluating the comprehension level of the students relative to the instructional unit. If oral or written questions are to be used to measure student comprehension levels, they shall be included in the instructor training guide. The evaluative technique may be used throughout the unit or at the end.

(F) Examinations. Each course provider shall submit for approval, as part of the application, tests designed to measure the comprehension level of students at the completion of the driving safety course and the instructor training course. The comprehensive examination for each driving safety course must include at least two questions from the required units set forth in subparagraph (D)(ii)-(xi) of this paragraph for a total of at least 20 questions. The final examination questions shall be of such difficulty that the answer may not easily be determined without completing the actual instruction. Instructors shall not assist students in answering the final examination questions, but may facilitate alternative testing. Instructors may not be certified or students given credit for the driving safety course unless they score 70% or more on the final test. The course content guide shall identify alternative testing techniques to be used for students with reading, hearing, or learning disabilities and policies for retesting students who score less than 70% on the final exam. The applicant may choose not to provide alternative testing techniques; however, students shall be advised whether the course provides alternative testing prior to enrollment in the course. Test questions may be short answer, multiple choice, essay, or a combination of these forms.

(G) Student course evaluation. Each student in a driving safety course shall be given an opportunity to evaluate the course and the instructor on an official evaluation form. A master copy of the evaluation form will be provided to TEA.

(H) State-level evaluation of driving safety courses. Each course provider shall collect adequate student data to enable TEA to evaluate the overall effectiveness of a course in reducing the number of violations and accidents of persons who successfully complete the course. The commissioner of education may determine a level of effectiveness that serves the purposes of Texas Civil Statutes, Article 4413(29c).

(I) Requirements for authorship. The course materials shall be written by a TEA-licensed driver training instructor or other individuals or organizations with recognized experience in writing instructional materials with input from a TEA-licensed driving safety instructor.

(2) Instructor development courses.

(A) Driving safety instructors shall successfully complete 36 clock hours (50 minutes of instruction in a 60-minute period) in the approved instructor development course for the driving safety course to be taught, under the supervision of a driving safety instructor trainer. Supervision is considered to have occurred when the instructor trainer is present and personally provides the 36 clock hours of training for driving safety instructors, excluding those clock hours approved by TEA staff that may be presented by a guest speaker or using films and other media that pertain directly to the concepts being taught.

(B) Instruction records shall be maintained by the course provider and instructor trainer for each instructor trainee and shall be available for inspection by authorized division representatives at any time during the training period and/or for license investigation purposes. The instruction record shall include: the trainee's name, address, drivers license number, and other pertinent data; the name and instructor license number of the person conducting the training; and the dates of instruction, lesson time, and subject taught during each instruction period. Each record shall also include grades or other means of indicating the trainee's aptitude and development. Upon satisfactory completion of the training course, the instructor trainer conducting the training will certify one copy of the instruction record for attachment to the trainee's application for licensing, and one copy will be maintained in a permanent file at the course provider location.

(C) All student instruction records submitted for the TEA-approved instructor development course shall be signed by the course provider. Original documents shall be submitted.

(D) Driving safety instructor development courses may be offered at approved classroom facilities of a licensed school which is approved to offer the driving safety course being taught. A properly licensed instructor trainer shall present the course.

(E) Applicants shall complete 36 hours of training in the driving safety curriculum that shall be taught. Of the 36 hours, 24 shall cover techniques of instruction and in-depth familiarization with materials contained in the driving safety curriculum. The additional 12 hours shall consist of practical teaching with students and shall occur after the first 24 hours have been completed.

(F) The driving safety course provider shall submit dates of instructor development course offerings for the 24-hour training that covers techniques of instruction and in-depth familiarization with the material contained in the driving safety curriculum, locations, class schedules, and scheduled instructor trainers' names and license numbers before the courses are offered. The 12-hour practical-teaching portion of the instructor development course shall be provided at properly licensed schools or classrooms approved to offer the course being provided.

(3) Continuing education courses.

(A) Continuing education requirements include the following.

(i) Each course provider will be responsible for receiving an approval for a minimum of a two-hour continuing education course. Each instructor currently endorsed to teach the course must attend the approved continuing education course conducted by the course provider.

(ii) The request for course approval shall contain the following:

(I) a description of the plan by which the course will be presented;

(II) the subject of each unit;

(III) the instructional objectives of each unit;

(IV) time to be dedicated to each unit;

(V) instructional resources for each unit, including names or titles of presenters and facilitators;

(VI) any information that TEA mandates to ensure quality of the education being provided;

(VII) a plan by which the course provider will monitor and ensure attendance and completion of the course by the instructions within the guidelines set forth in the course; and

(VIII) a course evaluation form to be completed by each instructor attending the course. The course provider must maintain each instructor's completed evaluation form for one year.

(iii) A continuing education course may be approved if TEA determines that:

(I) the course constitutes an organized program of learning that enhances the instructional skills, methods, or knowledge of the driving safety instructor;

(II) the course pertains to subject matters that relate directly to driving safety instruction, instruction techniques, or driving safety-related subjects;

(III) the entire course has been designed, planned, and organized by the course provider. The course provider shall use licensed driving safety instructors to provide instruction or other individuals with recognized experience or expertise in the area of driving safety instruction or driving safety-related subject matters. Evidence of the individuals' experience or expertise may be requested by the division director; and

(IV) the course contains updates or approved revisions to the driving safety course curriculum, policies or procedures, and/or any changes to the course, that are affected by changes in traffic laws or statistical data.

(B) Course providers shall notify the division director of the scheduled dates, times, and locations of all continuing education courses no less than ten calendar days prior to the class being held, unless otherwise excepted by the division director.

(b) Course providers shall submit documentation on behalf of schools applying for approval of additional courses after the original approval has been granted. The documents shall be designated by the division director and include the appropriate fee. Courses shall be approved before soliciting students, advertising, or conducting classes. An approval for an additional course shall not be granted if the school's compliance is in question at the time of application.

(c) If an approved course is discontinued, the division director shall be notified within 72 hours of discontinuance and furnished with the names and addresses of any students who could not complete the course because it was discontinued. If the school does not make arrangements satisfactory to the students and the division director for the completion of the courses, the full amount of all tuition and fees paid by the students are due and refundable. If arrangements are not made satisfactory to the students and the division director, the refunds must be made no later than 30 days after the course was discontinued. Any course discontinued shall be removed from the list of approved courses.

(d) If, upon review and consideration of an original, renewal, or amended application for course approval, the commissioner of education determines that the applicant does not meet the legal requirements, the commissioner shall notify the applicant, setting forth the reasons for denial in writing.

(e) The commissioner of education may revoke approval of any course given to a course owner, provider, or school under any of the following circumstances.

(1) A statement contained in the application for the course approval is found to be untrue.

(2) The school has failed to maintain the faculty, facilities, equipment, or courses of study on the basis of which approval was issued.

(3) The school and/or course provider has been found to be in violation of Texas Civil Statutes, Article 4413(29c), and/or this chapter.

(4) The course has been found to be ineffective in carrying out the purpose of the Texas Driver and Traffic Safety Education Act.

§176.1109. Specialized Driving Safety Courses of Instruction.

(a) This section contains requirements for specialized driving safety courses, instructor development courses, and continuing education. For each course, the following curriculum documents and materials are required to be submitted as part of the application for approval. Except as provided by §176.1110 of this title (relating to Alternative Delivery Methods of Driving Safety Instruction), all course content shall be delivered under the direct observation of a specialized driving safety licensed instructor. Any changes and updates to a course shall be submitted and approved prior to being offered. Approval will be revoked for any course that meets the definition of inactive as defined in §176.1101 of this title (relating to Definitions).

(1) Specialized driving safety courses.

(A) Educational objectives. The educational objectives of specialized driving safety courses shall include, but not be limited to: improving the student's knowledge, compliance with, and attitude toward the use of child passenger safety seat systems and the wearing of seat belt and other occupant restraint systems.

(B) Specialized driving safety course content guides. A course content guide is a description of the content of the course and the techniques of instruction that will be used to present the course. For courses offered in languages other than English, the course owner shall provide a copy of the student verification of course completion document and/or contract, student instructional materials, final exam, and evaluation in the proposed language accompanied by a statement from an accredited translator that the materials are the same in both languages. To be approved, each course owner shall submit as part of the application a course content guide that includes the following:

(i) a statement of the course's goal and philosophy relative to occupant protection;

(ii) a statement of policies and administrative provisions related to instructor conduct, standards, and performance;

(iii) a statement of policies and administrative provisions related to student progress, attendance, makeup, and conduct. The policies and administrative provisions shall be used by each school that offers the course and include the following requirements:

(I) progress standards that meet the requirements of subparagraph (F) of this paragraph;

(II) appropriate standards to ascertain the attendance of students. All schools approved to use the course must use the same standards for documenting attendance to include the hours scheduled each day and each hour not attended;

(III) appropriate criteria to determine course completion. If the student does not complete the entire course, including all makeup lessons, within the timeline specified by the court, no credit for instruction shall be granted;

(IV) provisions for the completion of make-up work. Any period of absence for any portion of instruction will require that the student complete that portion of instruction. All make-up

lessons must be equivalent in length and content to the instruction missed and taught by a licensed instructor; and

(V) conditions for dismissal and conditions for reentry of those students dismissed for violating the conduct policy;

(iv) a statement of policy addressing entrance requirements and special conditions of students, such as the inability to read, language barriers, and other disabilities;

(v) a list of relevant instructional resources, such as textbooks, audio and visual media and other instructional materials, and equipment that will be used in the course; and the furniture deemed necessary to accommodate the students in the course, such as tables, chairs, and other furnishings. The course shall include a minimum of 60 minutes of videos, including audio; however, the videos and other relevant instructional resources cannot be used in excess of 150 minutes of the 300 minutes of instruction. The resources may be included in a single list or may appear at the end of each instructional unit;

(vi) written or printed materials that shall be provided for use by each student as a guide to the course. The division director may make exceptions to this requirement on an individual basis;

(vii) instructional activities to be used to present the material (lecture, films, other media, small-group discussions, workbook activities, written and oral discussion questions, etc.). When small-group discussions are planned, the course content guide shall identify the questions that will be assigned to the groups;

(viii) instructional resources for each unit;

(ix) techniques for evaluating the comprehension level of the students relative to the instructional unit. If oral or written questions are to be used to measure student comprehension levels, they shall be included in the course guide. The evaluative technique may be used throughout the unit or at the end; and

(x) a completed form cross-referencing the instructional units to the topics identified in subparagraph (D) of this paragraph. A form to cross-reference the instructional units to the required topics and topics unique to the course will be provided by the division.

(C) Course and time management. Approved specialized driving safety courses shall be presented in compliance with the following guidelines.

(i) A minimum of 300 minutes of instruction is required of which at least 200 minutes shall address the use of child passenger safety seat systems and the wearing of seat belt and other occupant restraint systems.

(ii) The total length of the course shall consist of a minimum of 360 minutes.

(iii) Sixty minutes of time, exclusive of the 300 minutes of instruction, shall be dedicated to break periods or to the topics included in the minimum course content. All break periods shall be provided after instruction has begun and before the comprehensive examination and summation.

(iv) Administrative procedures, such as enrollment, shall not be included in the 300 minutes of the course.

(v) Courses conducted in a single day in a traditional classroom setting shall allow a minimum of 30 minutes for lunch, which is exclusive of the total course length of 360 minutes.

(vi) Courses taught over a period longer than one day shall provide breaks on a schedule equitable to those prescribed for one-day courses. However, all breaks shall be provided after the course introduction and prior to the last unit of the instructional day or the comprehensive examination and summation, whichever is appropriate.

(vii) The order of topics shall be approved by Texas Education Agency (TEA) as part of the course approval, and for each student, the course shall be taught in the order identified in the approved application.

(viii) Students shall not receive a uniform certificate of course completion unless that student receives a grade of at least 70% on the final examination.

(ix) No more than 50 students per class are permitted.

(x) The specialized driving safety instructor or school shall make a material effort to establish the identity of the student.

(D) Minimum course content. A specialized driving safety course shall include, as a minimum, materials adequate to address the following topics and to comply with the minimum time requirements for the course as a whole.

(i) Course introduction--minimum of ten minutes (instructional objective--to orient students to the class). Instruction shall address the following topics:

(I) purpose and benefits of the course;

(II) course and facilities orientation;

(III) requirements for receiving course credit; and

(IV) student course evaluation procedures.

(ii) The occupant protection problem--minimum of 15 minutes (instructional objectives--to develop an understanding of Texas occupant protection laws and the national and state goals regarding occupant protection). Instruction shall address the following topics:

(I) identification of Texas Occupant Protection Laws;

(II) deaths, injuries and economic losses related to improper use of occupant restraint systems; and

(III) national and state goals regarding occupant protection.

(iii) Factors influencing driver performance--(instructional objective--to identify the characteristics and behaviors of drivers and how they affect driving performance). Instruction shall address the following topics:

(I) attitudes, habits, feelings, and emotions;

(II) alcohol and other drugs;

(III) physical condition;

(IV) knowledge of driving laws and procedures; and

(V) understanding the driving task.

(iv) Physical forces that influence driver control--(instructional objective--to identify the physical forces that affect driver control and vehicle performance). Instruction shall address the following topics:

(I) speed control (acceleration, deceleration, etc.);

(II) traction (friction, hydroplaning, stopping distances, centrifugal force, etc.); and

(III) force of impact (momentum, kinetic energy, inertia, etc.).

(v) Perceptual skills needed for driving--(instructional objective--to identify the factors of perception and how the factors affect driver performance). Instruction shall address the following topics:

(I) visual interpretations;

(II) hearing;

(III) touch;

(IV) smell;

(V) reaction abilities (simple and complex); and

(VI) judging speed and distance.

(vi) Occupant protection equipment--minimum of 25 minutes (instructional objective--to identify the improvements and technological advances in automotive design and construction). Instruction shall address the following topics:

(I) anti-lock brakes;

(II) traction control devices;

(III) suspension control devices;

(IV) electronic stability/active handling systems;

(V) crumple zones;

(VI) door latch improvements;

(VII) tempered or safety glass;

(VIII) headlights; and

(IX) visibility enhancements.

(vii) Occupant restraint systems--minimum of 40 minutes (instructional objective--to identify the rationale for having and using occupant restraints and protective equipment). Instruction shall address the following topics:

(I) safety belts, airbags, and other protective equipment;

(II) proper usage and necessary precautions;

(III) vehicle control and driver stability;

(IV) crash dynamics and protection; and

(V) operational principles (active versus passive).

(viii) Child passenger safety--minimum of 120 minutes (instructional objective--to understand the child passenger safety law in Texas; the importance of child safety seats; and the risks to children that are unrestrained or not properly restrained). Instruction shall address the following topics:

(I) misconceptions or mistaken ideas regarding child passenger safety;

(II) purpose of child safety seats;

(III) how to secure the child properly and factors to consider;

(IV) child safety seat types and parts;

(V) precautions regarding child safety seats;

(VI) correct installation of a child safety restraint system; and

(VII) tips regarding child safety restraint systems.

(ix) Comprehensive examination and summation--minimum of 15 minutes (this shall be the last unit of instruction).

(x) The remaining required 20 minutes of instruction shall be allocated to the topics included in the minimum course content or to additional occupant protection topics that satisfy the educational objectives of the course.

(E) Instructor training guides. An instructor training guide contains a description of the plan, training techniques, and curriculum to be used to train instructors to present the concepts of the approved specialized driving safety course described in the applicant's specialized driving safety course content guide. Each course provider shall submit as part of the application an instructor training guide that is bound or hole-punched and placed in a binder and that has a cover and a table of contents. The guide shall include the following:

(i) a statement of the philosophy and instructional goals of the training course;

(ii) a description of the plan to be followed in training instructors. The plan shall include, as a minimum, provisions for the following:

(I) instruction of the trainee in the course curriculum;

(II) training the trainee in the techniques of instruction that will be used in the course;

(III) training the trainee about administrative procedures and course provider policies;

(IV) demonstration of desirable techniques of instruction by the instructor trainer;

(V) a minimum of 15 minutes of instruction of the course curriculum by the trainee under the observation of the instructor trainer as part of the basic training course;

(VI) time to be dedicated to each training lesson; and

(VII) a minimum of 600 minutes of instruction of the course in a regular approved course under the observation of a licensed specialized driving safety instructor trainer. The instructor trainee shall provide instruction for two full courses. It is not mandatory that the two courses be taught as two complete courses; however, every instructional unit shall be taught twice; and

(iii) instructional units sufficient to address the provisions identified in clause (ii)(I)- (V) of this subparagraph. The total time of the units shall contain a minimum of 24 instructional hours. Each instructional unit shall include the following:

(I) the subject of the unit;

(II) the instructional objectives of the unit;

(III) time to be dedicated to the unit;

(IV) an outline of major concepts to be presented;

(V) instructional activities to be used to present the material (i.e., lecture, films, other media, small-group discussions, workbook activities, written and oral discussion questions). When

small-group discussions are planned, the course guide shall identify the questions that will be assigned to the groups;

(VI) instructional resources for each unit; and

(VII) techniques for evaluating the comprehension level of the students relative to the instructional unit. If oral or written questions are to be used to measure student comprehension levels, they shall be included in the instructor training guide. The evaluative technique may be used throughout the unit or at the end.

(F) Examinations. Each course provider shall submit for approval, as part of the application, tests designed to measure the comprehension level of students at the completion of the specialized driving safety course and the instructor training course. The comprehensive examination for each specialized driving safety course must include at least two questions from each unit, excluding the course introduction and comprehensive examination units. The final examination questions shall be of such difficulty that the answer may not easily be determined without completing the actual instruction. Instructors shall not assist students in answering the final examination questions unless alternative testing is required. Instructors may not be certified or students given credit for the specialized driving safety course unless they score 70% or more on the final test. The course content guide shall identify alternative testing techniques to be used for students with reading, hearing, or learning disabilities and policies for retesting students who score less than 70% on the final exam. The applicant may choose not to provide alternative testing techniques; however, students shall be advised whether the course provides alternative testing prior to enrollment in the course. Test questions may be short answer, multiple choice, essay, or a combination of these forms.

(G) Student course evaluation. Each student in a specialized driving safety course shall be given an opportunity to evaluate the course and the instructor on an official evaluation form. A master copy of the evaluation form will be provided to TEA.

(H) State-level evaluation of specialized driving safety courses. Each course provider shall collect adequate student data to enable TEA to evaluate the overall effectiveness of a course in reducing the number of violations and accidents of persons who successfully complete the course. The commissioner of education may determine a level of effectiveness that serves the purposes of Texas Civil Statutes, Article 4413(29c).

(I) Requirements for authorship. The course shall be authored by a TEA-licensed driver training instructor who possesses a current National Highway Traffic Safety Association Child Passenger Safety technician or instructor certificate.

(2) Specialized driving safety instructor development courses.

(A) Specialized driving safety instructors shall successfully complete 36 clock hours (50 minutes of instruction in a 60-minute period) in the approved instructor development course for the specialized driving safety course to be taught, under the supervision of a specialized driving safety instructor trainer. Supervision is considered to have occurred when the instructor trainer is present and personally provides the 36 clock hours of training for the instructors, excluding those clock hours approved by TEA staff that may be presented by a guest speaker or using films and other media that pertain directly to the concepts being taught.

(B) Instruction records shall be maintained by the course provider and instructor trainer for each instructor trainee and shall be available for inspection by authorized division representatives at any time during the training period and/or for license investigation purposes. The instruction record shall include: the trainee's name, address, drivers license number, and other pertinent data; the name and instructor license number of the person conducting the training; and the dates of instruction, lesson time, and subject taught during each instruction period. Each record shall also include grades or other means of indicating the trainee's aptitude and development. Upon satisfactory completion of the training course the instructor trainer conducting the training will certify one copy of the instruction record for attachment to the trainee's application for licensing and one copy will be maintained in a permanent file at the course provider location.

(C) All student instruction records submitted for the TEA-approved specialized driving safety instructor development course shall be signed by the course provider. Original documents shall be submitted.

(D) Specialized driving safety instructor development courses may be offered at approved classroom facilities of a licensed school which is approved to offer the specialized course being taught. A properly licensed instructor trainer shall present the course.

(E) Applicants shall complete 36 hours of training in the specialized driving safety curriculum that shall be taught. Of the 36 hours, 24 shall cover techniques of instruction and in-depth familiarization with materials contained in the specialized driving safety curriculum. The additional 12 hours shall consist of practical teaching with students and shall occur after the first 24 hours have been completed.

(F) The course provider shall submit dates of instructor development course offerings for the 24-hour training that covers techniques of instruction and in-depth familiarization with the material contained in the specialized driving safety curriculum, locations, class schedules, and scheduled instructor trainers' names and license numbers before the courses are offered. The 12-hour practical-teaching portion of the instructor development course shall be provided at properly licensed schools or classrooms approved to offer the course being provided.

(3) Continuing education courses.

(A) Continuing education requirements include the following.

(i) Each course provider will be responsible for receiving an approval for a minimum of a two-hour continuing education course. Each instructor currently endorsed to teach the course must attend the approved continuing education course conducted by the course provider.

(ii) The request for course approval shall contain the following:

(I) a description of the plan by which the course will be presented;

(II) the subject of each unit;

(III) the instructional objectives of each unit;

(IV) time to be dedicated to each unit;

(V) instructional resources for each unit, including names or titles of presenters and facilitators;

(VI) any information that TEA mandates to ensure quality of the education being provided;

(VII) a plan by which the course provider will monitor and ensure attendance and completion of the course by the instructions within the guidelines set forth in the course; and

(VIII) a course evaluation form to be completed by each instructor attending the course. The course provider must maintain each instructor's completed evaluation form for one year.

(iii) A continuing education course may be approved if TEA determines that:

(I) the course constitutes an organized program of learning that enhances the instructional skills, methods, or knowledge of the specialized driving safety instructor;

(II) the course pertains to subject matters that relate directly to driving safety or specialized driving safety instruction, instruction techniques, or driving safety-related subjects;

(III) the entire course has been designed, planned, and organized by the course provider. The course provider shall use licensed driving safety or specialized driving safety instructors to provide instruction or other individuals with recognized experience or expertise in the area of driving safety or specialized driving safety instruction or driving safety- related subject matters. Evidence of the individuals' experience or expertise may be requested by the division director; and

(IV) the course contains updates or approved revisions to the specialized driving safety course curriculum, policies or procedures, and/or any changes to the course, that are affected by changes in traffic laws or statistical data.

(B) Course providers shall notify the division director of the scheduled dates, times, and locations of all continuing education courses no less than ten calendar days prior to the class being held, unless otherwise excepted by the division director.

(b) Course providers shall submit documentation on behalf of schools applying for approval of additional courses after the original approval has been granted. The documents shall be designated by the division director and include the appropriate fee. Courses shall be approved before soliciting students, advertising, or conducting classes. An approval for an additional course shall not be granted if the school's compliance is in question at the time of application.

(c) If an approved course is discontinued, the division director shall be notified within 72 hours of discontinuance and furnished with the names and addresses of any students who could not complete the course because it was discontinued. If the school does not make arrangements satisfactory to the students and the division director for the completion of the courses, the full amount of all tuition and fees paid by the students are due and refundable. If arrangements are not made satisfactory to the students and the division director, the refunds must be made no later than 30 days after the course was discontinued. Any course discontinued shall be removed from the list of approved courses.

(d) If, upon review and consideration of an original, renewal, or amended application for course approval, the commissioner of education determines that the applicant does not meet the legal requirements, the commissioner shall notify the applicant, setting forth the reasons for denial in writing.

(e) The commissioner of education may revoke approval of any course given to a course owner, provider, or school under any of the following circumstances.

(1) A statement contained in the application for the course approval is found to be untrue.

(2) The school has failed to maintain the faculty, facilities, equipment, or courses of study on the basis of which approval was issued.

(3) The school and/or course provider has been found to be in violation of Texas Civil Statutes, Article 4413(29c), and/or this chapter.

(4) The course has been found to be ineffective in carrying out the purpose of the Texas Driver and Traffic Safety Education Act.

§176.1110. Alternative Delivery Methods of Driving Safety Instruction.

(a) Driving safety courses and specialized driving safety courses delivered by an alternative delivery method (ADM).

(1) The commissioner of education may approve an ADM for an approved driving safety course or specialized driving safety course and waive any rules to accomplish this approval if the ADM includes testing and security measures that are at least as secure as the measures available in a usual classroom.

(A) As provided in this paragraph, the educational objectives, minimum course content, applicable areas of course and time management, examination, and student course evaluation requirements are met. The following requirements shall also be met:

(i) the ADM shall follow the same topic order and course content sequence as the approved traditional course. A predominantly text-based ADM will not be considered. The minimum time requirements for each unit and the course as a whole described in §176.1108(a)(1)(C) and (D) of this title (relating to Driving Safety Courses of Instruction) and §176.1109(a)(1)(C) and (D) of this title (relating to Specialized Driving Safety Courses of Instruction) shall be met;

(ii) advertisement of goods and services shall not appear during the actual instructional times of the course;

(iii) the enrollment contract shall identify the type of any third-party data that will be accessed prior to or during validation of the student's identity. The course owner shall obtain the student's approval to access the third-party data;

(iv) the enrollment contract shall identify the hardware and software requirements to successfully complete the course. The course owner shall obtain the student's acknowledgement that the student understands the computer requirements;

(v) the enrollment contract shall specify that interruptions in course service may occur over which the course owner has no control. The course owner shall obtain the student's acknowledgement that the student understands that service interruptions may occur;

(vi) the enrollment contract shall include a statement that notifies the student of the course owners security and privacy policy regarding student data including personal and financial data. The course owner shall obtain the student's acknowledgement that the student understands the privacy policy;

(vii) the student shall be able to browse or review previously completed material;

(viii) the student shall be able to navigate logically and systematically through the course;

(ix) technical support personnel shall be knowledgeable of course completion requirements and technical issues;

(x) the written material for the ADM shall be edited for grammar, punctuation, and spelling and be of such quality that does not detract from the subject matter;

(xi) multi-media requirements shall be met, as follows:

(I) all videos shall include a validation process that verifies the student spent the required time viewing and comprehending the video material;

(II) videos may utilize streaming video, flash, or comparable technologies;

(III) the video image shall be clear and provide quality that does not detract from the subject matter;

(IV) the audio shall be clear, provide quality that does not detract from the message, and when applicable be in sync with the video;

(V) the video shall have controls available to the user for pausing and restarting;

(VI) videos shall display with the relevant text; and

(VII) permanently moving animation that is not related to the topic being presented shall be prohibited;

(xii) the course materials are written by a Texas Education Agency (TEA)-licensed driver training instructor or other individuals or organizations with recognized experience in writing instructional materials with input from a TEA-licensed driving safety instructor;

(xiii) with the exception of circumstances beyond the control of the course owner, the student has adequate access (on the average, within two minutes) to both a licensed instructor and telephonic technical assistance (help desk) throughout the course such that the flow of instructional information is not delayed. The course owner, upon request, shall be able to provide response time documentation to show that this requirement is being met;

(xiv) course owners shall develop and maintain a course infrastructure that facilitates effective validation and positively contributes to the student learning experience;

(xv) the equipment and course materials are available only through and at the approved driving safety school or classroom or at a storefront location specifically approved by TEA for that purpose; and

(xvi) course owners shall receive approval from TEA prior to implementing changes to the course or changes that significantly impact the delivery model, physical architecture, logical architecture, or other changes that will impact the periodic audit process or alter the understanding of the provider infrastructure, business model, or operations.

(B) Course owners shall develop security policies and procedures that address all elements of the course owner security program and submit this information to TEA by July 1, 2002. After July 1, 2002, all applicants for ADM approval shall submit this information as part of the ADM application package. The elements of the security program include:

(i) risk management plan;

(ii) user authentication and authorization procedures and technologies;

(iii) access control procedures and technologies;

(iv) auditing capability;

(v) systems availability;

(vi) course and systems integrity;

(vii) confidentiality and privacy;

(viii) business continuity and disaster recovery;

(ix) systems monitoring and incident response; and

(x) change control.

(C) Course owners shall develop and maintain a means to reasonably authenticate users on a periodic basis, upon entering, during, and exiting the driving safety or specialized driving safety course. This may be accomplished by a combination of the following:

(i) username and password authentication;

(ii) third-party database authentication including TEA-provided student validated questions;

(iii) certification authentication through the use of digital certificates;

(iv) biometric authentication; or

(v) other means that are as secure as the methods described in clauses (i)-(iv) of this subparagraph that are based on emerging technologies and allow for reasonable assurance that the students are authenticated.

(D) The ADM shall incorporate a personal validation process that verifies student identity and participation throughout the course.

(i) Course owners using third-party authentication shall incorporate the following minimum requirements into the process:

(I) a minimum of 20 personal validation questions shall be asked throughout the course with at least one question in every major unit or section, not including the final examination;

(II) the personal third-party validation questions shall be discrete items of information drawn from third-party databases of at least two sources and verified for accuracy;

(III) the test bank for the third-party validated questions shall be at least 20 questions of which 14 must be asked during the course. The 14 third- party validated questions asked during the course shall not be based solely on drivers license information. The failure criteria shall not allow a student to pass if the student is only able to correctly answer questions drawn from only one third-party database;

(IV) the course owner shall ask during the course a minimum of six TEA- provided personal validation questions from a test bank of 20 TEA- provided questions in addition to the questions asked under subclause

(III) of this clause; and

(V) the personal validation questions must be randomly generated in respect to time and order and the same question shall not be asked more than twice. Questions that appear twice shall be as a result of random generation and not by design.

(ii) A student for whom no third-party database information is available (for example, a student with an out-of-state drivers license) may be issued a uniform certificate of completion upon presentation to the course owner of a notarized copy of the student's drivers license or equivalent type of photo identification and a statement from the student certifying that the individual attended and successfully completed the six-hour driving safety or specialized driving safety course for which the certificate is being issued and for which there exists a corresponding footprint.

(E) The ADM shall incorporate a course validation process that verifies student participation and comprehension of course material, including the following:

(i) the ADM includes built-in timers to ensure that six hours have been attended and completed by the student; and

(ii) testing of student participation throughout the course to ensure that the student receives the minimum course content and time management requirements for instruction, as follows:

(I) at least 40 course validation questions shall be asked throughout the course. Course validation questions shall be asked in every major unit or section throughout the course, not including the final examination;

(II) at least 50% of the course validation questions asked shall be educational content questions drawn from statistics, facts, and techniques presented as part of the course material;

(III) at least one course validation question shall be asked during or following each multimedia clip to show that the student participated in and comprehended the multimedia clip;

(IV) the test bank for course validation questions shall be at least 80 questions, of which at least 50% shall be educational questions drawn from the course material;

(V) all course validation questions shall be generated in random order within each major unit or section and the same questions shall not be asked more than twice. Questions that appear twice shall be as a result of random generation and not by design; and

(VI) course validation questions shall be short answer, multiple choice, essay, or a combination of these forms, and of such difficulty that the answer may not be easily determined without having participated in the actual instruction.

(F) The ADM shall incorporate a final examination that measures student knowledge and comprehension of course material by an examination consisting of at least two questions per required unit set forth in §176.1108(a)(1)(D)(ii)-(xi) of this title (relating to Driving Safety Courses of Instruction) for a total of at least 20 questions. The final examination questions shall be drawn from a bank of at least 80 questions. Test questions shall be generated in random order, and no test question shall be repeated within the 20- question final examination. Test questions shall be of such difficulty that the answer may not be easily determined without having completed the actual instruction. A student must correctly answer 70% or more of the questions on the final examination. Testing should be administered by a TEA-licensed instructor, and if the ADM does not involve the student being in physical proximity to the instructor, the testing may be administered using technology.

(G) The ADM failure criteria shall be consistent with the risk management plan and provide reasonable assurance of user identity and that the student is comprehending and participating with the course material.

(H) The ADM provides for the creation and maintenance of records documenting student enrollment, the steps taken to verify each student's identity, the participation of each student, and the testing of each student's knowledge. The following requirements shall be met:

(i) TEA shall be informed of proposed changes to course and student validation records (i.e., footprints), and no changes can be implemented without written approval signed by the division director; and

(ii) the course owner shall maintain a complete student course data file (footprint) to demonstrate student activity. Course owners shall ensure that at least the following information is collected and retained for creating the student footprint:

(I) student's name and drivers license number;

(II) dates and times of student activity (log-on and log-off times);

(III) dates, times, and results of personal-validation and course-content questions. If a "key" or "code" is used to identify the question and answer, rather than recording the entire question and answer, then the "key" or "code" must be furnished to TEA;

(IV) verification of the amount of time the student spent in each unit;

(V) verification of the amount of total time the student spent in the course;

(VI) an identifier of the reason a person was suspended or failed the course;

(VII) dates, times, and responses for each question on the final examination. If a "key" or "code" is used to identify the question and answer, rather than recording the entire question and answer, the "key" or "code" must be furnished to TEA; and

(VIII) name or identity number of staff member entering comments, retesting, or revalidating student.

(I) The ADM provides for systems security, as follows:

(i) course owners shall develop and maintain a technology infrastructure that facilitates sound security and positively contributes to the student learning experience;

(ii) course owners shall develop and maintain an appropriate solution to ensure the integrity of information, especially financial and personal information, in transit and at rest;

(iii) course owners shall develop and maintain a systems back-up and disaster recovery capability;

(iv) course owners shall assure that course data are readily, securely, and reliably available by electronic or printed means to TEA and TEA authorized recipients on a demand basis. If the data are not stored in Texas, then back-ups of the data shall be stored in Texas and any information that changes must be updated at least once every 24 hours;

(v) course owners shall develop and maintain a means to meet state audit, compliance, and verification requirements; and

(vi) course owners shall develop and maintain a means to meet the state-conducted audit requirements. In lieu of meeting the state-conducted audit requirements, course owners shall annually submit a SysTrust audit encompassing all SysTrust principles. The TEA retains the right to request and review work papers and other supporting documentation related to the audit reports and the reviews undertaken. If the technical support, application server host, or data storage facilities are located outside the State of Texas, the course owner shall submit a SysTrust audit encompassing all SysTrust principles annually to meet the audit requirements in lieu of a state-conducted audit.

(J) Course owners shall locate technical support, application server host, and data storage facilities within the United States.

(K) For an ADM approved before the effective date of this section, the ADM must demonstrate compliance with this section prior to January 31, 2002, unless otherwise stated.

(2) Course owners that meet the requirements outlined in paragraph (1)(A)-(J) of this subsection shall receive ADM approval.

(b) ADM audits.

(1) ADMs shall be audited and the results shall become a part of the course provider file maintained by the division.

(2) The TEA shall provide a copy of the TEA audit program and corresponding resource information.

(3) ADM course owners shall address all exceptions noted during the audit. Failure to do so shall result in adverse action up to and including revocation of ADM approval.

(c) ADM course owners, upon termination of the course approval and/or course provider license, shall deliver any missing student data to TEA within seven calendar days of termination.

§176.1111. Student Enrollment Contracts.

(a) No person shall be instructed, either theoretically or practically, or both, to operate or drive motor vehicles until after a written legal contract has been executed. A contract shall be executed prior to the school's receipt of any money.

(b) All driving safety and specialized driving safety contracts shall contain at least the following:

(1) the student's legal name and drivers license number;

(2) the student's address, including city, state, and zip code;

(3) the student's telephone number;

(4) the student's date of birth;

(5) the full legal name and license number of the driving safety school or approval number of the classroom location, as applicable;

(6) the specific name of the approved driving safety course to be taught;

(7) a statement indicating the agreed total contract charges that itemizes all tuition, fees, and other charges;

(8) the terms of payment;

(9) the number of classroom lessons;

(10) the number of behind-the-wheel lessons, if applicable;

(11) the length of each lesson or course;

(12) the course provider's cancellation and refund policy;

(13) a statement indicating the specific location, date, and time that instruction is scheduled to begin and the date classroom instruction is scheduled to end;

(14) the signature and license number of the instructor;

(15) the signature of the student or the approved equivalent for a driving safety course delivered by an alternative delivery method; and

(16) a statement that notifies the student of the course owners security and privacy policy regarding student data, including personal and financial data.

(c) In addition, all driving safety school contracts shall contain statements substantially as follows.

(1) I have been furnished a copy of the school tuition schedule; cancellation and refund policy; and school regulations pertaining to absence, grading policy, progress, and rules of operation and conduct.

(2) The school is prohibited from issuing a uniform certificate of course completion if the student has not met all of the requirements for course completion, and the student should not accept a uniform certificate of course completion under such circumstances.

(3) This agreement constitutes the entire contract between the school and the student, and verbal assurances or promises not contained herein shall not bind the school or the student.

(4) I further realize that any grievances not resolved by the school may be forwarded to the course provider (identify name and address) and to Driver Training, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. The current telephone number of the division shall also be provided.

(d) Driving safety or specialized driving safety may use a group contract that includes more than one student's name.

(e) A copy of each contract shall be a part of the student files maintained by the driving safety school and/or course provider.

(f) Course providers shall submit proposed or amended contracts to the division director, and those documents shall be approved prior to use by schools.

(g) Contracts for group instruction must meet all legal requirements.

(h) Contracts executed in an electronic format shall be considered to contain original signatures for purposes of this section.

§176.1112. Cancellation and Refund Policy.

(a) Course provider cancellation shall be in accordance with Texas Civil Statutes, Article 4413(29c). Driving safety schools shall use the cancellation policy approved for the course provider.

(b) Refunds for all driving safety schools or course providers shall be completed within 30 days after the effective date of termination. Proof of completion of refund shall be the refund document or copies of both sides of the canceled check and shall be on file within 120 days of the effective date of termination. All refund checks shall identify the student to whom the refund is assigned. In those cases where multiple refunds are made using one check, the check shall identify each individual student and the amount to be credited to that student's account.

(c) In reference to Texas Civil Statutes, Article 4413(29c), §13(h)(4), a school or course provider is considered to have made a good faith effort to consummate a refund if the student file contains evidence of the following attempts:

(1) certified mail to the student's last known address; and

(2) certified mail to the student's permanent address.

(d) If it is determined that the school does not routinely pay refunds within the time required by Texas Civil Statutes, Article 4413(29c), §13(h)(2)(E), the school shall submit a report of an audit which includes any interest due as set forth in Texas Civil Statutes, Article 4413(29c), §13(h)(4), conducted by an independent certified public accountant or public accountant who is properly registered with the appropriate state board of accountancy, of the refunds due former students. The audit opinion letter shall be accompanied by a schedule of student refunds due which shall disclose the following information for the previous two years from the date of request by Texas Education Agency (TEA) for each student:

(1) name, address, and either social security number or drivers license number;

(2) last date of attendance or date of termination; and

(3) amount of refund with principal and interest separately stated, date and check number of payment if payment has been made, and any balance due.

(e) Any funds received from, or on behalf of, a student shall be recorded in a format that is readily accessible to representatives of TEA and acceptable to the division director.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107699
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
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For further information, please call: (512) 463-9701

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19 TAC §§176.1109 - 176.1116

The repeals are adopted under Texas Civil Statutes, Article 4413(29c), §6, as amended by Senate Bill 777, 76th Texas Legislature, 1999, which authorizes the commissioner of education to adopt rules necessary to implement the Texas Driver and Traffic Safety Education Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Manager, Policy Planning
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For further information, please call: (512) 463-9701

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TITLE 22. EXAMINING BOARDS

PART 5. STATE BOARD OF DENTAL EXAMINERS

CHAPTER 101. DENTAL LICENSURE

22 TAC §101.2

The State Board of Dental Examiners adopts amendments to §101.2, Staggered Dental Registrations without changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8302).

The Texas State Board of Dental Examiners has developed a staggered license registration system comprised of initial dental license registration periods followed by annual registrations (i.e., renewals). The amended §101.2 is adopted to increase the annual license renewal fee for dentists to $93.00 from $71.00. The increase in fee is for the purpose of generating additional revenue to cover increased appropriations.

No comments were received regarding adoption of the proposal.

The amended rule is adopted under Texas Government Code §2001.021 et. seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry and with §254.004 which requires the agency to establish fees sufficient to cover operating costs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107666
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
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For further information, please call: (512) 463-6400

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22 TAC §101.3

The State Board of Dental Examiners adopts new §101.3, Temporary License by Credentials, Dentists without changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8303).

New §101.3 is adopted to implement the requirements of House Bill 3507 enacted by the 77th Legislature. House Bill 3507, Article 5 provides that a dentist upon payment of a fee set by the Board, who satisfies all the requirements of §256.101 of the Texas Occupations Code (Issuance of License to Certain Out-of-State Applicants) except the practice requirement and who satisfies the requirements of §256.1015, shall be granted a temporary license to practice dentistry. The new rule, in part, address the requirements of House Bill 3507, Article 5, by eliminating the requirement that a dentist practice dentistry for at least the five years preceding the date of application if the dentist is employed by a nonprofit corporation that accepts Medicaid reimbursement.

No comments were received regarding adoption of the proposal.

The new rule is adopted under Texas Government Code §2001.021 et. seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry and with §256.101(a)(10) which provides the Board with authority to establish rules governing licensure by credentials and with the provisions of House Bill 3507, Article 5, 77th Legislature, 2001.

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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Jeffry R. Hill
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22 TAC §101.7

The State Board of Dental Examiners adopts amendments to §101.7, Licensure by Credentials, Dentists without changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8304).

Section 101.7(11) is amended to eliminate reference to "Credentials Review Committee of the Board" and replaced with the term "Board." This allows staff of the Board to review and make recommendations directly to the Board concerning applications for licensure by credentials and eliminates review of all applications by the Committee, thus expediting the process for processing applications for licensure by credentials. Paragraphs (12) - (15) were amended to clarify meaning and did not affect the rule substantively. Prior paragraph (15) requiring that applications be delivered to the office of the Board was eliminated because this requirement is found in paragraph (14) and is addressed more clearly.

No comments were received regarding adoption of the proposal.

The amended rule is adopted under Texas Government Code §2001.021 et. seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry and §256.101(a)(10) which provides the Board with authority to establish rules concerning licensure by credentials.

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 §101.9

The State Board of Dental Examiners adopts new §101.9, Dental Profiles without changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8305).

The new §101.9 is adopted to implement the requirements of Senate Bill 187 enacted by the 77th Legislature requiring the agency to collect data for use in dental profiles that are to be made available to the public.

No comments were received regarding adoption of the proposal.

The new rule is adopted under Texas Government Code §2001.021 et. seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry and Senate Bill 187, §11, 77th Legislature, 2001, which requires the Board to adopt rules to establish a profile system.

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 102. FEES

22 TAC §102.1

The State Board of Dental Examiners adopts amendments to §102.1, Fee Schedule without changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8306).

The amendments to §102.1 are adopted to implement increases in certain fees to cover additional appropriations. Specifically subsection (a)(2) increasing annual registration of dentists from $88.00 to $93.00; subsection (b)(2) increasing annual registration of hygienists from $52.00 to $57.00; subsection (a)(9) providing a fee of $500.00 for the application of temporary licensure by credentials for a dentist; and subsection (b)(8) providing a fee of $100.00 for the application of temporary licensure by credentials for a hygienists; and subsection (h)(1) and (2) providing fees of $50.00 for application of certificates to apply pit and fissure sealants by dental assistants and a fee of $50.00 for annual renewal of certificates to apply pit and fissure sealants.

No comments were received regarding adoption of the proposal.

The amended rule is adopted under Texas Government Code §2001.021 et. seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry and §254.004 which requires the agency

to establish fees sufficient to cover operating costs and to comply with provisions of House Bill 3507 and Senate Bill 187, 77th Legislature, 2001.

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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Jeffry R. Hill
Executive Director
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For further information, please call: (512) 463-6400

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CHAPTER 103. DENTAL HYGIENE LICENSURE

22 TAC §103.2

The State Board of Dental Examiners adopts amendments to §103.2, Licensure by Credentials, Dental Hygienists without changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8307).

The amendments to §103.2 are adopted to implement the requirements of Senate Bill 533 enacted by the 77th Legislature. Paragraph (3)(A) was amended to address the requirements of Senate Bill 533 to change the requirement of practicing dental hygiene for a minimum of five years immediately preceding application to the Board to three years. Paragraph (11) is amended to eliminate reference to "Credentials Review Committee of the Board" and replaced with the term "Board." This allows staff of the Board to review and make recommendations directly to the Board concerning applications for licensure by credentials and eliminates review of all applications by the Committee, thus expediting the process for processing applications for licensure by credentials. Paragraphs (12) - (15) were amended to clarify meaning and did not affect the rule substantively. Prior paragraph (15) requiring that applications be delivered to the office of the Board was eliminated because this requirement is found in paragraph (14) and is addressed more clearly.

No comments were received regarding adoption of the proposal.

The amended rule is adopted under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry, §256.101(a)(10) which provides the Board with authority to establish rules concerning licensure by credentials and with Senate Bill 533, 77th Legislature, 2001.

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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Jeffry R. Hill
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22 TAC §103.4

The State Board of Dental Examiners adopts amendments to §103.4, Staggered Dental Hygiene Registrations without changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8302).

The Texas State Board of Dental Examiners has developed a staggered license registration system comprised of initial dental hygiene license registration periods followed by annual registrations (i.e., renewals). The amended §103.4 is adopted requiring that the annual license registration fee be increased to $57.00 from $42.00. The increase fee is for the purpose of generating additional revenue to cover increased appropriations.

No comments were received regarding adoption of the proposal.

The amended rule is adopted under Texas Government Code §2001.021 et. seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry and with §254.004 which requires the agency to establish fees sufficient to cover operating costs.

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 §103.5

The State Board of Dental Examiners adopts new §103.5 Temporary License by Credentials, Dental Hygienists without changes to the proposed text as published in the October 19, 2001 issue of the *Texas Register* (26 TexReg 8309).

New §103.5 is adopted to implement the requirements of House Bill 3507 enacted by the 77th Legislature. House Bill 3507, Section 5 provides that a dental hygienist upon payment of a fee set by the Board, who satisfies all the requirements of §256.101 of the Texas Occupations Code (Issuance of License to Certain-Out-of-State Applicants) except the practice requirement and who satisfies the requirements of §256.1015 shall be granted a temporary license to practice dental hygiene. The new rule, in part addresses the requirements of House Bill 3507,

Article 5, by eliminating the requirement that a dental hygienist practice dental hygiene for at least the five years preceding the date of application if the dental hygienist is employed by a nonprofit corporation that accepts Medicaid reimbursement.

No comments were received regarding adoption of the proposal.

The new rule is adopted under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry and with §256.101(a)(10) which provides the Board with authority to establish rules governing licensure by credentials and with the provisions of House Bill 3507, Article 5, 77th Legislature, 2001.

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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Jeffry R. Hill
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CHAPTER 105. ALTERNATIVE DENTAL HYGIENE TRAINING PROGRAM

22 TAC §§105.1 - 105.4

The State Board of Dental Examiners adopts new Chapter 105, Alternative Dental Hygiene Training Program and §105.1, Definitions, §105.2, Licensure Qualifications, §105.3, Requirements for Alternative Dental Hygiene Training Programs, and §105.4, Program Instructors. Section 105.3 and §105.4 are adopted with changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8310). Section 105.1 and §105.2 are adopted without changes to the proposed text as published and will not be republished.

Changes were made to §105.3(a)(4) and to §105.4(a)(1)(E)(i), (2)(B)(iii) and (C).

New Chapter 105, Alternative Dental Hygiene Training Program, §§105.1 - 105.4 are adopted to implement the requirements of House Bill 3507 enacted by the 77th Texas Legislature. House Bill 3507, Section 3 provides for alternative training programs for dental hygienists and mandates the agency develop a program whereby qualified training programs can be approved by the agency. The training received by a student under the alternative training program is designed to be equivalent to the training received by a student of a traditional dental hygiene program. Approval of programs pursuant to §§105.1 - 105.4 will allow dental hygiene students to be trained in alternative programs. Sections 105.1 - 105.4 were drafted to implement the recommendations made by an advisory committee established by House Bill 3507, Section 3.

A public hearing was held in Austin, Texas on November 27, 2001 to take comments on proposed Chapter 105. Comments made on each rule will be addressed by section number.

Section 105.1, Definitions

Ms. Paula Harris, R.D.H., B.S., furnished written comments on §105.1. Ms. Harris asked for an interpretation of "direct supervision" and whether or not this term means that the dentist can be in another room treating his own patient. The Board answers in the affirmative and notes specifically that the definition explains its response to the question. The definition of direct supervision states that the dentist responsible for the procedure shall be physically present in the office and shall be continuously aware of the patient's physical status. Ms. Harris was concerned that the alternative training program supervision requirement may provide inadequate supervision to the student because the dentist may be preoccupied while the dental hygiene instructor in the clinic floor of an accredited dental hygiene program is not occupied other than monitoring and instructing students, leading to reduction in time to respond to students and patients. Although the Board recognizes inherent differences between dentist instructors in alternative training programs to those of dental hygiene instructors in accredited dental hygiene programs, the definition of direct supervision does provide that the dentist be present to monitor the skill of the student and the quality of care administered to the patient and the Board does not believe that this definition of direct supervision results in compromise to patient care. Further, the Board is of the opinion that the recommendations of the Advisory Committee appointed pursuant to the provisions of House Bill 3507 should be followed when feasible. The Advisory Committee discussed this issue at great length on more than one occasion and concluded that direct supervision is appropriate. No changes are made.

Section 105.2, Licensure Qualifications

The Board received oral comment from Mr. Jose Antonio Torres at the November 27, 2001 public hearing. Mr. Torres made no specific recommendation for changes to the rule but offered his support for the requirements of this section.

Section 105.3, Requirements for Alternative Dental Hygiene Training Programs

The Texas Dental Hygienists' Association, (TDHA), and the Texas Dental Hygiene Educators Association (TDHEA) provided oral comments on the rule during the November 27, 2001 public hearing. The Texas Dental Association (TDA), Ms. Paula Harris, R.D.H., B.S., and Representative Senfronia Thompson provided written comments on the rule.

The TDHEA expressed its concern as to patient welfare and development and evaluation of new programs, but stressed its confidence in the protection offered by compliance standards required by the Commission on Dental Accreditation ("CODA"). TDHEA commented that it will not support any changes made to the rules that modifies accreditation language or in any way revise the rules resulting in outcomes below the minimum CODA requirements. The Board agrees and the rules have not been modified so that CODA standards will not apply.

Representative Thompson comments in support for dentists from Latin America who want to work as dental hygienists in Texas, but who were previously accredited and trained in their native country of origin. Representative Thompson supports alternative training programs as a way of providing another means of training hygienists to meet the severe shortage of

hygienists. The Board concurs and appreciates the concerns raised by Representative Thompson and notes that alternative programs approved under these rules are not forclosed to foreign trained dentists who seek licensure as dental hygienists.

The TDA provided written comments on §105.3(a)(4). Section 105.3(a)(4) specifies information to be provided to the Board by institutions of higher education that sponsor alternative training programs, including the locations where clinical training will be provided. TDA suggests the phrase "when determined" to prevent the limitation of clinical training sites to those sites identified when the sponsoring institution sought Board approval for an alternative training program. TDA comments that §105.3(a)(4) as currently proposed would make it hard to implement additional sites in the future. The Board concurs and proposes §105.3(a)(4) be amended to read:

(4) The location or locations, when determined, where clinical training will be provided.

The Texas Dental Hygienists' Association ("TDHA") provided oral comments on proposed §105.3(a)(8)(D) during the November 27, 2001 public hearing. TDHA asked for clarification on two questions: (1) how long can the student continue to practice clinically after the completion of the 12 consecutive months of clinical training if the student has not successfully completed the didactic education; (2) can didactic work be extended over several years at the student's leisure. TDHA expressed concern that if a student is allowed to continue to practice clinically while didactic coursework continues at an unduly, unspecified and extended time, the public will not be properly protected nor will the students be encouraged to complete their education in a timely manner. In response to question (1), the student cannot continue to practice as a student hygienist in a clinical setting after the completion of the 1000 hours because it is only the authority of the program as provided by this rule that the student may practice dental hygiene. Once the hours are completed, the student can no longer practice in a clinical setting as part of a the alternative training program because the authority of the program ends. In response to question (2), the rule does not contemplate when a student must complete didactic course work. In theory, a student could extend didactic course work over a period of time that goes beyond the 12 consecutive months of clinical training and 1000 hours. The Board believes that established time periods for completion of didactic course work should be left to the individual instructor/program to determine. No changes are made.

TDHA further commented on §105.3(a)(8)(D). TDHA states that the alternative training program calls for direct supervision meaning that the dentist be physically present in the office when a student provides direct comprehensive dental hygiene care to patients. The Board responded to a similar comment from Ms. Paula Harris, R.D.H., B.S., on §105.1. Ms. Harris asked for the interpretation of "direct supervision" and whether or not this term means that the dentist can be in another room treating his own patient. Ms. Harris was concerned that the alternative training program supervision requirement may provide inadequate supervision to the student because the dentist may be preoccupied and that the dental hygiene instructor in the clinic floor of an accredited dental hygiene program is not occupied other than monitoring and instructing students, leading to reduction in time to respond to students and patients. TDHA stated that for a dentist to be physically present in the office does not guarantee that the student is receiving the personal level of instruction required to deliver adequate and safe patient care. TDHA suggests a more personal level of instruction/supervision to ensure that students do not have to resort to self-taught methods. As stated in its earlier response to Ms. Harris, the definition of direct supervision does provide that the dentist be present to monitor the skill of the student and the quality of care administered to the patient and the Board does not believe that this definition of direct supervision results in compromise to patient care. The Board also recognizes that dentists who are instructors do have patients and the requirement of personal supervision in inherently burdensome and unworkable in many situations. No changes are made.

Ms. Paula Harris provided written comments on §105.3(a)(8)(D). Ms. Harris contends that there should be a two year limit for the completion of didactic course work. Again, the Board believes that established time periods for completion of didactic course work should be left to the individual instructor/program to determine. Ms. Harris further comments on concerns for student due process and the lack of legal process in place to address student due process needs. Although the concerns raised by Ms. Harris are duly noted by the Board, this rule is not the proper forum to address student due process concerns as other mechanisms, rules, and statutes are available to remedy and provide for student due process. The Board does appreciate Ms. Harris' concerns that the alternative training program may increase public risk along with access to an inferior dental delivery system, however, the Board believes that it has implemented the appropriate provisions to ensure that instructors are qualified, that the alternative training programs standards are substantially equivalent to current CODA accredited programs, and that ultimately, access to care is expanded, meeting the mandates of House Bill 3507. No changes are made.

TDHA commented on proposed §105.3(d) providing that the dental hygiene student participating in the alternative dental hygiene training program may not receive a salary or other compensation for providing dental hygiene services as part of clinical training in the dental hygiene alternative training program. TDHA raised concern of the possibility of a dentist paying salary or other compensation to a student who has completed the clinical portion of the training but not the didactic portion and TDHA requested clarification. TDHA expressed concern that time constraints and financial concerns of the dentist/instructor will affect his or her personal practice of dentistry and personal income. The Board is mindful of these concerns, but the rule is clear--a dental hygiene student participating in the alternative dental hygiene training program may not receive a salary or other compensation for providing dental hygiene services as part of clinical training in the dental hygiene alternative training program. A student who has satisfied the clinical portion of the training program may no longer provide hygiene services and one doing so would not fall under the exemption of §251.004, Texas Occupations Code. A dentist may not pay a student for dental hygiene services after the completion of the clinical portion even if the student has not satisfied the didactic portion. No changes are made.

TDHA commented that the Board should consider adding a rule requiring dentists to charge reduced fees for student services. TDHA comments that dental hygiene programs charge reduced fees for dental prophylaxes performed by students and that patients receiving treatment by students in private practice dental settings should also expect a reduced fee for the service. TDHA contends that patients who subject themselves in this way will be receiving a reduced level of care that the fee should reflect. Except to prohibit flagrant overcharging, the Board does not have

authority to set fees charged by dentists. The Board already has a rule that adequately addresses the potential for flagrant overcharging. After due consideration given, the Board disagrees that a rule should be proposed to require a dentist charge reduced fees for student services. No changes are made.

One individual filed written comments concerning Chapter 105. Specifically the commentor was concerned about fees charged to patients treated by students. The commentor proposed that fees for patients treated in alternative training programs should be reduced to the same fee charged at CODA accredited schools. The Board is not aware that CODA accreditation status carries with it mandated fees or maximum fees. The Board does not propose changes to §105.3 in response to this comment.

Section 105.4, Program Instructors

The Texas Dental Hygienists' Association (TDHA) provided oral comments on the proposed rule during the public hearing on November 27, 2001. The Texas Dental Association (TDA), and Ms. Paula Harris, R.D.H., B.S. provided written comments on proposed §105.4.

The Texas Dental Association ("TDA") provided written comments on proposed §105.4(a)(2)(B)(ii) and (iii) which requires informed consent by patients who receive services performed by alternative training students. TDA comments that the current wording of the proposed rule implies that if the dentist is an alternative training instructor, his or her hygienist must also be an instructor. TDA proposes to add the phrase, "if applicable."

The Board concurs and §105.4(a)(2)(B)(iii) is amended to read:

(iii) If applicable, I understand that (name of dental hygienist), RDH is registered with the State Board of Dental Examiners as an instructor in a board approved alternative dental hygiene training program working under the direct supervision of Dr. (name of dentist).

Texas Dental Hygienists' Association provided oral comments to §105.4(a)(1)(E). Section 105.4(a)(1) provides that the Board will register a dentist to instruct dental hygiene students in an alternative dental hygiene training program if the applicant meets certain criteria. Among the required criteria, §105.4(a)(1)(E) provides that the applicant currently practice in a rural or underserved area. TDHA asks how "currently practicing" is defined and whether it means once per week, once per month, once per year, etc. TDHA seems to suggest that the rules should be fashioned to impose upon programs and instructors restrictions that exceed those set forth in statute. A given student must complete the 1000 hours of clinical instruction within a twelve month period. That provision places limits both on students and instructors. The Board perceives no reason why an instructor who meets the program requirements should be prohibited from having a part time practice in a location or locations other than that where the dentist instructs, which must be in a rural area or underserved area.

TDHA further commented that a dentist instructor must work in an area defined under §105.4(a)(1)(E)(i) and (ii), but that the rule does not state that the training must also occur in such an area. This provision clearly does not require that the alternative training program take place in such an area; even though the Board is of the opinion that the intent of the legislation is that alternative training programs be located in rural or underserved areas.

Accordingly, the language of §105.4(a)(1)(E)(i) is changed to read:

(E) Proposes to provide clinical instruction through an alternative training program where clinical services are provided in either:

(i) a location outside a standard metropolitan statistical area, as defined by the U.S. Census Bureau; or.

TDHA commented on §105.4(b) stating that there are no provisions providing that a dental hygienist instructor must practice in a specified area as stated under §105.4(a) (dentist instructors). A dental hygienist instructor must work under the direct supervision of a dentist instructor. Thus the location provisions applicable to dentists will apply to dental hygienist instructors. No changes are made.

TDHA commented on §105.4(a)(2)(A) which requires that a dentist instructor be responsible for a prominent display in clear view of all patients information concerning the practice. TDHA comments that the dentist instructor should not be responsible to provide the actual sign and that the Board be responsible for providing the approved dentist instructor with a display notice. The Board disagrees. The rule provides the text that must be displayed and requires that the display be prominent. Compliance, is the prominent display of the text, will assure that patients are notified about required information. The Board is of the opinion the individual dentist should have some choice concerning the size of letters on the sign to fit the specific circumstances of that of the office. The Advisory Committee discussed whether sign size and text size should be dictated and recommended use of the term "prominent display." No changes are made.

TDHA commented on §105.4(a)(2)(B)(i) - (v) which requires that a dentist instructor be responsible for obtaining and maintaining written informed consent TDHA comments that the dentist instructor should not be responsible to provide the form for the written consent and that the Board be responsible for providing the form. The reasons given are similar to those expressed for §105.4(a)(2)(A). For the same reason given for §105.4(a)(2)(A) above, the Board disagrees. No changes are made.

TDHA commented on §105.4(a)(2)(C) which requires that a dentist instructor be responsible for informing all patients at the time the dental hygiene appointment is made that the individual providing such dental hygiene care is a student in a CODA accredited alternative dental hygiene training program. TDHA comments that the phrase "accreditation eligible" be inserted after CODA to bring this provision in compliance with §105.3(a)(7).

The Board amends §105.4(a)(2)(C) to read:

(C) Informing all patients at the time the dental hygiene appointment is made that the individual providing such dental hygiene care is a student in a CODA eligible or CODA accredited alternative dental hygiene training program.

Ms. Paula Harris, R.D.H., B.S., provided written comments on §105.4(b)(1)(E). Section 105.4(b)(1)(E) provides that a dental hygienist instructor be employed by and work under the direct supervision of a dentist who is registered as an instructor with the Board. Ms. Harris contends that there should be a provision providing that a dental hygiene student in training must be employed by and work under the direct supervision of their employer dentist to prevent a sponsoring dentist from starting "training centers" with retired dentist instructors administering the training program and instructing several students at once. The Board believes that the requirements provided by the proposed provisions adequately provide that the dental hygienist student will work under the direct supervision of an instructor who, if he or she meets the requirements established by the provision, will insure that

the student receive instruction from a person qualified to instruct. The Board does not propose changes to §105.4(b)(1)(E).

New Chapter 105 et seq. is adopted under Texas Government Code §2001.021 et. seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry and House Bill 3507, §3, 77th Legislature, 2001, which provides the Board with the authority to adopt rules to implement the program.

§105.3. Requirements for Alternative Dental Hygiene Training Programs.

(a) To become approved and to maintain approval on an alternative training program for dental hygienists, a sponsoring institution of higher education must provide the State Board of Dental Examiners with the following information:

(1) The name of the sponsoring institution of higher education;

(2) A name, or other identifier, for the alternative program;

(3) The name of the Commission on Dental Accreditation (CODA) accredited institution that will provide didactic training for students;

(4) The location or locations, when determined, where clinical training will be provided

(5) Proof that the alternative dental hygiene training program has been designated either CODA eligible or CODA accredited;

(6) A statement that no instructor will provide clinical instruction to students enrolled in the program without having first received from the State Board of Dental Examiners a certificate showing that the instructor has met all of the requirements of §105.4 of this title (relating to Program Instructors);

(7) A statement, that in addition to students meeting requirements for admission to CODA eligible or CODA accredited programs, each student will meet the following criteria before admission to the alternative training program:

(A) is a graduate of an accredited high school or hold a certificate of high school equivalency;

(B) is at least 18 years of age;

(C) that prior to the date of starting the program (not the date of application), the applicant must have completed a minimum of two year (24 consecutive months) working in a full-time position (28 hours per week) in a dental office performing clinical duties for dental patients; and

(D) has been notified in writing by the program that no license to practice dental hygiene in the State of Texas will be issued by the State Board of Dental Examiners unless the alternative dental hygiene training program is accredited by the Commission on Dental Accreditation. The student shall acknowledge in writing before a notary public certification of receipt of such notification; and

(8) A statement that in addition to requirements that may be imposed by the sponsoring institution, the alternative dental hygiene training program will require its graduates have completed the following:

(A) a minimum of four semesters of didactic education from an institution of higher education in Texas accredited by a regional accrediting agency approved by the US Department of Education;

(B) didactic education shall occur by one or more of the following methodologies: classroom instruction, distance learning, remote coursework or similar modes of instruction;

(C) didactic courses shall include instruction in anatomy, pharmacology, radiography, hygiene, ethics, jurisprudence and any other subject regularly taught in programs in dental hygiene accredited by the Commission on Dental Accreditation;

(D) clinical training of 1000 hours during a period of 12 consecutive months under the direct supervision of a dentist or dental hygienist who has been registered as an instructor by the Board. The clinical training shall be appropriately documented the same as required for all accredited dental hygiene training programs;

(E) seventy-five full mouth prophylaxes; and

(F) demonstrate the ability to accurately record the location and extent of dental restorations, chart mobility, furcations, gingival recession, keratinized gingiva, and pocket depth on six aspects of each tooth.

(b) Clinical training may occur simultaneously with didactic education.

(c) The program must require that all instructors meet requirements of §105.4 of this title.

(d) The dental hygiene student participating in the alternative dental hygiene training program may not receive a salary or other compensation for providing dental hygiene services as part of clinical training in the dental hygiene alternative training program.

§105.4. Program Instructors.

(a) Dentist Instructors.

(1) The State Board of Dental Examiners will register a dentist to instruct dental hygiene students in an alternative dental hygiene training program, upon payment of a fee in an amount set by the Board and completion of a registration form provided by the board indicating that applicant meets all of the following criteria:

(A) Is licensed in Texas, and has practiced in Texas for five of the seven years preceding the date of the application;

(B) Has not been the subject of any disciplinary action(s) or order(s) of the Board;

(C) Has a faculty appointment from the sponsoring institution of higher education;

(D) Has successfully completed a Calibration Course from the program's sponsoring institution of higher education; and

(E) Proposes to provide clinical instruction through an alternative training program where clinical services are provided in either:

(i) a location outside a standard metropolitan statistical area, as defined by the U.S. Census Bureau; or

(ii) In an area that the Texas Department of Health has determined is underserved or an area that has been designated by the U.S. Department of Health and Human Services as having a shortage of dental professionals.

(2) Each registered dentist instructor is responsible for the following:

(A) Prominent display in clear view of all patients of his/her practice the following statement: "This practice has been approved as an alternative dental hygiene training program. Therefore, students in the program may be performing services";

(B) Obtain and maintain a written informed consent signed by all patients treated in the program that states the following:

(i) On the date I made my dental hygiene care appointment I was informed that the services will be performed by a student in an alternative dental hygiene training program;

(ii) I understand that Dr. (name of dentist) is registered with the State Board of Dental Examiners as an instructor in a Board approved alternative dental hygiene training program in dental hygiene;

(iii) If applicable, I understand that (name of dental hygienist), RDH is registered with the State Board of Dental Examiners as an instructor in a board approved alternative dental hygiene training program working under the direct supervision of Dr. (name of dentist);

(iv) I understand that my dental hygiene care on (date of service) is being provided by a student in an alternative dental hygiene training program affiliated with (name of sponsoring institution of higher education); and

(v) I understand that my dental records may be reviewed by representatives of the institution of higher education sponsoring the Commission on Dental Accreditation (CODA) accredited alternative dental hygiene training program;

(C) Informing all patients at the time the dental hygiene appointment is made that the individual providing such dental hygiene care is a student in a CODA eligible or CODA accredited alternative dental hygiene training program.

(D) All tasks and procedures performed by, or services provided to a patient by a student on behalf of the program; and,

(E) Successful completion of a Calibration Course from the sponsoring institution of higher education every three years, and submission of proof of such completion to the Board.

(b) Dental Hygienist Instructors.

(1) The State Board of Dental Examiners will register a dental hygienist to instruct dental hygiene students in an alternative dental hygiene training program upon payment of a fee in an amount set by the Board and completion of a registration form provided by the Board indicating that the applicant meets all of the following criteria:

(A) Is licensed in Texas, and has practiced in Texas for five years preceding the training;

(B) Has not been the subject of any disciplinary action(s) or order(s) of the Board;

(C) Has a faculty appointment from the sponsoring institution of higher education;

(D) Has successfully completed a Calibration Course from the program's sponsoring institution of higher education; and

(E) Is employed by and works under the direct supervision of a dentist who is registered as an instructor with the Board pursuant to subsection (a) of this section.

(2) Every three years, each registered dental hygienist instructor must successfully complete a Calibration Course from the sponsoring institution of higher education and submit proof of such completion to the Board.

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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Jeffry R. Hill
Executive Director
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CHAPTER 108. PROFESSIONAL CONDUCT
SUBCHAPTER A. PROFESSIONAL RESPONSIBILITY

22 TAC §108.7

The State Board of Dental Examiners adopts amendments to §108.7, Minimum Standard of Care, General with changes to the proposed text published in the July 20, 2001, issue of the *Texas Register* (26 TexReg 5330). Changes to §108.7(6) were made.

The amendments to §108.7 results from an effort by the Board and several interested entities, including the three Texas dental schools, the Health and Human Services Commission, and the Texas Department of Health to develop standards for the contents of records required to be maintained by dentists in Texas pertaining to the dental services rendered to patients. The language of paragraph (1) has been modified to drop references to required records, and to refer to §108.8, Records of the Dentist, where specifics are shown. Paragraph (6) has been changed to add the words "...treatment plans and..." as well as "...treatment plans or..." to clarify the requirement for informed consent.

The following entity, Texas Dental Association ("TDA") furnished written comments on the proposed amendments to §108.7(6). Section 108.7(6) provides that each dentist shall conduct his/her practice in a manner consistent with that of a reasonable and prudent dentist under the same or similar circumstance and that each dentist should maintain a written informed consent signed by the patient, or a parent or legal guardian of the patient if the patient has been adjudicated incompetent to manage the patient's personal affairs. Further §108.7(6) provides that such consent is required for all treatment plans and procedures where a reasonable possibility of complications from the treatment plan or procedure exists, and such consent should disclose risks or hazards that could influence a reasonable person in making a decision to give or withhold consent. TDA asks whether this rule requires written informed consent for administration of nitrous oxide and whether a dentist must obtain written informed consent when administering nitrous oxide while performing a Class 1 Amalgam commenting that it can be concluded that a written informed consent for nitrous oxide is recommended but not required in light of comparisons to §108.32(6) (Minimum Standard of Care, Anesthesia) and §108.34 (Permit Requirements and Clinical Provisions). In response to TDA's questions, written informed consent is required where a reasonable possibility of complications from the treatment plan or procedure exists. No changes were made.

TDA further commented that the term "treatment plan" when used for a second time under §108.7(6) should be changed to

"treatment planned" to avoid confusion and the term "procedures" when employed a second time should be singular for sentence consistency.

The Board agrees and amends §108.7(6) to read:

(6)...Such consent is required for all treatment plans and procedures where a reasonable possibility of complications from the treatment planned or a procedure exists, and such consent should disclose risks or hazards that could influence a reasonable person in making a decision to give or withhold consent.

The amended rule is adopted under Texas Government Code §2001.021 et. seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

§108.7. Minimum Standard of Care, General.

Each dentist licensed by the State Board of Dental Examiners and practicing in Texas shall conduct his/her practice in a manner consistent with that of a reasonable and prudent dentist under the same or similar circumstance. Further, each dentist:

(1) Shall maintain patient records that meet the requirements set forth in §108.8 of this title (relating to Records of the Dentist).

(2) Shall maintain and review an initial medical history and perform limited physical evaluation for all dental patients to wit:

(A) The initial medical history shall include, but shall not necessarily be limited to, known allergies to drugs, serious illness, current medications, previous hospitalizations and significant surgery, and a review of the physiologic systems obtained by patient history. A "check list", for consistency, may be utilized in obtaining initial information. The dentist shall review the medical history with the patient at any time a reasonable and prudent dentist in the same or similar circumstances would so do.

(B) The initial limited physical examination should include, but shall not necessarily be limited to, blood pressure and pulse/heart rate as may be indicated for each patient.

(3) Shall obtain and review an updated medical history and limited physical evaluation when a reasonable and prudent dentist under the same or similar circumstances would determine it is indicated.

(4) Shall, for office emergencies:

(A) maintain a positive pressure breathing apparatus including oxygen which shall be in working order.

(B) maintain other emergency equipment and/or currently dated drugs as a reasonable and prudent dentist with the same or similar training and experience in the same or similar circumstances would maintain;

(C) provide training to dental office personnel in emergency procedures which shall include, but not necessarily be limited to, basic cardiac life support, inspection and utilization of emergency equipment in the dental office, and office procedures to be followed in the event of an emergency as determined by a reasonable and prudent dentist in the same or similar circumstances; and

(D) shall adhere to generally accepted protocols and/or standards of care for management of complications and emergencies.

(5) Shall successfully complete a current course in basic cardiopulmonary resuscitation given or approved by either the American Heart Association or the American Red Cross.

(6) Should maintain a written informed consent signed by the patient, or a parent or legal guardian of the patient if the patient is a minor, or a legal guardian of the patient if the patient has been adjudicated incompetent to manage the patient's personal affairs. Such consent is required for all treatment plans and procedures where a reasonable possibility of complications from the treatment planned or a procedure exists, and such consent should disclose risks or hazards that could influence a reasonable person in making a decision to give or withhold consent.

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 §108.8

The State Board of Dental Examiners adopts amendments to §108.8, Records of the Dentist with changes to the proposed text as published in the July 20, 2001, issue of the *Texas Register* (26 TexReg 5331). Changes to §108.8(a), (b)(4), and (c)(11) were made.

The amendments to §108.8 are the result of several meetings with representatives from the Texas Department of Health, the Health and Human Services Commission, the three Texas dental schools, National Heritage Insurance Corporation and members of the Board and staff to discuss records keeping requirements for dentists. The effect of the amendments is to provide more specific rules for dental practitioners to follow in making and maintaining dental records.

The following entity, Texas Dental Association ("TDA") furnished written comments on the proposed amendments to §108.8(a). TDA comments that §108.8(a) defines the term "dental records" to include "documentation of" a list of items, including "study models, casts, molds, impressions." TDA comments that the term "documentation of" is confusing because the dental record would be the tangible item itself, rather than documentation of that item. Further, TDA comments that in many dental practices, models, casts, molds, and impressions are often simply made and used as steps in the actual treatment of patients and may be destroyed or damaged during use for that treatment. TDA points out that other dentists have study models and casts as part of their records, but classifying models, casts, molds, and impressions as "dental records" and requiring them to be retained for five years could cause storage problems for many dentists. TDA suggests that the phrase "documentation of" be deleted and the phrase, "if applicable" be inserted to reference models, casts, molds, and impressions.

The Board agrees and §108.8(a) is amended to read:

(a) The term dental records includes, but is not limited to: identification of the practitioner providing treatment; medical

and dental history; limited physical examination; radiographs; dental and periodontal charting; diagnoses made; treatment plans; informed consent statements or confirmations; study models, casts, molds, and impressions, if applicable; cephalometric diagrams; narcotic drugs, dangerous drugs, controlled substances dispensed, administered or prescribed; anesthesia records; pathology and medical laboratory reports; progress and completion notes; materials used; dental laboratory prescriptions; billing and payment records; appointment records; consultations and recommended referrals; and post treatment recommendations.

TDA furnished written comments on the proposed amendments to §108.8(b)(4) requiring that a dentist document a patient's "vital signs." TDA seeks clarification asking if the requirement includes taking vital signs on every patient at every visit. TDA further inquires as to whether this requirement includes taking of vital signs for children, orthodontic, post-op patients, and patients who receive denture adjustments. TDA suggests that substituting the phrase, "if taken" for "when applicable" and following with an explanation that vital signs should be taken any time a reasonable and prudent dentist practicing in the same or similar circumstance would take vital signs.

The Board agrees and amends §108.8(b)(4) to read:

(4) Vital signs, including but not limited to, blood pressure and heart rate, when applicable in accordance with §108.7 of this title (relating to Minimum Standard of Care, General).

TDA requested that the Board clarify the language of when vital signs should not be omitted. The Board feels that the provisions are clear based on §108.7 and §108.8. The Board declines this suggestion.

TDA furnished written comments on the proposed amendments to §108.8(c)(11) stating that the term "licensed dentist" is confusing. TDA suggests that the term "provider dentist" be substituted for "licensed dentist."

The Board agrees and amends §108.8(c)(11) to read:

(11) Confirmable identification of provider dentist, and confirmable identification of person making record entries if different from provider dentist.

The amended rule is adopted under Texas Government Code §2001.021 et. seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

§108.8. Records of the Dentist.

(a) The term dental records includes, but is not limited to: identification of the practitioner providing treatment; medical and dental history; limited physical examination; radiographs; dental and periodontal charting; diagnoses made; treatment plans; informed consent statements or confirmations; study models, casts, molds, and impressions, if applicable; cephalometric diagrams; narcotic drugs, dangerous drugs, controlled substances dispensed, administered or prescribed; anesthesia records; pathology and medical laboratory reports; progress and completion notes; materials used; dental laboratory prescriptions; billing and payment records; appointment records; consultations and recommended referrals; and post treatment recommendations.

(b) A Texas dental licensee practicing dentistry in Texas shall make, maintain, and keep adequate records of the diagnoses made and the treatments performed for and upon each dental patient for reference, identification, and protection of the patient and the dentist. Records shall be kept for a period of not less than five years. Records must include documentation of the following:

(1) Patients name;

(2) Date of visit

(3) Reason for visit;

(4) Vital signs, including but not limited to blood pressure and heart rate when applicable in accordance with §108.7 of this title (relating to Minimum Standard of Care, General).

(5) If not recorded, an explanation why vital signs were not obtained.

(c) Further, records must include documentation of the following when services are rendered:

(1) Written review of medical history and limited review of medical exam;

(2) Findings and charting of clinical and radiographic oral examination;

(A) Documentation of radiographs taken and findings deduced from them, including radiograph films or digital reproductions.

(B) Use of radiographs at a minimum, should be in accordance with guidelines set forth on "Dental Radiographic Examinations" published by the United States Department of Health and Human Services, October 1987, as amended or reprinted from time to time.

(3) Diagnosis(es);

(4) Treatment plan, recommendation, and options;

(5) Treatment provided;

(6) Medication and dosages given to patient;

(7) Complications;

(8) Written informed consent that meets the provisions of §108.7(6);

(9) The dispensing, administering, or prescribing of all medications to or for a dental patient shall be made a part of such patient's dental record. The entry in the patient's dental record shall be in addition to any record keeping requirements of the DPS or DEA prescription programs.

(10) All records pertaining to Controlled Substances and Dangerous Drugs shall be maintained in accordance with the Texas Controlled Substances Act.

(11) Confirmable identification of provider dentist, and confirmable identification of person making record entries if different from provider dentist;

(12) When any of the items in paragraphs (1) - (11) of this subsection are not indicated, the record must include an explanation why the item is not recorded.

(d) Dental records are the sole property of the dentist who performs the dental service. Such records shall be available for inspection by the patient after and upon appointment with a dentist. This shall not prohibit the transfer of a copy of records to the patient, or to an agreed designated consultant for ascertainment of facts, nor transfer of original records to another Texas dental licensee who will provide treatment to the patient. The transferring dentist shall retain a copy of the written record if such original transfer is made.

(e) A dentist who leaves a location or practice, whether by retirement, sale, transfer, termination of employment or otherwise, shall either maintain all dental records belonging to him or her, make a written transfer of records to the succeeding dentist, or make a written agreement for the maintenance of records, and the State Board of Dental Examiners shall be notified within 15 days of any such event, giving full information concerning the dentists and location(s) involved. A maintenance of records agreement shall not transfer ownership of the dental records, but shall require: that the dental records be maintained in accordance with the laws of the State of Texas and the Rules of the State Board of Dental Examiners; and that the dentist(s) performing the service(s) recorded shall have access to and control of the records for purposes of inspection and copying. A transfer of records may be made by agreement at any time in an employment or other working relationship between a dentist and another entity. Such transfer of records may apply to all or any part of the dental records generated in the course of the relationship, including future dental records.

(f) Dental records shall be made available for inspection and reproduction on demand by the officers, agents, or employees of the State Board of Dental Examiners. The patient's privilege against disclosure does not apply to the Board in a disciplinary investigation or proceeding under the Dental Practice Act.

(g) A dentist shall furnish copies of dental records to a patient who requests his or her dental records. Requested copies including radiographs shall be furnished within 30 days of the date of the request, provided however, that copies need not be released until payment of copying costs has been made. Records may not be withheld based on a past due account for dental care or treatment previously rendered to the patient.

(1) A dentist providing copies of patient dental records is entitled to a reasonable fee for copying which shall be no more than $25 for the first 20 pages and $0.15 per page for every copy thereafter.

(2) Fees for radiographs, which if copied by an radiograph duplicating service, may be equal to actual cost verified by invoice.

(3) Reasonable costs for radiographs duplicated by means other than by a radiograph duplicating service shall not exceed the following charges:

(A) a full mouth radiograph series: $15.00;

(B) a panoramic radiograph: $15.00;

(C) a lateral cephalometric radiograph: $15.00;

(D) a single extra-oral radiograph: $5.00;

(E) a single intra-oral radiograph: $5.00.

(4) State agencies and institutions will provide copies of dental health records to patients who request them following applicable agency rules and directives.

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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Jeffry R. Hill
Executive Director
State Board of Dental Examiners
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CHAPTER 114. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL--DENTAL ASSISTANTS

22 TAC §114.3

The State Board of Dental Examiners adopts new §114.3, Application of Pit and Fissure Sealants with changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8312). Changes were made to §114.3(b) and (d)(2).

New §114.3 is adopted to implement the requirements of House Bill 3507, Article 4, enacted by the 77th Legislature. The Board proposes to amend the rule as published to address an oversight. The provisions of the Occupations Code, §258.002(b) as amended by House Bill 3507 provide that dentists may delegate to certified dental assistants authority to apply pit and fissure sealants. The section also provides that dental assistants may cleanse the occlusal and smooth surfaces of the tooth to prepare for the sealants or to prepare the tooth for application of orthodontic bonding resins. The proposed rule did not include "bonding resins".

The rule is amended at subsection (b) to read as follows:

(b) In addition to application of pit and fissure sealants a dental assistant certified in this section may use a rubber prophylaxis cup and appropriate polishing materials to cleanse the occlusal and smooth surfaces of teeth that will be sealed or to prepare teeth for application of orthodontic bonding resins. Cleansing is intended only to prepare the teeth for the application of sealants or bonding resins and should not exceed the amount needed to do so.

Further, the Board has amended the rule at subsection (d)(2) to insert the term "CODA" to require that training be obtained through a CODA accredited program. The term was inadvertently omitted from the published version. The rule at subsection (d)(2) is amended to read as follows:

(2) completion of a minimum of 16 hours of clinical and didactic education in pit and fissure sealants taken through a CODA accredited dental hygiene program approved by the Board whose course of instruction includes:

No comments were received regarding adoption of the proposal.

The new rule is adopted under Texas Government Code §2001.021 et. seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry and with the provisions of House Bill 3507, Article 4, 77th Legislature, 2001.

§114.3. Application of Pit and Fissure Sealants.

(a) A Texas licensed dentist who is enrolled as a Medicaid Provider with appropriate state agencies may delegate the application of a pit and fissure sealant to a dental assistant, if the dental assistant:

(1) is employed by and works under the direct supervision of the licensed dentist; and

(2) is certified pursuant to subsection (d) of this section.

(b) In addition to application of pit and fissure sealants a dental assistant certified in this section may use a rubber prophylaxis cup and appropriate polishing materials to cleanse the occlusal and smooth surfaces of teeth that will be sealed or to prepare teeth for application of orthodontic bonding resins Cleansing is intended only to prepare the teeth for the application of sealants or bonding resins and should not exceed the amount needed to do so.

(c) The dentist may not bill for a cleansing provided hereunder as a prophylaxis.

(d) A dental assistant wishing to obtain certification must pay an application fee set by Board rule and on a form prescribed by the Board must provide proof of the following:

(1) at least two years of experience as a dental assistant;

(2) completion of a minimum of 16 hours of clinical and didactic education in pit and fissure sealants taken through a CODA accredited dental hygiene program approved by the Board whose course of instruction includes:

(A) infection control;

(B) cardiopulmonary resuscitation;

(C) treatment of medical emergencies;

(D) microbiology;

(E) chemistry;

(F) dental anatomy;

(G) ethics related to pit and fissure sealants;

(H) jurisprudence related to pit and fissure sealants; and

(I) the correct application of sealants, including the actual clinical application of sealants; and

(3) Submit proof that applicant has successfully completed a current course in basic life support given by the American Heart Association or the American Red Cross.

(e) Before January 1 of each year, dental assistants certified hereunder who wish to renew their certifications must pay a renewal fee set by Board rule and must provide proof of the following:

(1) completion of at least six hours of continuing education in technical and scientific coursework annually. The terms technical and scientific as applied to continuing education shall mean that courses have significant intellectual or practical content and are designed to directly enhance the practitioner's knowledge and skill in providing clinical care to the individual patient.

(A) Dental assistants shall select and participate in continuing education courses offered by or endorsed by dental schools, dental hygiene schools, or dental assisting schools that have been accredited by the Commission on Dental Accreditation of the American Dental Association; or

(B) by nationally recognized dental, dental hygiene or dental assisting organizations.

(C) No more than three hours may be in self-study; and

(2) Submit proof that applicant has successfully completed a current course in basic life support given by the American Heart Association or the American Red Cross.

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 115. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL--DENTAL HYGIENE

22 TAC §115.5

The State Board of Dental Examiners adopts new §115.5, Practicing in Long Term Care Facilities and School Based Health Centers with changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8313). Changes were made to §115.5(a)(1)(F).

New §115.5 is adopted to implement the requirements of House Bill 3507 enacted by the 77th Texas Legislature which provides that dentists may delegate to qualified dental hygienists the authority to treat patients in certain types of locations without the dentist having seen the patient.

Texas Dental Association ("TDA") furnished written comments on §115.5(a)(1)(F). Section 115.5(a)(1) specifies requirements for written authorization provided by a dentist who delegates duties to a dental hygienist practicing in a long term care facility or school-based center. TDA comments that although §115.5(a)(1)(F) requires the written authorization to include, "those procedures necessary to allow subsequent clinical evaluation by a dentist," the proposed rule does not require the dentist to list the procedure(s) he or she has specifically authorized the hygienist to perform. TDA suggests adding the phrase, "those procedures the dentist specifically authorizes the hygienist to perform, including."

The Board agrees and amends §115.5(a)(1)(F) to read:

(F) those procedures the dentist specifically authorizes the hygienist to perform, including those procedures necessary to allow subsequent clinical evaluation by a dentist;

The new rule is adopted under Texas Government Code §2001.021 et. seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry and with the provisions of House Bill 3507, Article 4, 77th Legislature, 2001 which provides for the procedures and with §262.102 which provides that the Board may adopt and enforce rules necessary to regulate dental hygienists.

§115.5. Dental Hygienists Practicing in Long Term Care Facilities and School-Based Health Centers.

(a) A dentist may delegate to a Texas licensed dental hygienist authorization to perform a service, task or procedure for patients whom the dentist has not seen within the past twelve months when conditions are met as follows:

(1) The dentist provides express authorization in writing which must include

(A) the dentist's name;

(B) the dental hygienist's name;

(C) the patient's name;

(D) the name and address of the location where service is to be provided;

(E) the date of the authorization; and

(F) those procedures the dentist specifically authorizes the hygienist to perform, including those procedures necessary to allow subsequent clinical evaluation by a dentist;

(2) The dentist has verified that the dental hygienist has at least two years experience as a dental hygienist; and

(3) The service, task or procedure must be performed in either:

(A) a nursing facility as defined in the Health and Safety Code, §242.301; or

(B) a school-based health center as defined by the Education Code, §38.011, as amended by Chapter 1418, Acts of the 76th Legislature, Regular Session.

(b) The dental hygienist must refer patients treated under the provisions of this rule to a dentist by notification in writing of the dentist's name and address. Such notification must be provided to the patient or a person legally responsible for the patient, the authorizing dentist, the referral dentist, and copies to the patient's medical record. This notification must include a statement of services, tasks, and procedures performed.

(c) A dental hygienist, after having performed the services, tasks or procedures under this rule, may not provide a second set of services, tasks or procedures for the patient until the patient has been seen by either the dentist who delegated to the hygienist the authority or by a dentist to whom the patient was referred.

(d) The nursing facility or school-based health center must agree to include information provided pursuant to subsection (b) of this section in the patient's medical records.

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 §115.20

The State Board of Dental Examiners adopts amendments to §115.20, Dental Hygiene Advisory Committee--Purpose and Composition without changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8314).

The amended §115.20 is adopted to implement the requirements of Senate Bill 533 enacted by the 77th Legislature which provides that members of the Dental Hygiene Advisory Committee serve staggered six year terms and that appointees may serve only one full term.

No comments were received regarding adoption of the proposal.

The amended rule is adopted under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry and §262.056 and §262.102.

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PART 17. TEXAS STATE BOARD OF PLUMBING EXAMINERS

CHAPTER 361. ADMINISTRATION

INTRODUCTION: The Texas State Board of Plumbing Examiners ("the Board") adopts amendments to §§361.1, 361.6, 361.8, 361.22, 361.26-361.28, and new §361.12, concerning administration. Section 361.1 (33) and (55) is adopted with changes to the proposed text as published in the September 28, 2001, issue of the *Texas Register* (26 TexReg 7389). Sections 361.6, 361.8, 361.22, 361.26-361.28 and new §361.12 are adopted without changes and will not be republished.

During the 77th Legislature House Bills 217 and 1505 were signed into law. As a result of these two House Bills, the Plumbing License Law is amended. The rule amendments and new rule are adopted substantially to implement the requirements of HB 217 and HB 1505. The Board's legal representative from the Office of the Attorney General has advised that the changes affect no new persons, entities, or subjects. The changes to the proposed text are found in rule Section 361.1 (33) and (55), the definition of Water Treatment, and are explained elsewhere in this preamble.

REASONED JUSTIFICATION: The major requirements of HB 217 and HB 1505 are explained as follows:

House Bill (HB) 217 amends the Plumbing License Law to modify the plumbing codes that the Board is required to adopt and authorizes the Board to adopt later editions of the plumbing codes. The Southern Standard Plumbing Code and the National Standard Plumbing Code were eliminated from the codes adopted by the Board. The Uniform Plumbing Code was maintained and the International Plumbing Code was added, resulting in two Plumbing Codes to be adopted by the Board. The bill provides that plumbing installed in an area not otherwise subject to regulation under the Plumbing License Law must be installed in accordance with a Board adopted plumbing code. The bill authorizes municipalities or owners of a public water system the ability to amend any provisions of the codes and standards to conform to local concerns that do not substantially vary with rules or laws of this state. The bill provides that plumbing installed in compliance with an adopted plumbing code must be inspected by a licensed plumbing inspector. (Section 3)

Under HB 217, the Board's jurisdiction was greatly expanded by requiring that all plumbing work connected to a public water system, or performed in any city in the state be performed by a licensed plumber. This eliminated the exemption, which had been in place since 1947, requiring a plumbing license in only cities with populations of 5,000 or more inhabitants (Section 2).

Under HB 217, Licensed Plumbing Inspectors are no longer restricted to being bona fide employees of a political subdivision, but were allowed to contract with a political subdivision as long as they are paid directly by the political subdivision (Sections 1 and 3).

House Bill (HB) 1505 amends the Plumbing License Law by clarifying some existing language and effectively regulating all facets of plumbing work and individuals engaged in plumbing work.

HB 1505 clarifies that medical gasses and vacuum are included in the definition of "plumbing" (Section 1).

HB 1505 establishes a new Tradesman Plumber-Limited license and four new registrations. HB 1505 mandates, by law, experience and qualification requirements for all licenses and registrations issued by the Board. The new Tradesman Plumber-Limited license authorizes individuals to engage in the construction and installation of plumbing only in one and two-family dwellings, after passing an examination administered by the Board. HB 1505 provides for registrations authorizing individuals to install residential yard water and sewer lines (Residential Utilities Installer); remove p-traps and install clean-outs to clear obstructions in sewer lines (Drain Cleaner); clear obstructions in sewer lines through existing openings only (Drain Cleaner-Restricted Registrant); and assist in the installation of plumbing work (Plumber's Apprentice). HB 1505 requires all registrants and licensees to work under the general supervision of a Master Plumber and Residential Utilities Installers, Drain Cleaners and Drain Cleaner-Restricted Registrants to maintain registrations as a Plumber's Apprentice. (Sections 1 and 5).

HB 1505 provides the Board with express authority to adopt rules and take other actions as the Board deems necessary to administer this law including provisions relating to the new classes of registrants and licensees (Sections 5, 9, 11, and 14).

HB 1505 authorizes the Board to appoint advisory committees as it considers necessary (Section 5).

HB 1505 requires, rather than authorizes, the Board to recognize, approve, and administer continuing education programs for licensees and endorsees (Section 5).

Under HB 1505, the Licensed Sanitary Engineer position on the Board was changed to a Licensed Professional Engineer. Clarification that the Master Plumber Position, Journeyman Plumber Position, and Plumbing Inspector position on the Board, must be licensees of the Board was also included (Section 5).

HB 1505 requires a person who desires to learn the trade of plumbing to register as a Plumber's Apprentice before beginning to assist a licensee at the trade of plumbing (Section 13).

HB 1505 requires that no person, whether as a master plumber, journeyman plumber, tradesman plumber-limited licensee, plumber's apprentice, residential utilities installer, drain cleaner, drain cleaner-restricted registrant, or otherwise engage in, work at, or conduct the business of plumbing in this state or serve as a plumbing inspector unless such a person is the holder of a valid license, endorsement, or registration. Additionally, this Section states that it shall be unlawful for any person, firm or corporation to engage in or work at the business of installing plumbing work except as specifically herein provided unless such installation of plumbing or plumbing work be under the supervision and control of a plumber licensed under the Act. (Section 16).

HB 1505 authorizes the Board to monitor insurance requirements for Master Plumbers responsible for the operation of a plumbing business by requiring them to submit a certificate of insurance to the Board (Section 17).

HB 1505 requires that the installation and replacement of water heaters be inspected by a Licensed Plumbing Inspector (Section 17).

HB 1505 also requires municipal plumbing inspections to be performed by licensed plumbing inspectors and provides that if the boundaries of a municipality and a municipal utility district overlap, only the affected municipality may perform a plumbing inspection and collect a permit fee (Section 17).

HB 1505 requires the Board to adopt the required rules necessary to implement this law no later than January 1, 2002 (Section 24).

The following is a list of the sections being added and amended in Chapter 361 to implement the requirements of HB 217 and HB 1505:

Section 361.1, regarding definitions, (3)-(6), (10)-(12), (14)-(18), (20)-(22), (24)(B)(i), (25)-(27), (29), (31), (33), (36)-(57).

The Board is amending and adding several new definitions to this section. Due to several definitions being added to this section, the existing paragraphs will be re-numbered to make room for these terms.

The Board had not proposed to change its existing definition of "Water Treatment" in Section 361.1(55). However, some staff of the Texas Natural Resource Conservation Commission (TNRCC) submitted written comments noting that the Board's existing definition of "Water Treatment" did not exactly mirror the definition contained in HB 2912, passed by the 77th Legislature, amending the Health and Safety Code. HB 2912 requires TNRCC to establish a program to certify water treatment specialists and exempts persons who hold a license under the Plumbing License Law from the requirements of the certification program. The staff of TNRCC commented that, for clarity, the Board's definition should mirror the language contained in HB 2912. The Board agrees and thereby adopts the new language as a non-substantive change to the proposed text.

Section 361.6, regarding fees, (a)(1)-(4), (b)(1)-(4).

This section will add new license and registration/application fees for Tradesman Plumber-Limited License; Plumber's Apprentice Registration/Application; Residential Utilities Installer Registration/Application; Drain Cleaner Registration/Application; and Drain Cleaner-Restricted Registration/Application to subsection (a) (1)-(4). Subsection (b) is being amended to add Registration to License, replace testing with examination and add the term political subdivision.

Section 361.8, regarding forms and materials, (1)-(7).

The section is amending existing paragraphs in order to delete the Application for Registration as an Apprentice Plumber and to add Certificate of Insurance.

Section 361.12, regarding Advisory Committees.

This section is being proposed as new to give the Board authority to appoint Advisory Committees.

Section 361.22, regarding contested cases; hearings.

"Registration" is being added and "for examination" is being deleted for this section.

Section 361.26, regarding contested cases: Investigations.

Subsection (a) is being amended to add registered or unregistered when referring to a person being investigated regarding a complaint.

Section 361.27, regarding rules of practice and procedure.

Subsection (a) (6) is being amended to replace "licensee" with "respondent."

Section 361.28, regarding preliminary criminal reviews.

"Registration" and "registered" is being added to subsections (a) and (b).

Also, as a result of HB 217 and HB 1505, the Texas State Board of Plumbing Examiners proposes amendments to Chapters 363, 365, and 367 elsewhere in this issue of the *Texas Register*.

The Board received written comments following the proposal of the rules and held a public hearing on November 7, 2001, in Austin, Texas, to receive additional written and oral comments.

The following entities and individuals furnished written or oral comments in favor of all or specific sections of the proposed Chapter 361 rules:

A person representing a statewide association of plumbing inspectors, the Texas Association of Plumbing Inspectors, who claimed to be in existence for at least 54 years with a membership of more than 300 plumbing inspectors in more than 200 cities in Texas, submitted comments stating that the association is in favor of the definition "Paid Directly" in rule Section 361.1(33).

A person representing the Plumbing/Mechanical Officials of North Texas, who claimed a membership of more than 80 plumbing inspectors in more than 40 cities in the Dallas-Fort Worth area and has been an association for at least 40 years, submitted comments stating that the association is in favor of the definition "Paid Directly" in rule Section 361.1(33).

Five plumbing inspectors for the City of Amarillo plumbing inspection department submitted comments in favor of all of the Board's rules as proposed.

The Chief Plumbing Inspector of the City of San Antonio submitted comments in favor of all of the Board's rules as proposed.

The Chief Plumbing Inspector of the City of Houston submitted comments in favor of the definition "Paid Directly" in rule Section 361.1(33).

An individual licensed plumbing inspector, who is employed by a city, submitted comments in favor of all of the Board's rules as proposed.

An individual licensed plumbing inspector, who contracts with multiple political subdivisions and is paid directly by each political subdivision, submitted comments in favor of the Board's rules as proposed in Chapter 361.

A plumbing inspector from the City of Texarkana Water Utilities commented in favor of all of the Board's rules as proposed.

A person representing the Mechanical Contractors Association of Houston, Inc., who claimed a membership of 95 contractors, commented that the association is in favor of all of the Board's rules as proposed. In addition, the association specifically commented in favor of the definition of "Direct Supervision" in Section 361.1(20) and the definition of "Paid Directly" in Section 361.1(33).

A person representing the Mechanical Contractors Association of Austin, who claimed a membership of 18 contractors that employ 600-700 plumbers, commented that the association is in favor of all of the Board's rules as proposed. In addition, the association specifically commented in favor of the definition of "Direct Supervision" in Section 361.1(20) and the definition of "Paid Directly" in Section 361.1(33).

An individual representing a mechanical and plumbing contractor provided comments in favor of all of the Board's rules as proposed. In addition, the individual specifically commented in favor of the definition of "Direct Supervision" in Section 361.1(20) and the definition of "Supervision" in Section 361.1(50).

A person representing the statewide association of the Associated Plumbing-Heating-Cooling Contractors of Texas (APHCCT), who claimed a membership of thousands, including associates, plumbing inspectors and more than 250 plumbing companies, commented that the association is in favor of all of the Board's rules as proposed. In addition, APHCCT specifically commented in favor of the definition of "Direct Supervision" in Section 361.1(20) and the definition of "Paid Directly" in Section 361.1(33).

A person representing the Austin Chapter of the APHCCT commented that the Austin Chapter is in favor of all of the Board's rules as proposed.

A person representing the APHCCT of North Texas commented that the North Texas Chapter is in favor of all of the Board's rules as proposed.

A person representing the Waco Chapter of the APHCCT commented that the Waco Chapter is in favor of all of the Board's rules as proposed.

A person representing the statewide association of Texas Plumbing, Air Conditioning and Mechanical Contractors Association, who claim to have more than 350 voting members, commented that the association is in favor of all of the Board's rules as proposed.

A person representing the Texas Plumbing, Air Conditioning and Mechanical Contractors Association of Houston, who claim to

have more than 250 voting members, commented that the Houston Chapter is in favor of all of the Board's rules as proposed.

Twenty-one individual plumbing contractors submitted comments in favor of all of the Board's rules as proposed and several specifically commented in favor of the definition of "Direct Supervision" in Section 361.1(20) and the definition of "Paid Directly" in Section 361.1(33).

The following individuals or entities furnished written or oral comments as resource witnesses regarding the proposed rules:

One individual who represented herself as a concerned housewife, commented on the numerous plumbing problems that she experienced with her new home including mold infestation. The individual stated that she believes that there should be more stringent rules for plumbers and plumbing inspectors and a master plumber on every plumbing job.

One individual who represented herself as a homeowner, commented on the plumbing problems that she had on her new home and attributed them to the plumbing installation and the plumbing inspection performed by a third party. The individual stated that she believes that consumers need to be protected from poor plumbing practices and poor plumbing inspections.

One person representing homeowners and the association of Home Owners for Better Building commented that she had not reviewed the proposed rules thoroughly and could not comment specifically regarding the proposed rules. The person commented on the plumbing installation and inspection practices in some areas of the state. The person stated that she believes that the Board should protect consumers. The person stated that she is opposed to inspections performed by a third party and believes that a master plumber should supervise every plumbing job.

The following entities and individuals furnished written or oral comments in opposition to all or specific sections of the proposed Chapter 361 rules:

Two persons from an incorporated plumbing inspection firm, one who is a licensed plumbing inspector, commented against the proposed definition of "Paid Directly" in Section 361.1(33). The persons stated that the rule will prohibit a licensed plumbing inspector from being paid by a company, corporation, etc., that has contracted with a political subdivision to perform plumbing inspections. The persons stated the proposed rule is discriminatory and will prohibit licensed plumbing inspectors from receiving benefits such as health insurance, workers compensation insurance, etc., that the plumbing inspector would receive from the company or corporation employing the plumbing inspector. The persons expanded on their belief that plumbing inspection firms offer advantages that plumbing inspectors paid directly by political subdivision do not receive.

Two persons representing The Coalition of Third Party Inspection Companies, whose members are the persons' two plumbing inspection companies, submitted comments opposed to the proposed definition of "Paid Directly" in Section 361.1(33) and described the rule as being anti-competitive. One of the individuals stated that it is not necessary for plumbing inspectors to be paid directly by a political subdivision. These two persons also presented similar comments on their own behalf, as officers of two plumbing inspection companies.

A licensed plumbing inspector representing the City of Hamilton commented in opposition to the proposed definition of "Paid Directly" in Section 361.1(33). The City of Hamilton believes that in the event that a plumbing inspector is unable to perform a scheduled plumbing inspection, it will be a problem for a city to get a back-up plumbing inspector if the city must pay the plumbing inspectors directly.

A person representing the Building Officials Association of Texas (BOAT) with approximately 285 members, provided comments opposed to the proposed definition of "Paid Directly" in Section 361.1(33). BOAT commented that the Board's proposed definition of Paid Directly is more restrictive than HB 217. BOAT believes that HB 217 allows a political subdivision to pay a company and does not require that the individual plumbing inspector to be paid directly by the political subdivision. BOAT believes that the Board should not define "Paid Directly."

BOAT also presented comments opposed to the proposed definition of "Plumbing Inspection" in Section 361.1(39). BOAT believes that the proposed language is contrary to state law. BOAT states that the rule will most likely be interpreted by the Board as requiring all municipalities to adopt a plumbing code, instead of only municipalities with populations of 5,000 or more.

BOAT also presented comments opposed to the proposed definition of "Political Subdivision" in Section 361.1(42). BOAT believes that the Board should not include all political subdivisions in its definition, but rather limit a political subdivision to include only a city with a population of 5,000 or more inhabitants, or a city of less than 5,000 inhabitants that has adopted a plumbing code.

A person representing the City of Fort Worth presented comments opposed to the proposed definition of "Paid Directly" in Section 361.1(33). The City of Fort Worth recognizes that HB 217 states that a political subdivision "may contract with any plumbing inspector paid directly by the political subdivision," but believes that the use of the word "may" implies that the language is permissive regarding direct payment and allows a political subdivision to contract with a plumbing inspector who is not paid directly by the political subdivision. The City of Fort Worth believes that because the definition of "Plumbing Inspector" in Section 2(5) of the Plumbing License Law does not define how a plumbing inspector is to be paid, the Board's proposed definition goes beyond the meaning of HB 217 and the Board should not define "Paid Directly." The City of Fort Worth believes that instead, if requested by a political subdivision, the Board should approve contracts between plumbing inspectors and political subdivisions which provide for alternate payment arrangements, other than the plumbing inspector being paid directly by the political subdivision.

The City of Fort Worth also opposes adding the terms "medical gasses and vacuum" to the proposed definitions of "Plumbing" in Section 361.1(37), which mirrors the language in the definition of "Plumbing" in Section 2(1)(A) and Section 2(1)(B) of the Plumbing License Law, as amended by HB 1505. The City of Fort Worth also opposes using the term in its proposed definition of "Plumbing Inspection" in Section 361.1(40). The City of Fort Worth states that it will place an unnecessary burden on local municipalities and the industry to inspect medical gasses and vacuum. The City of Fort Worth believes that there is no need to inspect these systems because it knows of no problems resulting from the lack of inspections.

The City of Fort Worth also presented comments opposed to the proposed definition of "Political Subdivision" in Section 361.1(42). The City of Fort Worth believes that the rule should categorize political subdivisions into primary and secondary

groups and specify when a political subdivision may perform their own plumbing inspections. Generally, the City of Fort Worth believes that the Board should prohibit a political subdivision from performing plumbing inspections if its boundaries overlap those of a municipality. The City of Fort Worth believes that, in such cases, the Board should allow only the municipality to perform plumbing inspections.

A person representing the Texas Municipal League (TML) and the Texas City Attorney's Association (TCAA) provided comments opposed to the proposed definition of "Paid Directly" in Section 361.1(33). TML provides legal, legislative and education services to its 1062 member cities. TCAA, a TML affiliate, claims a membership of approximately 570 lawyers who serve as attorneys for Texas cities. TML and TCAA believe that the proposed rule will effectively prohibit a political subdivision from contracting with plumbing inspection companies. TML and TCAA believes that the Board's rules should not address direct payment of plumbing inspectors and should provide for plumbing inspections to be performed by plumbing inspection companies (firms) in the same manner that the Texas Natural Resource Conservation Commission provides for operation of wastewater treatment facilities or collection systems. TML and TCAA believe that the Board should require plumbing inspection companies to obtain a certificate of registration issued by the Board demonstrating that the company employs licensed plumbing inspectors. TML and TCAA suggest that such certificate of registration would be subject to revocation by the Board. TML and TCAA recognizes that HB 217 states that a political subdivision "may contract with any plumbing inspector paid directly by the political subdivision," but asserts that proper interpretation under Chapters 311 and 312 of the Government Code, would be that "any plumbing inspector" could mean "company." TML and TCAA further asserts that proper interpretation of the term "person" could mean "company" [Section 2(5) of the Plumbing License Law uses the term "person" to define "Plumbing Inspector"].

TML and TCAA also oppose the proposed definition of "Plumbing Inspection" in Section 361.1(39). TML and TCAA believe that the definition could be interpreted to mean that political subdivisions of all types, including cities with populations less than 5,000, would be required to adopt a plumbing code.

A person representing the Texas Association of Builders (TAB), with a claimed membership of approximately 10,000, presented comments opposed to the proposed definition of "Direct Supervision" in Section 361.1(20), stating that a licensed plumber should not be required to be on every job at all times supervising plumber's apprentices. TAB believes that direct supervision of apprentices will increase housing costs and slow production. Generally, TAB believes that direct supervision of plumber's apprentices may be accomplished by allowing plumber's apprentices to perform the installation of plumbing systems under the supervision of a licensed plumber who does not remain on the job, but rather checks on the plumber's apprentices every few hours. TAB believes that a licensed plumber should only be required to be "accessible" to up to five unlicensed crews working on up to five separate one family dwellings located in one subdivision. Additionally, TAB suggests that the Board's definition of "Plumber's Apprentice" in Section 361.1(36), should be amended to allow a an individual to install plumbing (under an "accessible" licensed plumber) without being registered as a Plumber's Apprentice, as long as the individual states that he/she does not desire to learn the trade of plumbing, but only desires to earn a living. TAB further suggests that the Board create a new category of "Plumber's Assistant" for these unlicensed and unregistered individuals who desire to earn a living installing plumbing, but do not wish to learn the trade of plumbing. TAB also proposes that the Board delay enforcement of the provisions of HB 217, HB 1505 and the Board's rules, until a sufficient number of licensed plumbers are available to meet the needs of the industry.

A person representing the Greater Houston Builders Association (GHBA), stating that the association represents 1,400 companies, including builders, developers, remodeling contractors, and associates, presented comments opposed the definition of "Direct Supervision" in Section 361.1(20). GHBA is affiliated with the Texas Association of Builders and presented comments generally similar to TAB. GHBA also suggested a "phase-in period" or delay in enforcement of the new legislation.

Two residential plumbing contractors from the Houston area, presented comments opposed to the definition of "Direct Supervision" in Section 361.1(20) and the requirement of HB 1505 regarding the registration of Plumber's Apprentices. Both contractors stated that the new legislation and Board's rules will place a hardship on residential plumbing contractors, who will need to employ additional licensed plumbers, under the requirements of HB 217. Both contractors propose a delay in enforcement of the new legislation and Board's rules.

Upon passage of the laws, by the 77th Legislature, affecting and amending the Plumbing License Law, the Board consulted with its attorney, an Assistant Attorney General, regarding the Board's interpretation of the new legislation. In proposing the new rules and rule amendments, in response to the requirements of the new legislation, the Board was advised by its attorney regarding the necessity of the Board to abide by the new legislation and the its authority to adopt the proposed rules.

The Board disagrees with the recommendations of those that submitted comments opposed to the proposed definition of "Paid Directly," in Section 361.1(33), for the following reasons:

HB 217 and HB 1505 define a "Plumbing Inspector" and state that a political subdivision ". . . may contract with any plumbing inspector paid directly by the political subdivision." (Emphasis added). The Board believes that this use of the word "may" is permissive only in allowing a political subdivision to choose to contract with or employ a plumbing inspector. The language is not permissive in allowing a political subdivision to choose whether or not to pay a plumbing inspector directly.

"Plumbing Inspector" is defined as " . . . any person who is employed by a political subdivision, or who contracts as an independent contractor with a political subdivision, for the purpose of inspecting plumbing work and installations in connection with health and safety laws, ordinances, and plumbing and gas codes, who has successfully fulfilled the examinations and requirements of the Board." (Emphasis added). In this context, the Board interprets the term "person" to mean "individual." Some of the arguments made against the Board's interpretation of "person" refer to the Code Construction Act passed in 1985. The Board's attorney has advised the Board that the Plumbing License Law (Article 6243-101) is not a "Code", or any part of any "Code" enacted by the "60th or subsequent Legislature as part of the state's continuing statutory revision program" [See Section 311.002(1) of the Texas Government Code known as the "Code Construction Act"]. Any amendments to the Plumbing License Law are not an "amendment, repeal, revision and reenactment of a code or code provision" [Section 311.002(2)]. The Code

Construction Act is not applicable to the Plumbing License Law or any amendment thereto.

Furthermore, even if it be assumed that the Code Construction Act applies, Section 311.003 expressly provides that the "rules provided in this chapter are not exclusive." The Section of the Code Construction Act which contains the definition "Person" is Section 311.005(2), which begins with the following language: "The following definitions apply unless the statute or context in which the word or phrase is used requires a different definition." (Emphasis added.)

When interpreting the meaning and intent of the Plumbing License Law, one must consider the context in which "person" is used throughout the entire statute. The term "person," is also used in Section 2 of the Plumbing License Law to define a "Master Plumber," "Journeyman Plumber," "Tradesman Plumber-Limited Licensee," "Water Supply Protection Specialist," "Residential Utilities Installer," "Drain Cleaner," "Drain Cleaner-Restricted Registrant" and "Plumber's Apprentice." The law requires Master Plumbers, Journeyman Plumbers, Tradesman Plumber-Limited Licensees, Water Supply Protection Specialists (WSPS) and Plumbing Inspectors to meet Board requirements, pass an examination administered by the Board and hold a license (or endorsement to a license in the case of a WSPS) issued by the Board. From the time when the 50th Legislature passed the Plumbing License Law in 1947, to date, all Board requirements for examination may only be met by individuals who desire to take an examination and hold a license or endorsement. None of the examination requirements prescribed by either the Board or the statute are such that could be met by companies or corporations. Companies, corporations, etc., may not take any examination administered by the Board. Only individuals may sit for an examination. The Board has authority to issue a license or license endorsement only to individuals and has no authority to license companies, corporations, etc. If one is to conclude that the term "person," as used in the Plumbing License Law, may include a company or corporation, then one must also conclude that a Plumber's Apprentice may be a company or corporation, as well as a Drain Cleaner-Restricted Registrant, Journeyman Plumber, and so on. The term "person" is also used in Section 4(a) and Section 4(b) of the Plumbing License Law to describe Board Members appointed by the Governor. The Governor appoints only individuals as members of the Board, and not companies, corporations, etc.

To further support this interpretation, Section 14(a) of the Plumbing License Law states, " . . . It shall be unlawful for any person, firm, or corporation to engage in or work at the business of installing plumbing and doing plumbing work except as specifically herein provided unless such installation of plumbing or plumbing work be under the supervision and control of a plumber licensed under this Act." (Emphasis added). Had the Legislature intended for the word "person," as it is used throughout the Act, to also mean a company, corporation, firm, etc., it would have been unnecessary and useless to include the terms "firm or corporation" in Section 14(a).

Arguments against the Board's interpretation of "person," as it is used in the Plumbing License Law have referred to the Board's definition of "person" as the term is used in the Board's rules. The Board has defined "Person" in Section 361.1(34) as "For the purposes of these Rules only, a person means an individual, partnership, corporation, limited liability company, association, governmental subdivision or public or private organization of any character other than an agency." (Emphasis added). The Board used this definition only to clarify what the term "person" means in regards to the Board's rule defining "Plumbing Company." The Board has defined "Plumbing Company" in Section 361.1(38), to mean "A person, as defined in these Rules, who engages in the plumbing business." (Emphasis added). Within its definition, the Board has clarified that it has defined the term "person" as it is used only in the Board's rules and not as it is used in the Plumbing License Law.

The Board has been advised by its legal counsel that the Board's definition of "Paid Directly" is not more restrictive than HB 217 sets forth, but simply helps to clarify that a plumbing inspector, whether as an employee of a political subdivision or an independent contractor with a political subdivision, is an individual who must be paid directly by the political subdivision, as required by HB 217. The Board's definition of "Paid Directly" does not specify what an individual plumbing inspector must do with his or her payment, once it is received directly from the political subdivision. The definition does not prohibit an individual plumbing inspector from being employed by a company or corporation, nor does it prohibit a company or corporation from providing any benefit that it wishes to any of its employees. The definition does not prohibit a political subdivision from contracting with or employing as many plumbing inspectors as the political subdivision wishes.

The Board and the plumbing industry have, since 1947, interpreted "person," as it is used in context throughout the Plumbing License Law to only mean "individual." The Board believes that this interpretation is correct.

The Board disagrees with the recommendations of those that submitted comments opposed to including medical gasses and vacuum in its definition of "Plumbing," in Section 361.1(37), for the following reason:

The Board's definition of "Plumbing" mirrors that found in Section 2(1) of the Plumbing License Law.

The Board disagrees with the recommendations of those that submitted comments opposed to the proposed definition of "Plumbing Inspection," in Section 361.1(39), for the following reasons:

The Board's definition of "Plumbing Inspection" includes all plumbing, as defined by Section 2(1), that must be inspected according to an adopted plumbing code as required in Section 5B and Section 15(a) of the Plumbing License Law. The definition does not require all political subdivisions to adopt a plumbing code and perform plumbing inspections. The Board has requested a formal opinion from the Office of the Attorney General, regarding the requirements of newly passed legislation as it applies to plumbing codes and plumbing inspections. The Board does not believe that this definition will conflict with any opinion that it will receive from the Attorney General, whatever the opinion states.

The Board disagrees with the recommendations of those that submitted comments opposed to the proposed definition of "Political Subdivision," in Section 361.1(42), for the following reasons:

The Board is defining Political Subdivision in an effort to help answer the many questions it has received over the years regarding whether or not a particular entity is a political subdivision. The question has been most often asked in regard to whether or not the particular entity may employ a plumbing inspector. In its definition, the Board is simply listing all known general entities, as advised by the Board's legal counsel, that meet the definition

of political subdivision under state law. Under HB 1505, Section 15(e) of the Plumbing License Law is specific in stating that if the boundaries of a municipality and a municipal utility district overlap, only the affected municipality may perform plumbing inspections and collect a permit fee. The Board has no legal authority to restrict or categorize other political subdivisions in regards to plumbing inspections, beyond that provided in Section 15(e).

The Board disagrees with the recommendations of those that submitted comments opposed to its definition of "Direct Supervision," in Section 361.1(20), for the following reasons:

Section 2(4), of the Plumbing License Law defines a "Plumber's Apprentice," in relevant part, as "any person. . .who, as his principal occupation, is engaged in learning and assisting in the installation of plumbing, is registered by the Board, and works under the supervision of a licensed master plumber and the direct supervision of a licensed plumber." (Emphasis added). A Plumber's Apprentice has not been proven by examination to be knowledgeable of the plumbing codes and qualified to properly install plumbing and may be a person with little or absolutely no previous experience in the plumbing industry. In contrast, Section 2 of the Plumbing License Law defines "Master Plumber," "Journeyman Plumber" and "Tradesman Plumber-Limited Licensee" as persons who must meet minimum experience requirements, have passed an examination administered by the Board, are licensed by the Board and may install plumbing work, within the scope of the law, without being under the direct supervision of another person. The life of any plumbing system is directly related to the preparation of plumbing materials prior to the assembly of the materials according to the manufacturer's recommendations. Even the best plumbing materials will fail if they have not been properly prepared prior to assembly. The installation of any plumbing system involves repeated steps of preparing materials for assembly and joining those materials together, over and over again until the installation of the plumbing system is complete. Plumbers licensed by the Board have been tested by practical examination to show that they know how to properly prepare materials prior to their assembly. However, once the materials are assembled, even a qualified licensed plumber cannot tell if the materials were prepared properly prior to assembly, unless the licensee was actually on the job while the plumbing work is being performed, to ensure that the individuals under the licensee's direct supervision prepared the materials properly.

The Board disagrees with the recommendations of those that submitted comments suggesting that the Board adopt a rule creating a new category of "Plumber's Assistant." "Plumber's Assistants" would be individuals who state that they do not wish to learn the trade of plumbing, but wish to only earn a living installing plumbing or assisting in the installation of plumbing without first being registered as a "Plumber's Apprentice." The Board disagrees for the following reasons:

The Board has no statutory authority to create a new category of registrant as proposed. Additionally, there are many tasks performed by plumbing contractors and their employees that individuals who do not desire to learn the trade of plumbing may perform without ever being registered as a "Plumber's Apprentice." These tasks include excavation and backfill of ditches, drilling holes, driving to pick up plumbing materials, unloading and loading plumbing materials and tools, holding and steadying ladders, insulating pipe, installing pipe supports and nail plates, etc.

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §§361.1, 361.6, 361.8, 361.12

STATUTORY AUTHORITY: The amendments are adopted in accordance with HB 217 are adopted under Section 3 (Section 5B, Article 6243-101, V.T.C.S); and in accordance with HB 1505 and HB 2912 are adopted under Section 5 (Section 5, Article 6243-101, V.T.C.S.), Section 11 (Section 8C, Article 6243-101, V.T.C.S), Section 14 (Section 12, Article 6243-101, V.T.C.S), and Section 24 which authorizes, empowers and directs the Board to prescribe, amend and enforce all rules and regulations necessary to carry out the Act.

§361.1. Definitions.

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

(1) Act--The Plumbing License Law, Texas Civil Statutes, Article 6243-101, as amended.

(2) Administrative Act--The Administrative Procedure Act, the Texas Government Code, Section 2001.001, et seq, as amended.

(3) Administrator--The Board-appointed executive director of all Board staff.

(4) Adopted Plumbing Code--A plumbing code, including a fuel gas code adopted by the Board or a political subdivision, including any city, town, village, municipality, public water system, municipal utility district, in compliance with Section 5B of the Act.

(5) Advisory Committee--A Board appointed committee subject to Section 5(f) of the Act and Chapter 2110 of the Government Code, of which the primary function is to advise the Board.

(6) Appliance Connection--An appliance connection procedure using only a code approved appliance connector that does not require cutting into or altering the existing plumbing system.

(7) Applicant--An individual seeking to obtain a License, Registration or Endorsement.

(8) Board--The Texas State Board of Plumbing Examiners.

(9) Board Member--An individual appointed by the governor and confirmed by the senate to serve on the Board.

(10) Building Sewer--The part of the sanitary drainage system outside of the building, which extends from the end of the building drain to a public sewer, private sewer, private sewage disposal system, or other point of sewage disposal.

(11) Certificate of Insurance--a form submitted to the Board certifying that the Responsible Master Plumber carries insurance coverage as specified in Section 15 of the Act and Section 367.3 of these Rules.

(12) Chief Examiner--an employee of the Board who, under the direction of the Administrator, coordinates and supervises the activities of the Board examinations and registrations.

(13) Chief Field Representative--an employee of the Board who meets the definition of "Field Representative" and, under the direction of the Administrator, coordinates and supervises the activities of the Field Representatives.

(14) Cleanout--A fitting, other than a p-trap, approved by the adopted plumbing code and designed to be installed in a sanitary drainage system to allow easy access for cleaning the sanitary drainage system.

(15) Code--Approved Appliance Connector--A semi-rigid or flexible assembly of tube and fittings approved by the adopted

plumbing code and designed for connecting an appliance to the existing plumbing system without cutting into or altering the existing plumbing system.

(16) Code Approved Existing Opening--For the purposes of drain cleaning activities described in Section 2(13) of the Act, a code approved existing opening is any existing cleanout fitting, inlet of any p-trap or fixture, or vent terminating into the atmosphere that has been approved and installed in accordance with the adopted plumbing code.

(17) Complaint--A written charge alleging a violation of state law, Board rules or orders, local codes or ordinances, or standards of competency; or the presence of fraud, false information, or error in the attempt to obtain a License, Registration or Endorsement.

(18) Contested Case--A proceeding, including but not limited to rulemaking, licensing and registering, in which the agency determines the legal right, duties, and privileges of a party after allowing an opportunity for adjudicative hearing of the case.

(19) Continuing Professional Education--Board-approved courses/programs required for a licensee to renew his or her License and/or Endorsement.

(20) Direct Supervision--

(A) The on-the-job oversight and direction of an individual performing plumbing work by a licensed plumber who is fulfilling his or her responsibility to the client and employer by ensuring the following:

(i) that the plumbing materials for the job are properly prepared prior to assembly according to the material manufacturers recommendations and the requirements of the adopted plumbing code; and

(ii) that the plumbing work for the job is properly installed to protect health and safety by meeting the requirements of the adopted plumbing code and all requirements of local and state ordinances, regulations and laws.

(B) The on-the-job oversight and direction by a licensed Plumbing Inspector of an individual training to qualify for the Plumbing Inspector Examination.

(21) Drain Cleaner--An individual who has completed at least 4,000 hours working under the supervision of a Master Plumber as a registered Drain Cleaner-Restricted Registrant, who has fulfilled the requirements of and is registered with the Board, and who installs cleanouts and removes and resets p-traps to eliminate obstructions in building drains and sewers.

(22) Drain Cleaner-Restricted Registrant--An individual who has worked as a registered Plumber's Apprentice under the supervision of a Master Plumber, who has fulfilled the requirements of and is registered with the Board, and who clears obstructions in sewer and drain lines through any code-approved existing opening.

(23) Endorsement--a certification issued by the Board in addition to the Master or Journeyman Plumber License.

(24) Field Representative--for the purposes of these Rules,

(A) "Field Representative" means an employee of the Board who is:

(i) knowledgeable of this Act and of municipal ordinances relating to plumbing;

(ii) qualified by experience and training in good plumbing practice and compliance with this Act;

(iii) designated by the Board to assist in the enforcement of this Act and rules adopted under this Act.

(B) A field representative may:

(i) Make on-site license and registration checks to determine compliance with this Act;

(ii) investigate consumer complaints filed under Section 8A of this Act;

(iii) assist municipal plumbing inspectors in cooperative enforcement of this Act; and

(iv) issue citations as provided by Section 14 of this Act.

(25) Journeyman Plumber--An individual licensed under this Act who has met the qualifications for registration as a Plumber's Apprentice or for licensure as a Tradesman Plumber-Limited Licensee, who has completed at least 8,000 hours working under the supervision of a master plumber, who supervises, engages in, or works at the actual installation, alteration, repair, service and renovating of plumbing, and who has successfully fulfilled the examinations and requirements of the Board.

(26) License--A document issued by the Board to certify that the named individual fulfilled the requirements of the Act and of these rules to hold a license issued by the Board.

(27) Licensing and Registering--The process of granting, denying, renewing, revoking, or suspending a License, Registration or Endorsement.

(28) Maintenance Man or Maintenance Engineer--An employee, as opposed to an independent contractor, who performs plumbing maintenance work incidental to and in connection with other duties. "Incidental to and in connection with" includes the repair, maintenance and replacement of existing potable water piping, existing sanitary waste and vent piping, existing plumbing fixtures and existing water heaters. "Incidental to and in connection with" does not include cutting into fuel gas plumbing systems and the installation of gas fueled water heaters. An individual who erects, builds, or installs plumbing not already in existence may not be classified as a maintenance man or maintenance engineer. Plumbing work performed by a maintenance man or maintenance engineer is not exempt from state law and municipal rules and ordinances regarding plumbing codes, plumbing permits and plumbing inspections. Such maintenance individuals shall not engage in plumbing work for the general public.

(29) Master Plumber--An individual licensed under this Act who is skilled in the planning, superintending, and the practical installation, repair, and service of plumbing, who secures permits for plumbing work, who is knowledgeable about the codes, ordinances, or rules and regulations governing those matters, who alone, or through an individual or individuals under his supervision, performs plumbing work, and who has successfully fulfilled the examinations and requirements of the Board.

(30) Medical Gas Piping Installation Endorsement--a document entitling the holder of a Master or Journeyman Plumber License to install piping that is used solely to transport gases used for medical purposes including, but not limited to oxygen, nitrous oxide, medical air, nitrogen, medical vacuum.

(31) One Family Dwelling--a detached structure designed for the residence of a single family that does not have the characteristics of a multiple family dwelling, and is not primarily designed for transient guests or for providing services for rehabilitative, medical, or assisted living in connection with the occupancy of the structure.

(32) Party--Each person named or admitted in association with an action as a party.

(33) Paid Directly--As related to Section 5B(e) of the Act and Section 365.1(4)(B) of these Rules, "paid" and "directly" have the common meanings and "paid directly" means that compensation for plumbing inspections must be paid by the political subdivision to the individual Licensed Plumbing Inspector who performed the plumbing inspections.

(34) Person--For the purposes of these Rules only, a person means an individual, partnership, corporation, limited liability company, association, governmental subdivision or public or private organization of any character other than an agency.

(35) Petitioner--A person asking the Board to adopt a rule.

(36) Plumber's Apprentice--any individual other than a Master Plumber, Journeyman Plumber, or Tradesman Plumber-Limited Licensee who, as his or her principal occupation, is engaged in learning and assisting in the installation of plumbing, is registered by the Board, and works under the supervision of a licensed Master Plumber and the direct supervision of a licensed plumber.

(37) Plumbing--All piping, fixtures, appurtenances, and appliances, including disposal systems, drain or waste pipes, or any combination of these that: supply, recirculate, drain, or eliminate water, gas, medical gasses and vacuum, liquids, and sewage for all personal or domestic purposes in and about buildings where persons live, work, or assemble; connect the building on its outside with the source of water, gas, or other liquid supply, or combinations of these, on the premises, or the water main on public property; and carry waste water or sewage from or within a building to the sewer service lateral on public property or the disposal or septic terminal that holds private or domestic sewage. The installation, repair, service, maintenance, alteration, or renovation of all piping, fixtures, appurtenances, and appliances on premises where persons live, work, or assemble that supply gas, water, liquids, or any combination of these, or dispose of waster water or sewage.

(38) Plumbing Company--A person, as defined in these Rules, who engages in the plumbing business.

(39) Plumbing Inspection--Any of the inspections required in Section 5B and Section 15(a) of the Act, including any check of pipes, faucets, tanks, valves, water heaters, plumbing fixtures and appliances by and through which a supply of water, gas, medical gasses or vacuum, or sewage is used or carried that is performed on behalf of any political subdivision, public water supply, municipal utility district, town, city or municipality to ensure compliance with the adopted plumbing and gas codes and ordinances regulating plumbing.

(40) Plumbing Inspector--means any individual who is employed by a political subdivision, or who contracts as an independent contractor with a political subdivision, for the purpose of inspecting plumbing work and installations in connection with health and safety laws, ordinances, and plumbing and gas codes, who has no financial or advisory interests in any plumbing company, and who has successfully fulfilled the examinations and requirements of the Board.

(41) Pocket Card--A card issued by the Board which certifies that the holder has a Master Plumber License, Journeyman Plumber License, Tradesman Plumber-Limited License, Plumbing Inspector License, Residential Utilities Installer Registration, Drain Cleaner Registration, Drain Cleaner-Restricted Registration or a Plumber's Apprentice Registration..

(42) Political Subdivision--A political subdivision of the State of Texas that includes a:

(A) city;

(B) county;

(C) school district;

(D) junior college district;

(E) municipal utility district;

(F) levee improvement district;

(G) drainage district;

(H) irrigation district;

(I) water improvement district;

(J) water control improvement district;

(K) water control preservation district;

(L) freshwater supply district;

(M) navigation district;

(N) conservation and reclamation district;

(O) soil conservation district;

(P) communication district;

(Q) public health district;

(R) river authority; and

(S) any other governmental entity that:

(i) embraces a geographical area with a defined boundary;

(ii) exists for the purpose of discharging functions of government and;

(iii) possesses authority for subordinate self government through officers selected by it.

(43) P-Trap--A fitting connected to the sanitary drainage system for the purpose of preventing the escape of sewer gasses from the sanitary drainage system and designed to be removed to allow for cleaning of the sanitary drainage system. For the purposes of drain cleaning activities described in Section 2(12) of the Act, a p-trap includes any integral trap of a water closet, bidet, or urinal.

(44) Public Water System--A system for the provision to the public of water for human consumption through pipes or other constructed conveyances. Such a system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year. Two or more systems with each having a potential to serve less than 15 connections or less than 25 individuals, but owned by the same person, firm, or corporation and located on adjacent land will be considered a public water system when the total potential service connections in the combined systems are 15 or greater or if the total number of individuals served by the combined systems total 25 or greater, at least 60 days out of the year. Without excluding other meanings of the terms "individual" or "served," an individual shall be deemed to be served by a water system if the individual lives in, uses as the individual's place of employment, or works in a place to which drinking water is supplied from the water system.

(45) Regularly Employed--Steadily, uniformly, or habitually working in an employer-employee relationship with a view of earning a livelihood, as opposed to working casually or occasionally.

(46) "Residential Utilities Installer" means an individual who has completed at least 2,000 hours working under the supervision of a Master Plumber as a registered Plumber's Apprentice, who

has fulfilled the requirements of and is registered with the Board, and who constructs and installs yard water service piping for one-family or two-family dwellings and building sewers.

(47) Respondent--A person charged in a complaint filed with the Board.

(48) Responsible Master Plumber--A Responsible Master Plumber is the Master Plumber who allows his Master Plumber License to be used by a company for the purpose of performing plumbing work and obtaining the required plumbing permits. The Master Plumber by allowing his license to be used in this manner, assumes responsibility for all plumbing work performed. A Responsible Master Plumber may allow his Master Plumber License to be used by only one plumbing company.

(49) Rule--An agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of the agency. 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.

(50) Supervision--the general on-the-job or off-the-job oversight, direction and management of plumbing work and individuals performing plumbing work by a Responsible Master Plumber who is fulfilling his or her responsibility to the client and employer by ensuring the following:

(A) that the operations of the plumbing company that has secured his or her services meets the requirements of all applicable local and state ordinances, regulations and laws; and

(B) that the plumbing work performed under his or her License will protect health and safety by meeting the requirements of the adopted plumbing code and all requirements of local and state ordinances, regulations and laws.

(51) System--An interconnection between one or more public or private end users of water, gas, sewer, or disposal systems that could endanger public health if improperly installed.

(52) "Tradesman Plumber-Limited Licensee" means an individual who has completed at least 4,000 hours working under the direct supervision of a Journeyman or Master Plumber as a registered Plumber's Apprentice, who has passed the required examination and fulfilled the other requirements of the Board, who constructs and installs plumbing for one-family or two-family dwellings, and who has not met or attempted to meet the qualifications for a Journeyman Plumber License.

(53) Two Family Dwelling--a detached structure with separate means of egress designed for the residence of two families ("duplex") that does not have the characteristics of a multiple family dwelling and is not primarily designed for transient guests or for providing services for rehabilitative, medical, or assisted living in connection with the occupancy of the structure.

(54) Water Supply Protection Specialist--a Master or Journeyman Plumber who holds the Water Supply Protection Specialist Endorsement issued by the Board.

(55) Water Treatment--A business conducted under contract that requires experience in the analysis of water, including the ability to determine how to treat influent and effluent water, to alter or purify water, and to add or remove a mineral, chemical, or bacterial content or substance. The term also includes the installation and service of potable water treatment equipment in public or private water systems and making connections necessary to complete installation of a water treatment system.

(56) Work as a Master Plumber -To act as and assume the responsibilities of a Responsible Master Plumber, as defined in these Rules.

(57) Yard Water Service Piping--The building supply piping carrying potable water from the water meter or other source of water supply to the point of connection to the water distribution system at the building.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107682
Robert Maxwell
Administrator
Texas State Board of Plumbing Examiners
Effective date: December 30, 2001
Proposal publication date: September 28, 2001
For further information, please call: (512) 458-2145

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SUBCHAPTER B. PETITION FOR ADOPTION OF RULES

22 TAC §§361.22, 361.26 - 361.28

The amendments are adopted in accordance with HB 217 are adopted under Section 3 (Section 5B, Article 6243-101, V.T.C.S; and in accordance with HB 1505 are proposed under Section 5 (Section 5, Article 6243-101, V.T.C.S.), Section 11 (Section 8C, Article 6243-101, V.T.C.S), Section 14 (Section 12, Article 6243-101, V.T.C.S), and Section 24 which authorizes, empowers and directs the Board to prescribe, amend and enforce all rules and regulations necessary to carry out the Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107683
Robert Maxwell
Administrator
Texas State Board of Plumbing Examiners
Effective date: December 30, 2001
Proposal publication date: September 28, 2001
For further information, please call: (512) 458-2145

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CHAPTER 363. EXAMINATIONS

22 TAC §§363.1, 363.6, 363.10

INTRODUCTION: The Texas State Board of Plumbing Examiners adopts amendments to §§363.1, 363.6, and 363.10, concerning examinations, without changes to the proposed text as published in the September 28, 2001, issue of the *Texas Register* (26 TexReg 7398). During the 77th Legislature House Bills 217 and 1505 were signed into law. As a result of these two House

Bills, the Plumbing License Law is amended. The rule amendments are adopted substantially to implement the requirements of HB 217 and HB 1505.

REASONED JUSTIFICATION: The major requirements of HB 217 and HB 1505 are explained as follows:

House Bill (HB) 217 amends the Plumbing License Law to modify the plumbing codes that the Texas State Board of Plumbing Examiners ("Board") is required to adopt and authorizes the Board by rule to adopt later editions of the adopted plumbing codes. The Southern Standard Plumbing Code and the National Standard Plumbing Code were eliminated from the codes adopted by the Board. The Uniform Plumbing Code was maintained and the International Plumbing Code was added, resulting in two Plumbing Codes to be adopted by the Board. The bill provides that plumbing installed in an area not otherwise subject to regulation under the Plumbing License Law must be installed in accordance with a Board adopted plumbing code. The bill authorizes municipalities or owners of a public water system the ability to amend any provisions of the codes and standards to conform to local concerns that do not substantially vary with rules or laws of this state. The bill provides that plumbing installed in compliance with an adopted plumbing code must be inspected by a licensed plumbing inspector. (Section 3).

Under HB 217, the Board's jurisdiction was greatly expanded by requiring that all plumbing work connected to a public water system, or performed in any city in the state be performed by a licensed plumber. This eliminated the exemption, which had been in place since 1947, requiring a plumbing license in only cities with populations of 5,000 or more inhabitants (Section 2).

Under HB 217, Licensed Plumbing Inspectors are no longer restricted to being bona fide employees of a political subdivision, but were allowed to contract with a political subdivision as long as they are paid directly by the political subdivision (Sections 1 and 3).

House Bill (HB) 1505 amends the Plumbing License Law by clarifying some existing language and effectively regulating all facets of plumbing work and individuals engaged in plumbing work.

HB 1505 clarifies that medical gasses and vacuum are included in the definition of "plumbing" (Section 1).

HB 1505 establishes a new Tradesman Plumber-Limited license and four new registrations. HB 1505 mandates, by law, experience and qualification requirements for all licenses and registrations issued by the Board. The new Tradesman Plumber-Limited license authorizes individuals to engage in the construction and installation of plumbing only in one and two-family dwellings, after passing an examination administered by the Board. HB 1505 provides for registrations authorizing individuals to install residential yard water and sewer lines (Residential Utilities Installer); remove p-traps and install clean-outs to clear obstructions in sewer lines (Drain Cleaner); clear obstructions in sewer lines through existing openings only (Drain Cleaner-Restricted Registrant); and assist in the installation of plumbing work (Plumber's Apprentice). HB 1505 requires all registrants and licensees to work under the general supervision of a Master Plumber and Residential Utilities Installers, Drain Cleaners and Drain Cleaner-Restricted Registrants to maintain registrations as a Plumber's Apprentice. (Sections 1 and 5).

HB 1505 provides the Board with express authority to adopt rules and take other actions as the Board deems necessary to administer this law including provisions relating to the new classes of registrants and licensees (Sections 5, 9, 11, and 14).

HB 1505 authorizes the Board to appoint advisory committees as it considers necessary (Section 5).

HB 1505 requires, rather than authorizes, the Board to recognize, approve, and administer continuing education programs for licensees and endorsees (Section 5).

Under HB 1505, the Licensed Sanitary Engineer position on the Board was changed to a Licensed Professional Engineer. Clarification that the Master Plumber Position, Journeyman Plumber Position, and Plumbing Inspector position on the Board, must be licensees of the Board was also included (Section 5).

HB 1505 requires a person who desires to learn the trade of plumbing to register as a Plumber's Apprentice before beginning to assist a licensee at the trade of plumbing (Section 13).

HB 1505 requires that no person, whether as a master plumber, journeyman plumber, tradesman plumber-limited licensee, plumber's apprentice, residential utilities installer, drain cleaner, drain cleaner-restricted registrant, or otherwise engage in, work at, or conduct the business of plumbing in this state or serve as a plumbing inspector unless such a person is the holder of a valid license, endorsement, or registration. Additionally, this Section states that it shall be unlawful for any person, firm or corporation to engage in or work at the business of installing plumbing work except as specifically herein provided unless such installation of plumbing or plumbing work be under the supervision and control of a plumber licensed under the Act. (Section 16).

HB 1505 authorizes the Board to monitor insurance requirements for Master Plumbers responsible for the operation of a plumbing business by requiring them to submit a certificate of insurance to the Board (Section 17).

HB 1505 requires that the installation and replacement of water heaters be inspected by a Licensed Plumbing Inspector (Section 17).

HB 1505 also requires municipal plumbing inspections to be performed by licensed plumbing inspectors and provides that if the boundaries of a municipality and a municipal utility district overlap, only the affected municipality may perform a plumbing inspection and collect a permit fee (Section 17).

HB 1505 requires the Board to adopt the required rules necessary to implement this law no later than January 1, 2002 (Section 24).

The following is an outline of the sections amended in Chapter 363:

Section 363.1, regarding qualifications, (a)-(l)

Several new subsections are being added to this section and will re-letter the existing subsections.

Subsections are being amended and added to include Tradesman Plumber-Limited License; Plumber's Apprentice Registration, Residential Utilities Installer Registration, Drain Cleaner Registration or Drain Cleaner-Restricted Registration to its qualifications.

Also, the number of hours required on installation or repair are being amended throughout the section.

Section 363.6, regarding special examination conditions, (a)-(c).

This section is being amended to add subsections (a)-(c) which will allow the Board to waive certain requirements regarding examinations in some instances.

Section 363.10, regarding disqualification.

This section is being amended to add "be registered or to" and "Registrant" in regards to disqualification of an individual.

Also, as a result of HB 217 and HB 1505, the Texas State Board of Plumbing Examiners proposes amendments to Chapters 361, 365, and 367 elsewhere in this issue of the Texas Register.

The Board received written comments following the proposal of the rules and held a public hearing on November 7, 2001, in Austin, Texas, to receive additional written and oral comments.

The following entities and individuals furnished written or oral comments in favor of all or specific sections of the proposed Chapter 363 rules:

Five plumbing inspectors for the City of Amarillo plumbing inspection department submitted comments in favor of all of the Board's Rules as proposed.

The Chief Plumbing Inspector of the City of San Antonio submitted comments in favor of all of the Board's rules as proposed.

An individual licensed plumbing inspector, who is employed by a city, submitted comments in favor of all of the Board's rules as proposed.

A plumbing inspector from the City of Texarkana Water Utilities commented in favor of all of the Board's rules as proposed.

A person representing the Mechanical Contractors Association of Houston, Inc., who claimed a membership of 95 contractors, commented that the association is in favor of all of the Board's rules as proposed.

A person representing the Mechanical Contractors Association of Austin, who claimed a membership of 18 contractors that employ 600-700 plumbers, commented that the association is in favor of all of the Board's rules as proposed.

An individual representing a mechanical and plumbing contractor provided comments in favor of all of the Board's rules as proposed.

A person representing the statewide association of the Associated Plumbing-Heating-Cooling Contractors of Texas (APHCCT), who claimed a membership of thousands, including associates, plumbing inspectors and more than 250 plumbing companies, commented that the association is in favor of all of the Board's rules as proposed.

A person representing the Austin Chapter of the APHCCT commented that the Austin Chapter is in favor of all of the Board's rules as proposed.

A person representing the APHCCT of North Texas commented that the North Texas Chapter is in favor of all of the Board's rules as proposed.

A person representing the Waco Chapter of the APHCCT commented that the Waco Chapter is in favor of all of the Board's rules as proposed.

A person representing the statewide association of Texas Plumbing, Air Conditioning and Mechanical Contractors Association, who claim to have more than 350 voting members, commented that the association is in favor of all of the Board's rules as proposed.

A person representing the Texas Plumbing, Air Conditioning and Mechanical Contractors Association of Houston, who claim to have more than 250 voting members, commented that the Houston Chapter is in favor of all of the Board's rules as proposed.

Twenty-one individual plumbing contractors submitted comments in favor of all of the Board's rules as proposed.

The following individuals or entities furnished written or oral comments as resource witnesses regarding the proposed rules:

One individual who represented herself as a concerned housewife, commented on the numerous plumbing problems that she experienced with her new home including mold infestation. The individual stated that she believes that there should be more stringent rules for plumbers and plumbing inspectors and a master plumber on every plumbing job.

One individual who represented herself as a homeowner, commented on the plumbing problems that she had on her new home and attributed them to the plumbing installation and the plumbing inspection performed by a third party. The individual stated that she believes that consumers need to be protected from poor plumbing practices and poor plumbing inspections.

One person representing homeowners and the association of Home Owners for Better Building commented that she had not reviewed the proposed rules thoroughly and could not comment specifically regarding the proposed rules. The person commented on the plumbing installation and inspection practices in some areas of the state. The person stated that she believes that the Board should protect consumers. The person stated that she is opposed to inspections performed by a third party and believes that a master plumber should supervise every plumbing job.

The following entities and individuals furnished written or oral comments in opposition to all or specific sections of the proposed Chapter 363 rules:

An individual licensed plumbing inspector submitted comments in opposition to Board Rule Section 363.1(e) as proposed, because no high school diploma or equivalency (G.E.D). is required to be eligible for a Tradesman Plumber-Limited License. The individual believes that the Board is not following the leaders of the country by supporting education and is setting up a system of under educated licensees.

The Chief Plumbing Inspector from the City of Houston submitted comments opposing allowing credit for any more than actual hours for any plumbing inspector qualifications in proposed Section 363.1(f). The plumbing inspector believes that more training is necessary to become a plumbing inspector than what is proposed in the rule.

Two persons representing The Coalition of Third Party Inspection Companies, whose members are the persons' two plumbing inspection companies, submitted comments opposed to the proposed Section 363.1(f) regarding plumbing inspector requirements. The persons believe that the proposed rule increases requirements for plumbing inspectors at a time when more plumbing inspectors will be needed. The persons proposed not changing the plumbing inspector requirements at this time. One of these persons also presented similar comments on their own behalf, as an officer of a plumbing inspection company.

Persons representing the Building Officials and Code Administrators International (BOCAI), the International Conference of Building Officials (ICBO), the Southern Building Code Congress International (SBCCI), entities that offer training and plumbing code certifications, provided separate and substantially similar comments opposing the plumbing inspector requirements proposed in Section 363.1(f)(3)(E)(i)-(vii). The entities state that these requirements appear to penalize applicants with no job experience in the plumbing industry, are not well balanced against reasonable standards and will make it difficult for municipalities to attract plumbing inspectors. The entities state that individuals do not need experience in the plumbing trade to be a competent inspector. The entities propose maintaining the mandatory requirement for plumbing inspector applicants to obtain one of their plumbing code certifications and thereby oppose Section 363.1(f)(3)(E)(i), which makes a plumbing code certification optional. The entities state that it is a valuable qualification that has worked well over the years as a mandatory requirement for persons who do not hold a plumbing license. The entities also recommended increasing the number of hours of credit for on the job training of plumbing inspectors from 200 to 300 hours, in Section 363.1(f)(3)(E)(viii), in order to allow cities to take full advantage of their training programs.

The Building Official from the City of Laredo submitted comments, which substantially mirror those of BOCAI, ICBO and SBCCI, opposing the plumbing inspector requirements in Section 363.1(f).

A person representing the Texas League of United Latin American Citizens (Texas LULAC), presented comments opposing the Board's requirements for obtaining Social Security numbers and proof of legal authorization to work in the United States from applicants for registration. Texas LULAC believes that these requirements could inhibit some applicants from registering.

Upon passage of the laws, by the 77th Legislature, affecting and amending the Plumbing License Law, the Board consulted with its attorney, an Assistant Attorney General, regarding the Board's interpretation of the new legislation. In proposing the new rules and rule amendments, in response to the requirements of the new legislation, the Board was advised by its attorney regarding the necessity of the Board to abide by the new legislation and the its authority to adopt the proposed rules.

The Board disagrees with the recommendation to require a high school or G.E.D. in order to be eligible to obtain a Tradesman Plumber-Limited License in Section 363.1(e), for the following reasons:

The Board proposed the language in Section 363.1(e), without requiring a high school diploma or G.E.D., in response to numerous letters and oral comments received from the plumbing industry and legislators, prior to the actual formal proposal of the rule. Those that commented believe that a high school diploma or G.E.D. is not necessary to be licensed to install plumbing in a one or two-family dwelling. The Board has maintained the requirement for a high school diploma or G.E.D. as a requirement for all other license categories. The rules as proposed will help qualify an individual to hold a Tradesman Plumber-Limited License without also holding a high school diploma or G.E.D., but will require the individual to obtain a high school diploma or G.E.D. prior to qualifying for any other license issued by the Board.

The Board disagrees with the recommendations of those who submitted comments opposing the plumbing inspector requirements proposed in Section 363.1(f), for the following reasons:

The Board proposed the revised plumbing inspector requirements in Section 363.1(f), primarily in response to numerous complaints that the Board has received regarding the amount of time it takes to qualify an individual, who does not hold a plumbing license, to take the plumbing inspector examination under the existing rules. The majority of the complaints came from small cities that lost their only plumbing inspector and were seeking to get another individual, who did not hold a plumbing license, qualified to take the plumbing inspector examination. Few of these individuals could meet the optional requirement of 5,000 hours experience working at the plumbing trade. Some of the individuals would have to drive to other cities for a day or two per week for many months, in order to meet the optional 500 hours on-the-job training under another licensed plumbing inspector. Many complained that the mandatory plumbing code certification exams are held only once every three months.

Section 363.1(f), as proposed, will allow an applicant a much wider variety of options to qualify for the plumbing inspector examination than those under the previous qualifications. In most cases, an applicant could also qualify in less time than that required under the previous qualifications. The revised rule is structured more towards a wider variety of training courses and much less toward past experience in the plumbing trade. The new language requires the applicant to obtain 500 hours of training or experience in the plumbing industry, while allowing the applicant to choose from more than 750 credited hours in eight available categories. Some of the categories involve training that applicants or plumbing inspectors have been taking, but were not credited for under the previous requirements. Some of the entities that submitted comments opposed to the rule offer more than one type of plumbing related training course or certification that could be credited under the new qualifications, whereas previously, only one type could be credited. The Board believes that the new rule will result in greater protection of the health and safety of the citizens by ensuring that plumbing inspections will be performed by licensed plumbing inspectors who have received a more diverse range of relevant plumbing related training.

The Board disagrees with the recommendations of those who presented comments opposing the Board's requirements for obtaining Social Security numbers and proof of legal authorization to work in the United States from applicants for registration for the following reasons:

The Board solicits applicants' Social Security numbers pursuant to Texas Family Code Section 231.302 for use by the State's Title IV-D agency to assist in the administration of laws relating to child support enforcement under Part's A and D of Title IV of the Federal Social Security Act (42 U.S.C. Sections 601-617 and 651-669).

Although registration as a Plumber's Apprentice has been a voluntary program until the passage of HB 1505, the proof of citizenship or legal authorization to work in the United States has been a requirement for registration as a Plumber's Apprentice since as early as January, 1998. The Board must verify the immigrant status of individuals seeking licensure who are physically present in this country in order to determine their eligibility for a professional license or registration in accordance with 8 USC Section 1621. See also, Attorney General Opinion JC-0051 (May 19, 1999). It is the opinion of this Board that for purposes of compliance with this Federal law, an application for a registration would be treated the same as an application for a license, because a registration

or a license are necessary for performing the work regulated by the Plumbing License Law.

STATUTORY AUTHORITY: The amendments are adopted in accordance with HB 217 are adopted under Section 3 (Section 5B, Article 6243-101, V.T.C.S; and in accordance with HB 1505 are adopted under Section 5 (Section 5, Article 6243-101, V.T.C.S.), Section 11 (Section 8C, Article 6243-101, V.T.C.S), Section 14 (Section 12, Article 6243-101, V.T.C.S), and Section 24 which authorizes, empowers and directs the Board to prescribe, amend and enforce all rules and regulations necessary to carry out the Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107684
Robert Maxwell
Administrator
Texas State Board of Plumbing Examiners
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Proposal publication date: September 28, 2001
For further information, please call: (512) 458-2145

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CHAPTER 365. LICENSING

INTRODUCTION: The Texas State Board of Plumbing Examiners ("the Board") adopts amendments to §§365.1, 365.4-365.14 and the repeal of §365.2, concerning Licensing. Section 365.1 is adopted with changes to the proposed text as published in the September 28, 2001, issue of the *Texas Register* (26 TexReg 7403). Sections 365.4-365.14 and the repeal of §365.2 are adopted without changes and will not be republished. During the 77th Legislature House Bills 217 and 1505 were signed into law. As a result of these two House Bills, the Plumbing License Law is amended. The rule amendments are adopted substantially to implement the requirements of HB 217 and HB 1505. The Board's legal representative from the Office of the Attorney General has advised that the changes affect no new persons, entities, or subjects. The changes to the proposed text are found in the introduction statement in rule Section 365.1, License and registration Categories; Description; Scope of Work Permitted, and are explained elsewhere in this preamble.

REASONED JUSTIFICATION: The major requirements of HB 217 and HB 1505 are explained as follows:

House Bill (HB) 217 amends the Plumbing License Law to modify the plumbing codes that the Board is required to adopt and authorizes the Board to adopt later editions of the plumbing codes. The Southern Standard Plumbing Code and the National Standard Plumbing Code were eliminated from the codes adopted by the Board. The Uniform Plumbing Code was maintained and the International Plumbing Code was added, resulting in two Plumbing Codes to be adopted by the Board. The bill provides that plumbing installed in an area not otherwise subject to regulation under the Plumbing License Law must be installed in accordance with a Board adopted plumbing code. The bill authorizes municipalities or owners of a public water system the ability to amend any provisions of the codes and standards to conform to local concerns that do not substantially vary with rules or laws of this state. The bill provides that plumbing installed in compliance with an adopted plumbing code must be inspected by a licensed plumbing inspector. (Section 3)

Under HB 217, the Board's jurisdiction was greatly expanded by requiring that all plumbing work connected to a public water system, or performed in any city in the state be performed by a licensed plumber. This eliminated the exemption, which had been in place since 1947, requiring a plumbing license in only cities with populations of 5,000 or more inhabitants (Section 2).

Under HB 217, Licensed Plumbing Inspectors are no longer restricted to being bona fide employees of a political subdivision, but were allowed to contract with a political subdivision as long as they are paid directly by the political subdivision (Sections 1 and 3).

House Bill (HB) 1505 amends the Plumbing License Law by clarifying some existing language and effectively regulating all facets of plumbing work and individuals engaged in plumbing work.

HB 1505 clarifies that medical gasses and vacuum are included in the definition of "plumbing" (Section 1).

HB 1505 establishes a new Tradesman Plumber-Limited license and four new registrations. HB 1505 mandates, by law, experience and qualification requirements for all licenses and registrations issued by the Board. The new Tradesman Plumber-Limited license authorizes individuals to engage in the construction and installation of plumbing only in one and two-family dwellings, after passing an examination administered by the Board. HB 1505 provides for registrations authorizing individuals to install residential yard water and sewer lines (Residential Utilities Installer); remove p-traps and install clean-outs to clear obstructions in sewer lines (Drain Cleaner); clear obstructions in sewer lines through existing openings only (Drain Cleaner-Restricted Registrant); and assist in the installation of plumbing work (Plumber's Apprentice). HB 1505 requires all registrants and licensees to work under the general supervision of a Master Plumber and Residential Utilities Installers, Drain Cleaners and Drain Cleaner-Restricted Registrants to maintain registrations as a Plumber's Apprentice (Sections 1 and 5).

HB 1505 provides the Board with express authority to adopt rules and take other actions as the Board deems necessary to administer this law including provisions relating to the new classes of registrants and licensees (Sections 5, 9, 11, and 14).

HB 1505 authorizes the Board to appoint advisory committees as it considers necessary (Section 5).

HB 1505 requires, rather than authorizes, the Board to recognize, approve, and administer continuing education programs for licensees and endorsees (Section 5).

Under HB 1505, the Licensed Sanitary Engineer position on the Board was changed to a Licensed Professional Engineer. Clarification that the Master Plumber Position, Journeyman Plumber Position, and Plumbing Inspector position on the Board, must be licensees of the Board was also included (Section 5).

HB 1505 requires a person who desires to learn the trade of plumbing to register as a Plumber's Apprentice before beginning to assist a licensee at the trade of plumbing (Section 13).

HB 1505 requires that no person, whether as a master plumber, journeyman plumber, tradesman plumber-limited licensee, plumber's apprentice, residential utilities installer, drain cleaner, drain cleaner-restricted registrant, or otherwise engage in, work at, or conduct the business of plumbing in this state or serve

as a plumbing inspector unless such a person is the holder of a valid license, endorsement, or registration. Additionally, this Section states that it shall be unlawful for any person, firm or corporation to engage in or work at the business of installing plumbing work except as specifically herein provided unless such installation of plumbing or plumbing work be under the supervision and control of a plumber licensed under the Act. (Section 16).

HB 1505 authorizes the Board to monitor insurance requirements for Master Plumbers responsible for the operation of a plumbing business by requiring them to submit a certificate of insurance to the Board (Section 17).

HB 1505 requires that the installation and replacement of water heaters be inspected by a Licensed Plumbing Inspector (Section 17).

HB 1505 also requires municipal plumbing inspections to be performed by licensed plumbing inspectors and provides that if the boundaries of a municipality and a municipal utility district overlap, only the affected municipality may perform a plumbing inspection and collect a permit fee (Section 17).

HB 1505 requires the Board to adopt the required rules necessary to implement this law no later than January 1, 2002 (Section 24).

The following is an outline of the sections being amended and deleted in Chapter 365:

Section 365.1, regarding license and registration categories; description; scope of work permitted, (4)-(10). The introductory statement in this Section is also being amended to simply include the new license and registrations added by HB 1505. Through an oversight, the amendments to the introductory statement were not shown in the published proposed amendments to this Section. However, the amendments to the introductory statement are non-substantive and do not add any new requirements or affect any new persons or subjects and do not require republication of the adopted sections as proposed amendments.

Registration is being added to the section title. Independent contractor is replacing agent in paragraph (4). Also, in new subparagraphs (E) and (F) the definition of plumbing inspector is more defined. The section is also adding new definitions to include: Tradesman Plumber-Limited Licensee; Residential Utilities Installer; Drain Cleaner; Drain Cleaner-Restricted Registrant; and Plumber's Apprentice.

Section 365.2 regarding apprentice registration is being repealed. The language in this rule has been amended and moved into other sections.

Section 365.4, regarding issuance, (a)-(c). Subsection (a) is being amended to include registration. Also, a new subsection (c) is being added to include licenses, endorsements and registrations.

Section 365.5, regarding renewals, (a)-(g).

This section is being amended to add: "registrant," "registration" to subsections (a)-(c). Also, Tradesman Plumber-Limited Licensee is being added to the individuals wishing to renew a license. Professional and CPE is being added to the applicable course title.

Section 365.6, regarding expirations (a)-(e).

This section is being amended similar to 365.5 to include registration, professional, and endorsement to the existing text. Section 365.7, regarding duplicate license.

"Registration" is now included when referencing replacement documents issued by the Board.

Section 365.8, regarding change of name or address, (a)-(b).

"Registrant" and "Registration" are being added to subsection (a). Subsection (b) is being amended to replace "agency" with "contract."

Section 365.9, regarding reprimand, suspension, revocation, (a)-(c).

The section is being amended to replace old statutory language with the current Government Code, Section 2001. "Registrant" and "Registration" are also being added to this section.

Sections 365.10, 365.11, and 365.12 are all being amended to update legal cites to correspond with recent legislation.

Section 365.13, regarding licensing of guaranteed student loan defaulters, (a)-(e). "Registration" and "registrant" are being added throughout this section.

Section 365.14, regarding continuing professional education programs, (a) and (c). Tradesman Plumber-Restricted Licensee is being added to subsections (a) and (c).

Also, as a result of HB 217 and HB 1505, the Texas State Board of Plumbing Examiners adopts amendments to Chapters 361, 363, and 367 elsewhere in this issue of the *Texas Register*.

The Board received written comments following the proposal of the rules and held a public hearing on November 7, 2001, in Austin, Texas, to receive additional written and oral comments.

The following entities and individuals furnished written or oral comments in favor of all or specific sections of the proposed Chapter 365 rules:

A person representing the statewide association of the Texas Association of Plumbing Inspectors, who claimed a membership of more than 300 plumbing inspectors in more than 200 cities in Texas and has been an association for at least 54 years, submitted comments stating that the association is in favor of the requirement that the individual plumbing inspector be paid directly by the political subdivision. This requirement is stated in rule Section 365.1(4)(B).

A person representing the Plumbing/Mechanical Officials of North Texas, who claimed a membership of more than 80 plumbing inspectors in more than 40 cities in the Dallas-Fort Worth area and has been an association for at least 40 years, submitted comments stating that the association is in favor of the requirement that the individual plumbing inspector be paid directly by the political subdivision. This requirement is stated in rule Section 365.1(4)(B).

Five plumbing inspectors for the City of Amarillo plumbing inspection department submitted comments in favor of all of the Board's Rules as proposed.

The Chief Plumbing Inspector of the City of San Antonio submitted comments in favor of all of the Board's rules as proposed.

The Chief Plumbing Inspector of the City of Houston submitted comments in favor of the requirement that the individual plumbing inspector be paid directly by the political subdivision. This requirement is stated in rule Section 365.1(4)(B).

An individual licensed plumbing inspector, who is employed by a city, submitted comments in favor of all of the Board's rules as proposed.

An individual licensed plumbing inspector, who contracts with multiple political subdivisions and is paid directly by each political subdivision, submitted comments in favor of the Board's rules as proposed in Chapter 365.

A plumbing inspector from the City of Texarkana Water Utilities commented in favor of all of the Board's rules as proposed.

A person representing the Mechanical Contractors Association of Houston, Inc., who claimed a membership of 95 contractors, commented that the association is in favor of all of the Board's rules as proposed. In addition, the association specifically commented in favor of the definition of the requirement that the individual plumbing inspector be paid directly by the political subdivision. This requirement is stated in rule Section 365.1(4)(B).

A person representing the Mechanical Contractors Association of Austin, who claimed a membership of 18 contractors that employ 600-700 plumbers, commented that the association is in favor of all of the Board's rules as proposed. In addition, the association specifically commented in favor of the requirement that the individual plumbing inspector be paid directly by the political subdivision. This requirement is stated in rule Section 365.1(4)(B).

An individual representing a mechanical and plumbing contractor provided comments in favor of all of the Board's rules as proposed. In addition, the individual specifically commented in favor of the requirement that the individual plumbing inspector be paid directly by the political subdivision. This requirement is stated in rule Section 365.1(4)(B).

A person representing the statewide association of the Associated Plumbing-Heating-Cooling Contractors of Texas (APHCCT), who claimed a membership of thousands, including associates, plumbing inspectors and more than 250 plumbing companies, commented that the association is in favor of all of the Board's rules as proposed. In addition, APHCCT specifically commented in favor of the requirement that the individual plumbing inspector be paid directly by the political subdivision. This requirement is stated in rule Section 365.1(4)(B).

A person representing the Austin Chapter of the APHCCT commented that the Austin Chapter is in favor of all of the Board's rules as proposed.

A person representing the APHCCT of North Texas commented that the North Texas Chapter is in favor of all of the Board's rules as proposed.

A person representing the Waco Chapter of the APHCCT commented that the Waco Chapter is in favor of all of the Board's rules as proposed.

A person representing the statewide association of Texas Plumbing, Air Conditioning and Mechanical Contractors Association, who claim to have more than 350 voting members, commented that the association is in favor of all of the Board's rules as proposed.

A person representing the Texas Plumbing, Air Conditioning and Mechanical Contractors Association of Houston, who claim to have more than 250 voting members, commented that the Houston Chapter is in favor of all of the Board's rules as proposed.

Twenty-one individual plumbing contractors submitted comments in favor of all of the Board's rules as proposed and several specifically commented in favor of the requirement that the individual plumbing inspector be paid directly by the political subdivision. This requirement is stated in rule Section 365.1(4)(B).

The following individuals or entities furnished written or oral comments as resource witnesses regarding the proposed rules:

One individual who represented herself as a concerned housewife, commented on the numerous plumbing problems that she experienced with her new home including mold infestation. The individual stated that she believes that there should be more stringent rules for plumbers and plumbing inspectors and a master plumber on every plumbing job.

One individual who represented herself as a homeowner, commented on the plumbing problems that she had on her new home and attributed them to the plumbing installation and the plumbing inspection performed by a third party. The individual stated that she believes that consumers need to be protected from poor plumbing practices and poor plumbing inspections.

One person representing homeowners and the association of Home Owners for Better Building commented that she had not reviewed the proposed rules thoroughly and could not comment specifically regarding the proposed rules. The person commented on the plumbing installation and inspection practices in some areas of the state. The person stated that she believes that the Board should protect consumers. The person stated that she is opposed to inspections performed by a third party and believes that a master plumber should supervise every plumbing job.

The following entities and individuals furnished written or oral comments in opposition to all or specific sections of the proposed Chapter 365 rules:

Two persons from an incorporated plumbing inspection firm, one who is a licensed plumbing inspector, commented on the requirement that the individual plumbing inspector be paid directly by the political subdivision. This requirement is stated in rule Section 365.1(4)(B). The persons stated that the rule will prohibit a licensed plumbing inspector from being paid by a company, corporation, etc., that has contracted with a political subdivision to perform plumbing inspections. The persons stated the proposed rule is discriminatory and will prohibit licensed plumbing inspectors from receiving benefits such as health insurance, workers compensation insurance, etc., that the plumbing inspector would receive from the company or corporation employing the plumbing inspector. The persons expanded on their belief that plumbing inspection firms offer advantages that plumbing inspectors paid directly by political subdivision do not. The persons also recommended that the Board delete rule Sections 365.1(4)(D) and Section 365.5(d) and allow plumbing inspectors to perform plumbing inspections and renew their license without providing proof to the Board that are employed by or have contracted with a political subdivision.

Two persons representing The Coalition of Third Party Inspection Companies, whose members are the persons' two plumbing inspection companies, submitted comments opposed to the requirement that the individual plumbing inspector be paid directly by the political subdivision. This requirement is stated in rule Section 365.1(4)(B). One of the individuals stated that it is not necessary for plumbing inspectors to be paid directly by a political subdivision. These two persons also presented similar

comments on their own behalf, as officers of two plumbing inspection companies.

A licensed plumbing inspector representing the City of Hamilton commented in opposition to the requirement that the individual plumbing inspector be paid directly by the political subdivision. This requirement is stated in rule Section 365.1(4)(B). The City of Hamilton believes that in the event that a plumbing inspector is unable to perform a scheduled plumbing inspection, it will be a problem for a city to get a back-up plumbing inspector if the city must pay the plumbing inspectors directly.

A person representing the Building Officials Association of Texas (BOAT) with approximately 285 members, provided comments opposed to the requirement that the individual plumbing inspector be paid directly by the political subdivision. This requirement is stated in rule Section 365.1(4)(B). BOAT commented that the requirement is more restrictive than HB 217. BOAT believes that HB 217 allows a political subdivision to pay a company and does not require that the individual plumbing inspector to be paid directly by the political subdivision.

A person representing the City of Fort Worth presented comments opposed to the requirement that the individual plumbing inspector be paid directly by the political subdivision. This requirement is stated in rule Section 365.1(4)(B). The City of Fort Worth recognizes that HB 217 states that a political subdivision "may contract with any plumbing inspector paid directly by the political subdivision," but believes that the use of the word "may" implies that the language is permissive regarding direct payment and allows a political subdivision to contract with a plumbing inspector who is not paid directly by the political subdivision. The City of Fort Worth believes that because the definition of "Plumbing Inspector" in Section 2(5) of the Plumbing License Law does not define how a plumbing inspector is to be paid, the Board's proposed definition goes beyond the meaning of HB 217 and the Board should not define "Paid Directly." The City of Fort Worth believes that instead, if requested by a political subdivision, the Board should approve contracts between plumbing inspectors and political subdivisions which provide for alternate payment arrangements, other than the plumbing inspector being paid directly by the political subdivision.

A person representing the Texas Municipal League (TML) and the Texas City Attorney's Association (TCAA) provided comments opposed to the requirement that the individual plumbing inspector be paid directly by the political subdivision. This requirement is stated in rule Section 365.1(4)(B). TML provides legal, legislative and education services to its 1062 member cities. TCAA, a TML affiliate, claims a membership of approximately 570 lawyers who serve as attorneys for Texas cities. TML and TCAA believe that the proposed rule will effectively prohibit a political subdivision from contracting with plumbing inspection companies. TML and TCAA believes that the Board's rules should not address direct payment of plumbing inspectors and should provide for plumbing inspections to be performed by plumbing inspection companies (firms) in the same manner that the Texas Natural Resource Conservation Commission provides for operation of wastewater treatment facilities or collection systems. TML and TCAA believe that the Board should require plumbing inspection companies to obtain a certificate of registration issued by the Board demonstrating that the company employs licensed plumbing inspectors. TML and TCAA suggest that such certificate of registration would be subject to revocation by the Board. TML and TCAA recognizes that HB 217 states that a political subdivision "may contract with any plumbing inspector paid directly by the political subdivision," but asserts that proper interpretation under Chapters 311 and 312 of the Government Code, would be that "any plumbing inspector" could mean "company." TML and TCAA further asserts that proper interpretation of the term "person" could mean "company" (Section 2(5) of the Plumbing License Law uses the term "person" to define "Plumbing Inspector"]. TML and TCAA also oppose rule Sections 365.1(4)(D) and Section 365.1(4)(E), and believe that the Board should allow plumbing inspectors to perform plumbing inspections and renew their license without providing proof to the Board that are employed by or have contracted with a political subdivision.

Upon passage of the laws, by the 77th Legislature, affecting and amending the Plumbing License Law, the Board consulted with its attorney, an Assistant Attorney General, regarding the Board's interpretation of the new legislation. In proposing the new rules and rule amendments, in response to the requirements of the new legislation, the Board was advised by its attorney regarding the necessity of the Board to abide by the new legislation and the its authority to adopt the proposed rules.

The Board disagrees with the recommendations of those that submitted comments opposed to the proposed rules relating to the proposed definition of "Paid Directly," in Section 361.1(33), for the following reasons:

HB 217 and HB 1505 define a "Plumbing Inspector" and state that a political subdivision ". . . may contract with any plumbing inspector paid directly by the political subdivision." (Emphasis added). The Board believes that this use of the word "may" is permissive only in allowing a political subdivision to choose to contract with or employ a plumbing inspector. The language is not permissive in allowing a political subdivision to choose whether or not to pay a plumbing inspector directly.

"Plumbing Inspector" is defined as " . . . any person who is employed by a political subdivision, or who contracts as an independent contractor with a political subdivision, for the purpose of inspecting plumbing work and installations in connection with health and safety laws, ordinances, and plumbing and gas codes, who has successfully fulfilled the examinations and requirements of the Board." (Emphasis added). In this context, the Board interprets the term "person" to mean "individual." Some of the arguments made against the Board's interpretation of "person" refer to the Code Construction Act passed in 1985. The Board's attorney has advised the Board that the Plumbing License Law (Article 6243-101) is not a "Code", or any part of any "Code" enacted by the "60th or subsequent Legislature as part of the state's continuing statutory revision program" [See Section 311.002(1) of the Texas Government Code known as the "Code Construction Act"]. Any amendments to the Plumbing License Law are not an "amendment, repeal, revision and reenactment of a code or code provision" [Section 311.002(2)]. The Code Construction Act is not applicable to the Plumbing License Law or any amendment thereto.

Furthermore, even if it be assumed that the Code Construction Act applies, Section 311.003 expressly provides that the "rules provided in this chapter are not exclusive." The Section of the Code Construction Act which contains the definition "Person" is Section 311.005(2), which begins with the following language: "The following definitions apply unless the statute or context in which the word or phrase is used requires a different definition." (Emphasis added.)

When interpreting the meaning and intent of the Plumbing License Law, one must consider the context in which "person" is used throughout the entire statute. The term "person," is also used in Section 2 of the Plumbing License Law to define a "Master Plumber," "Journeyman Plumber," "Tradesman Plumber-Limited Licensee," "Water Supply Protection Specialist," "Residential Utilities Installer," "Drain Cleaner," "Drain Cleaner-Restricted Registrant" and "Plumber's Apprentice." The law requires Master Plumbers, Journeyman Plumbers, Tradesman Plumber-Limited Licensees, Water Supply Protection Specialists (WSPS) and Plumbing Inspectors to meet Board requirements, pass an examination administered by the Board and hold a license (or endorsement to a license in the case of a WSPS) issued by the Board. From the time when the 50th Legislature passed the Plumbing License Law in 1947, to date, all Board requirements for examination may only be met by individuals who desire to take an examination and hold a license or endorsement. None of the examination requirements prescribed by either the Board or the statute are such that could be met by companies or corporations. Companies, corporations, etc., may not take any examination administered by the Board. Only individuals may sit for an examination. The Board has authority to issue a license or license endorsement only to individuals and has no authority to license companies, corporations, etc. If one is to conclude that the term "person," as used in the Plumbing License Law, may include a company or corporation, then one must also conclude that a Plumber's Apprentice may be a company or corporation, as well as a Drain Cleaner-Restricted Registrant, Journeyman Plumber, and so on. The term "person" is also used in Section 4(a) and Section 4(b) of the Plumbing License Law to describe Board Members appointed by the Governor. The Governor appoints only individuals as members of the Board, and not companies, corporations, etc.

To further support this interpretation, Section 14(a) of the Plumbing License Law states, " . . . It shall be unlawful for any person, firm, or corporation to engage in or work at the business of installing plumbing and doing plumbing work except as specifically herein provided unless such installation of plumbing or plumbing work be under the supervision and control of a plumber licensed under this Act." (Emphasis added). Had the Legislature intended for the word "person," as it is used throughout the Act, to also mean a company, corporation, firm, etc., it would have been unnecessary and useless to include the terms "firm or corporation" in Section 14(a).

Arguments against the Board's interpretation of "person," as it is used in the Plumbing License Law have referred to the Board's definition of "person" as the term is used in the Board's rules. The Board has defined "Person" in Section 361.1(34) as "For the purposes of these Rules only, a person means an individual, partnership, corporation, limited liability company, association, governmental subdivision or public or private organization of any character other than an agency." (Emphasis added). The Board used this definition only to clarify what the term "person" means in regards to the Board's rule defining "Plumbing Company." The Board has defined "Plumbing Company" in Section 361.1(38), to mean "A person, as defined in these Rules, who engages in the plumbing business." (Emphasis added). Within its definition, the Board has clarified that it has defined the term "person" as it is used only in the Board's rules and not as it is used in the Plumbing License Law.

The Board has been advised by its legal counsel that the Board's definition of "Paid Directly" is not more restrictive than HB 217 sets forth, but simply helps to clarify that a plumbing inspector, whether as an employee of a political subdivision or an independent contractor with a political subdivision, is an individual who must be paid directly by the political subdivision, as required by HB 217. The Board's definition of "Paid Directly" does not specify what an individual plumbing inspector must do with his or her payment, once it is received directly from the political subdivision. The definition does not prohibit an individual plumbing inspector from being employed by a company or corporation, nor does it prohibit a company or corporation from providing any benefit that it wishes to any of its employees. The definition does not prohibit a political subdivision from contracting with or employing as many plumbing inspectors as the political subdivision wishes.

The Board and the plumbing industry have, since 1947, interpreted "person," as it is used in context throughout the Plumbing License Law to only mean "individual." The Board believes that this interpretation is correct.

The Board disagrees with the recommendations of those that submitted comments opposed to the rules which require plumbing inspectors to submit proof to the Board that the individual is employed by or contracted with a political subdivision, prior to performing plumbing inspections, for the following reasons:

Section 2(5) of the Plumbing License Law defines a "Plumbing Inspector" as a person ". . . who is employed by a political subdivision, or who contracts as an independent contractor with a political subdivision, for the purpose of inspecting plumbing work and installations . . .." Clearly under Section 2(5), employment by a political subdivision or contract as an independent contractor with a political subdivision is a requirement for licensed plumbing inspectors. Historically, prior to the passage of HB 217 which allowed a plumbing inspector to contract with a political subdivision, the Board has required proof of employment by a political subdivision in order for an individual to renew a plumbing inspector license. The rules requiring such proof have simply been amended to allow for the passage of HB 217, which allows a plumbing inspector to contract with a political subdivision.

22 TAC §§365.1, 365.4 - 365.14

STATUTORY AUTHORITY: The amendments are adopted in accordance with HB 217 are adopted under Section 3 (Section 5B, Article 6243-101, V.T.C.S; and in accordance with HB 1505 are adopted under Section 5 (Section 5, Article 6243-101, V.T.C.S.), Section 11 (Section 8C, Article 6243-101, V.T.C.S), Section 14 (Section 12, Article 6243-101, V.T.C.S), and Section 24 which authorizes, empowers and directs the Board to prescribe, amend and enforce all rules and regulations necessary to carry out the Act.

§365.1. License and Registration Categories; Description; Scope of Work Permitted.

The Board shall establish four separate license categories, two endorsement categories and four registration categories, as described in paragraphs (1)- (10) of this section.

(1) Master Plumber--a license that entitles the individual to perform plumbing work, enter into contracts or agreements to perform plumbing work for the general public and to secure permits to perform plumbing work.

(2) Journeyman Plumber--a license that entitles the individual to do plumbing work only under the general supervision of Master plumbers and only under contracts or agreements to perform plumbing work secured by Master Plumbers.

(3) Medical Gas Piping Installation Endorsement--an endorsement to a Journeyman or Master Plumber license entitling the individual to install piping that is used solely to transport gases used for medical purposes, including, but not limited to oxygen, nitrous oxide, medical air, nitrogen and medical vacuum.

(4) Plumbing Inspector--a license that entitles the individual to do plumbing inspections as an employee or independent contractor of a political subdivision for compliance with health and safety laws and ordinances.

(A) A Plumbing Inspector shall not have any financial or advisory interest in any plumbing company.

(B) All compensation paid for a plumbing inspection shall be paid directly to the individual Licensed Plumbing Inspector by the political subdivision for which the plumbing inspection is performed.

(C) A Plumbing Inspector shall not accept any compensation or anything of value from any contractor or owner whose work is being inspected by the Plumbing Inspector.

(D) Prior to the performance of any Plumbing Inspection, the Plumbing Inspector must have submitted to the Board written proof of employment or contract for the purposes of performing plumbing inspections by each political subdivision that the Plumbing Inspector is employed by, or an independent contractor for.

(E) A Plumbing Inspector may be employed by or contract with any political subdivision throughout the state and a Plumbing Inspector's authority to enforce the Act, Board Rules and local ordinances lies only within the jurisdiction of the political subdivision/s that the Plumbing Inspector is employed by or has contracted with.

(F) A Plumbing Inspector shall not, in any manner, represent or indicate that the Plumbing Inspector is employed by or a representative of the Board or the State of Texas unless, in fact, the Plumbing Inspector is employed by the Board or the State of Texas.

(5) Water Supply Protection Specialist--an endorsement to a Journeyman or Master Plumber License certifying the individual to perform Customer Service Inspections as defined in the Texas Natural Resource Conservation Commission's Rules and Regulations for Public Water Systems. A Water Supply Protection Specialist Endorsement shall not be used in lieu of a Plumbing Inspector License as required under Section 14(a) of the Act to perform plumbing inspections required under Section 5B and Section 15(a) of the Act.

(6) Tradesman Plumber-Limited Licensee--A license that entitles the individual to construct and install plumbing for only one or two family dwellings, only under the supervision of Master Plumbers and only under contracts or agreements to perform plumbing work secured by Master Plumbers.

(7) Residential Utilities Installer--A registration that entitles the individual to construct and install yard water service piping and building sewers for only one or two family dwellings, only under the supervision of Master Plumbers and only under contracts or agreements to perform plumbing work secured by Master Plumbers.

(8) Drain Cleaner--a registration that entitles the individual to install cleanouts and remove and reset p-traps for the purposes of eliminating obstructions in building drains and sewers, only under the supervision of Master Plumbers and only under contracts or agreements to perform plumbing work secured by Master Plumbers.

(9) Drain Cleaner-Restricted Registrant--A registration that entitles the individual to clear obstructions in sewer and drain lines only through any existing code-approved opening, only under the supervision of Master Plumbers and only under contracts or agreements to perform plumbing work secured by Master Plumbers.

(10) Plumber's Apprentice--A registration that entitles the individual to, as his or her principal occupation, to engage in learning and assisting in the installation of plumbing, only under the supervision of a Master Plumber and the direct supervision of a licensed plumber and only under contracts or agreements to perform plumbing work secured by Master Plumbers.

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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Robert Maxwell
Administrator
Texas State Board of Plumbing Examiners
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Proposal publication date: September 28, 2001
For further information, please call: (512) 458-2145

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22 TAC §365.2

The repeal is adopted in accordance with HB 217 is adopted under Section 3 (Section 5B, Article 6243-101, V.T.C.S; and in accordance with HB 1505 is adopted under Section 5 (Section 5, Article 6243-101, V.T.C.S.), Section 11 (Section 8C, Article 6243-101, V.T.C.S), Section 14 (Section 12, Article 6243-101, V.T.C.S), and Section 24 which authorizes, empowers and directs the Board to prescribe, amend and enforce all rules and regulations necessary to carry out the Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Robert Maxwell
Administrator
Texas State Board of Plumbing Examiners
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CHAPTER 367. ENFORCEMENT

22 TAC §§367.1 - 367.3, 367.5, 367.7

INTRODUCTION: The Texas State Board of Plumbing Examiners ("the Board") adopts amendments to §§367.1-367.3, 367.5, 367.7, concerning enforcement. Section 367.3 is adopted with changes to the proposed text as published in the September 28, 2001, issue of the *Texas Register* (26 TexReg 7412). Sections 367.1, 367.2, 367.5, and 367.7 are adopted without changes and will not be republished. During the 77th Legislature House Bills 217 and 1505 were signed into law. As a result of these two

House Bills, the Plumbing License Law is amended. The rule amendments are adopted substantially to implement the requirements of HB 217 and HB 1505. The Board's legal representative from the Office of the Attorney General has advised that the changes affect no new persons, entities, or subjects. The changes to the proposed text are found in the introduction statement in rule Section 367.3, Requirements for Plumbing Companies, Responsible Master Plumbers; Certificate of Insurance, and are explained elsewhere in this preamble.

REASONED JUSTIFICATION: The major requirements of HB 217 and HB 1505 are explained as follows:

House Bill (HB) 217 amends the Plumbing License Law to modify the plumbing codes that the Board is required to adopt and authorizes the Board to adopt later editions of the plumbing codes. The Southern Standard Plumbing Code and the National Standard Plumbing Code were eliminated from the codes adopted by the Board. The Uniform Plumbing Code was maintained and the International Plumbing Code was added, resulting in two Plumbing Codes to be adopted by the Board. The bill provides that plumbing installed in an area not otherwise subject to regulation under the Plumbing License Law must be installed in accordance with a Board adopted plumbing code. The bill authorizes municipalities or owners of a public water system the ability to amend any provisions of the codes and standards to conform to local concerns that do not substantially vary with rules or laws of this state. The bill provides that plumbing installed in compliance with an adopted plumbing code must be inspected by a licensed plumbing inspector. (Section 3)

Under HB 217, the Board's jurisdiction was greatly expanded by requiring that all plumbing work connected to a public water system, or performed in any city in the state be performed by a licensed plumber. This eliminated the exemption, which had been in place since 1947, requiring a plumbing license in only cities with populations of 5,000 or more inhabitants (Section 2).

Under HB 217, Licensed Plumbing Inspectors are no longer restricted to being bona fide employees of a political subdivision, but were allowed to contract with a political subdivision as long as they are paid directly by the political subdivision (Sections 1 and 3).

House Bill (HB) 1505 amends the Plumbing License Law by clarifying some existing language and effectively regulating all facets of plumbing work and individuals engaged in plumbing work.

HB 1505 clarifies that medical gasses and vacuum are included in the definition of "plumbing" (Section 1).

HB 1505 establishes a new Tradesman Plumber-Limited license and four new registrations. HB 1505 mandates, by law, experience and qualification requirements for all licenses and registrations issued by the Board. The new Tradesman Plumber-Limited license authorizes individuals to engage in the construction and installation of plumbing only in one and two-family dwellings, after passing an examination administered by the Board. HB 1505 provides for registrations authorizing individuals to install residential yard water and sewer lines (Residential Utilities Installer); remove p-traps and install clean-outs to clear obstructions in sewer lines (Drain Cleaner); clear obstructions in sewer lines through existing openings only (Drain Cleaner-Restricted Registrant); and assist in the installation of plumbing work (Plumber's Apprentice). HB 1505 requires all registrants and licensees to work under the general supervision of a Master Plumber and Residential Utilities Installers, Drain Cleaners and Drain Cleaner-Restricted Registrants to maintain registrations as a Plumber's Apprentice. (Sections 1 and 5).

HB 1505 provides the Board with express authority to adopt rules and take other actions as the Board deems necessary to administer this law including provisions relating to the new classes of registrants and licensees (Sections 5, 9, 11, and 14).

HB 1505 authorizes the Board to appoint advisory committees as it considers necessary (Section 5).

HB 1505 requires, rather than authorizes, the Board to recognize, approve, and administer continuing education programs for licensees and endorsees (Section 5).

Under HB 1505, the Licensed Sanitary Engineer position on the Board was changed to a Licensed Professional Engineer. Clarification that the Master Plumber Position, Journeyman Plumber Position, and Plumbing Inspector position on the Board, must be licensees of the Board was also included (Section 5).

HB 1505 requires a person who desires to learn the trade of plumbing to register as a Plumber's Apprentice before beginning to assist a licensee at the trade of plumbing (Section 13).

HB 1505 requires that no person, whether as a master plumber, journeyman plumber, tradesman plumber-limited licensee, plumber's apprentice, residential utilities installer, drain cleaner, drain cleaner-restricted registrant, or otherwise engage in, work at, or conduct the business of plumbing in this state or serve as a plumbing inspector unless such a person is the holder of a valid license, endorsement, or registration. Additionally, this Section states that it shall be unlawful for any person, firm or corporation to engage in or work at the business of installing plumbing work except as specifically herein provided unless such installation of plumbing or plumbing work be under the supervision and control of a plumber licensed under the Act. (Section 16).

HB 1505 authorizes the Board to monitor insurance requirements for Master Plumbers responsible for the operation of a plumbing business by requiring them to submit a certificate of insurance to the Board (Section 17).

HB 1505 requires that the installation and replacement of water heaters be inspected by a Licensed Plumbing Inspector (Section 17). HB 1505 also requires municipal plumbing inspections to be performed by licensed plumbing inspectors and provides that if the boundaries of a municipality and a municipal utility district overlap, only the affected municipality may perform a plumbing inspection and collect a permit fee (Section 17). HB 1505 requires the Board to adopt the required rules necessary to implement this law no later than January 1, 2002 (Section 24).

The following is an outline of the sections being amended in Chapter 367:

Section 367.1, regarding general provisions, (b), (c), (e)-(k). Subsection (b) is amended to include registrations. "Shall" is replacing "should" in subsection (c). Subsections (e)-(h) are being amended to reference the current plumbing codes. New subsections (i) and (k) are being added.

Section 367.2, regarding standards of conduct, (a)-(e). The section is being amended to add registrant to subsections (a)-(e).

Section 367.3, regarding requirements for plumbing companies, responsible master plumbers; certificate of Insurance, (a)(5)-(8). Section 367.3(a)(4) is being amended to clarify that, under HB 1505, a Drain Cleaner-Restricted Registrant, Drain Cleaner, and

Residential Utilities Installer are not required to be under the on-the-job direct supervision of a licensed plumber, as long as they are working within the scope permitted under Board Rule Section 365.1. Through an oversight, this language was not shown in the published proposed amendments to this Section. However, this added language is in harmony with the published proposed rule Section 365.1 and with the requirements of HB 1505. The addition of this language is non-substantive and does not add any new requirements or affect any new persons or subjects and does not require republication of the adopted sections as proposed amendments.

Subsection (a) is being amended to include new paragraphs (5)-(8). The new paragraphs require a responsible master plumber to furnish the Board with a certificate of insurance.

Section 367.5, regarding on-site license and registration checks. The section is being amended to add registration.

Section 367.7, regarding violations of standards and practices, (a) and (b). Subsection (a) is being amended to include registration in the title of Chapter 365. Subsection (b) will now include registration, unregistered, and person registered for necessary compliance. Subsection (b) (5) is being amended to replace "agent of" with "independent contractor for".

Also, as a result of HB 217 and HB 1505, the Texas State Board of Plumbing Examiners proposes amendments to Chapters 361, 363, and 365 elsewhere in this issue of the Texas Register.

The Board received written comments following the proposal of the rules and held a public hearing on November 7, 2001, in Austin, Texas, to receive additional written and oral comments.

The following entities and individuals furnished written or oral comments in favor of all or specific sections of the proposed Chapter 367 rules:

Five plumbing inspectors for the City of Amarillo plumbing inspection department submitted comments in favor of all of the Board's Rules as proposed.

The Chief Plumbing Inspector of the City of San Antonio submitted comments in favor of all of the Board's rules as proposed.

An individual licensed plumbing inspector, who is employed by a city, submitted comments in favor of all of the Board's rules as proposed.

A plumbing inspector from the City of Texarkana Water Utilities commented in favor of all of the Board's rules as proposed.

A person representing the Mechanical Contractors Association of Houston, Inc., who claimed a membership of 95 contractors, commented that the association is in favor of all of the Board's rules as proposed.

A person representing the Mechanical Contractors Association of Austin, who claimed a membership of 18 contractors that employ 600-700 plumbers, commented that the association is in favor of all of the Board's rules as proposed.

An individual representing a mechanical and plumbing contractor provided comments in favor of all of the Board's rules as proposed.

A person representing the statewide association of the Associated Plumbing-Heating-Cooling Contractors of Texas (APHCCT), who claimed a membership of thousands, including associates, plumbing inspectors and more than 250 plumbing companies, commented that the association is in favor of all of the Board's rules as proposed.

A person representing the Austin Chapter of the APHCCT commented that the Austin Chapter is in favor of all of the Board's rules as proposed.

A person representing the APHCCT of North Texas commented that the North Texas Chapter is in favor of all of the Board's rules as proposed.

A person representing the Waco Chapter of the APHCCT commented that the Waco Chapter is in favor of all of the Board's rules as proposed.

A person representing the statewide association of Texas Plumbing, Air Conditioning and Mechanical Contractors Association, who claim to have more than 350 voting members, commented that the association is in favor of all of the Board's rules as proposed.

A person representing a the Texas Plumbing, Air Conditioning and Mechanical Contractors Association of Houston, who claim to have more than 250 voting members, commented that the Houston Chapter is in favor of all of the Board's rules as proposed.

Twenty-one individual plumbing contractors submitted comments in favor of all of the Board's rules as proposed.

The following individuals or entities furnished written or oral comments as resource witnesses regarding the proposed rules:

One individual who represented herself as a concerned housewife, commented on the numerous plumbing problems that she experienced with her new home including mold infestation. The individual stated that she believes that there should be more stringent rules for plumbers and plumbing inspectors and a master plumber on every plumbing job.

One individual who represented herself as a homeowner, commented on the plumbing problems that she had on her new home and attributed them to the plumbing installation and the plumbing inspection performed by a third party. The individual stated that she believes that consumers need to be protected from poor plumbing practices and poor plumbing inspections.

One person representing homeowners and the association of Home Owners for Better Building commented that she had not reviewed the proposed rules thoroughly and could not comment specifically regarding the proposed rules. The person commented on the plumbing installation and inspection practices in some areas of the state. The person stated that she believes that the Board should protect consumers. The person stated that she is opposed to inspections performed by a third party and believes that a master plumber should supervise every plumbing job.

The following entities and individuals furnished written or oral comments in opposition to all or specific sections of the proposed Chapter 367 rules:

A person representing the City of Fort Worth presented comments opposed to rule Section 367.1(k), requiring new construction of a graywater system or modification to an existing graywater system be carried out under the rules adopted by the Board and the Texas Natural Resources Commission. The City of Fort Worth believes that the rule should be amended to add language referring to Section 5B of the Act and the plumbing codes specified under other subsections of Section 367.1.

Upon passage of the laws, by the 77th Legislature, affecting and amending the Plumbing License Law, the Board consulted with its attorney, an Assistant Attorney General, regarding the Board's interpretation of the new legislation. In proposing the new rules and rule amendments, in response to the requirements of the new legislation, the Board was advised by its attorney regarding the necessity of the Board to abide by the new legislation and the its authority to adopt the proposed rules.

The Board disagrees with the recommendations of those that submitted comments opposed to rule Section 367.1(k), regarding graywater systems, that the rule should be amended to add language referring to Section 5B of the Act and the plumbing codes specified under other subsections of Section 367.1., for the following reasons:

Rule Section 367.1(k) was proposed in order to notify anyone that would propose to undertake the new construction of a graywater system or modification to an existing graywater system, that the rules of the Board and the Texas Natural Resource Commission should be consulted prior to such undertaking. The Board believes that it would be superfluous to again mention the applicable plumbing adopted by the Board and required by the Plumbing License Law which are mentioned in five of the previous subsections of Section 367.1.

STATUTORY AUTHORITY: The amendments are adopted in accordance with HB 217 are adopted under Section 3 (Section 5B, Article 6243-101, V.T.C.S; and in accordance with HB 1505 are adopted under Section 5 (Section 5, Article 6243-101, V.T.C.S.), Section 11 (Section 8C, Article 6243-101, V.T.C.S), Section 14 (Section 12, Article 6243-101, V.T.C.S), and Section 24 which authorizes, empowers and directs the Board to prescribe, amend and enforce all rules and regulations necessary to carry out the Act.

§367.3. Requirements for Plumbing Companies, Responsible Master Plumbers; Certificate of Insurance.

(a) A company or person offering to do plumbing work must secure the services of at least one Responsible Master Plumber holding a current Master Plumber License.

(1) A Responsible Master Plumber shall not allow any person, firm, company, or corporation to use his or her Master Plumber License. for any purpose unless the Master Plumber is a bona fide employee of the person, firm, company, or corporation or is the owner of the firm, company, or corporation that will use the master plumber's license.

(2) A Master Plumber may act as the Responsible Master Plumber for only one such person, company, firm, or corporation.

(3) The Responsible Master Plumber shall be knowledgeable of and responsible for all permits, contracts, and agreements to perform plumbing work secured and plumbing work performed under his or her Master Plumber License.

(4) All work performed under the license of the Responsible Master Plumber, other than that performed in accordance with Section 365.1 of these Rules by a Drain Cleaner-Restricted Registrant, Drain Cleaner or Residential Utilities Installer, shall be under the on-the-job direct supervision of a licensed plumber that is a bona fide employee of, or the owner of the firm, company, or corporation using the Master Plumber's License.

(5) Prior to acting as a Responsible Master Plumber as defined in these Rules, a Master Plumber shall furnish the Board with a certificate of insurance using a Certificate of Insurance form provided by the Board. The certificate of insurance must:

(A) be written by a company licensed to do business in this state;

(B) provide for commercial general liability insurance for the Master Plumber for claims for property damage or bodily injury, regardless of whether the claim arises from a negligence claim or on a contract claim;

(C) be in a coverage amount of not less than $300,000 for all claims arising in any one-year period;

(D) state the name and license number of the Master Plumber for whom the coverage is provided;

(E) state the name of the plumbing company for which the Master Plumber is acting as the Responsible Master Plumber.

(6) Insurance coverage specified in paragraph (5) of this Section, shall be maintained at all times during which a Master Plumber acts as a Responsible Master Plumber.

(7) The Certificate of Insurance form expires on the date that the insurance coverage, specified in paragraph (5) of this Section, expires.

(8) The Responsible Master Plumber shall furnish the Board with a completed Certificate of Insurance form not later than 10 days after the expiration of the previously furnished Certificate of Insurance form.

(b) A company or person offering to install pipe used solely to transport gases for medical purposes must first secure the services of at least one Responsible Master Plumber that holds a current Master Plumber License that contains a current Medical Gas Installation Endorsement issued by the Board to be responsible for the installation of all pipe used solely to transport gases for medical purposes installed by that company and permits required to install the piping.

(1) The Responsible Master Plumber with the Medical Gas Installation Endorsement shall be responsible for generally supervising any individuals involved in the installation of pipe used solely to transport gases for medical purposes installed by that company and ensuring that all medical gas pipe assembly, brazing, and installation of required pipe markings is performed only by a Licensed Plumber holding a current Medical Gas Installation Endorsement issued by the Board.

(2) The relationship between the Master Plumber and the company or person using the Responsible Master Plumber's License with the Medical Gas Installation Endorsement must be as defined in subsection (a) 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 December 10, 2001.

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Robert Maxwell
Administrator
Texas State Board of Plumbing Examiners
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For further information, please call: (512) 458-2145

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PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. PROVISIONS OF THE REAL ESTATE LICENSE ACT

SUBCHAPTER G. MANDATORY CONTINUING EDUCATION

22 TAC §535.72

The Texas Real Estate Commission (TREC) adopts an amendment to §535.72, concerning presentation of mandatory continuing education (MCE) courses, advertising and records, without changes to the proposed text as published in the November 2, 2001, issue of the *Texas Register* (26 TexReg 8705).

The amendment permits education providers to file a course completion document electronically with TREC if the filing contains the content of the current TREC form, MCE Form 9-4. The providers will be responsible for ensuring that the person reported as receiving course credit is the person who completed the course and that the reporting process does not compromise the security of TREC's records. Adoption of the amendment is necessary to enable providers to report course completion more quickly and thus eliminate possible delays in renewing or obtaining a student's license when continuing education is required.

No comments were received regarding the proposal.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200107529
Mark A. Moseley
General Counsel
Texas Real Estate Commission
Effective date: December 24, 2001
Proposal publication date: November 2, 2001
For further information, please call: (512) 465-3900

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SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §535.208

The Texas Real Estate Commission (TREC) adopts an amendment to §535.208, concerning applications for an inspector license, without changes to the proposed text as published in the November 2, 2001, issue of the *Texas Register* (26 TexReg 8706).

The amendment eliminates the requirement that a person applying online for an inspector license furnish TREC with a hard copy of the application within 60 days to complete the process. Instead, the person will be required to furnish TREC with a photograph and signature prior to receiving a license, and the photograph and signature may be furnished before the application is filed. Adoption of the amendment is necessary to streamline the electronic application process TREC is presently developing. The amendment ensures appropriate identification of the applicant without delaying completion of the application process.

No comments were received regarding the proposal.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Mark A. Moseley
General Counsel
Texas Real Estate Commission
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Proposal publication date: November 2, 2001
For further information, please call: (512) 465-3900

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SUBCHAPTER T. EASEMENT OR RIGHT-OF-WAY AGENTS

22 TAC §535.400

The Texas Real Estate Commission (TREC) adopts an amendment to §535.400, concerning registration of easement or right-of-way agents, without changes to the proposed text as published in the October 12, 2001, issue of the *Texas Register* (26 TexReg 7973).

The amendment eliminates the requirement that a person applying online for registration as an easement or right-of-way agent furnish TREC with a hard copy of the application within 60 days to complete the process. Instead, the person will be required to furnish TREC with a photograph and signature prior to receiving a registration, and the photograph and signature may be furnished before the application is filed. Adoption of the amendment is necessary to streamline the electronic application process presently being developed by TREC, while obtaining appropriate identification of the applicant.

No comments were received regarding the proposal.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200107530
Mark A. Moseley
General Counsel
Texas Real Estate Commission
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Proposal publication date: October 12, 2001
For further information, please call: (512) 465-3900

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 14. COUNTY INDIGENT HEALTH CARE PROGRAM

The Texas Department of Health (department) adopts amendments to §§14.1, 14.2, 14.102, 14.103, 14.104, 14.105, 14.107, 14.201, 14.202, 14.203, 14.204 and new §14.109 concerning the County Indigent Health Care Program (CIHCP). Section 14.109 is adopted with changes to the proposed text as published in the August 31, 2001, issue of the *Texas Register* (26 TexReg 6536). Sections 14.1 - 14.2, 14.102 - 14.105, 14.107, and 14.201 - 14.204 are adopted without changes and therefore the sections will not be republished.

The rules comply with Health and Safety Code, Chapter 61, which requires that the standards and procedures used to determine eligibility must be consistent with the Temporary Assistance to Needy Families (TANF) and Medicaid standards and procedures.

The amendment to §14.1 complies with state law, simplifies program administration, and makes minor clarifications. To comply with state law, §14.1 clarifies the distribution of state assistance funds to eligible counties based on a maximum annual allocation. To simplify program administration, word changes have been made concerning a county's submission of their General Revenue Tax Levy (GRTL) report and the loss of eligibility for state assistance funds if their GRTL report is not received timely by the State Property Tax Board.

The amendment to §14.2 simplifies program administration concerning eligibility disputes.

The amendments to §§14.102, 14.103, 14.104, and 14.105 comply with state law, will be analogous with the Temporary Assistance for Needy Families (TANF) program, and correct minor spelling, grammar, and punctuation errors. Specifically, the amendment to §14.104, which is a result of House Bill 2602, Chapter 1128 of the Session Laws (77th Legislature, 2001), maintains the current net monthly income limit of 21% of the Federal Poverty Income Limit (FPIL). The amendment to §14.105 makes wording changes concerning the resource value of prepaid burial insurance policies and real property to be analogous with the TANF program.

In §14.107, changes have been adopted to simplify program administration concerning appeal hearings and fraud hearings.

The amendment to §14.201, which is a result of House Bill 2446, Chapter 874 of the Session Laws, (77th Legislature, 2001), allows counties to choose emergency medical services as an optional service.

Amendments to §§14.202, 14.203, and 14.204 include wording changes and minor punctuation, capitalization, and acronym changes to make minor clarifications.

The department adopts new §14.109 concerning employment services. This rule complies with state law. Specifically the new section covers the county option to implement an employment services program; guidelines to be used if a county implements an employment services program; the allowable exemptions; and the disqualification periods for non-compliance.

No comments were received regarding the proposal. A public hearing on the proposal was held at 10:00 a.m. on September 21, 2001, in the Public Hearing Room, Texas Department of Health, 12555 Riata Vista Circle, Austin, Texas, to accept comments on the proposed rules. No comments were received.

The department is making the following minor change due to staff comments to clarify the intent and improve the accuracy of the section.

Change: Concerning §14.109(b)(4)(A), the word "her" is replaced with "he" for clarity and consistency within paragraph (4).

SUBCHAPTER A. COUNTY PROGRAM ADMINISTRATION

25 TAC §14.1, §14.2

The amendments are adopted under Health and Safety Code Chapter 61; and Human Resources Code, Chapters 22 and 32. The department has rule making authority for CIHCP under Health and Safety, Code Chapter 61.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 5, 2001.

TRD-200107586
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: January 1, 2002
Proposal publication date: August 31, 2001
For further information, please call: (512) 458-7236

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SUBCHAPTER B. DETERMINING ELIGIBILITY

25 TAC §§14.102 - 14.105, 14.107, 14.109

The amendments and new section are adopted under Health and Safety Code Chapter 61; and Human Resources Code, Chapters 22 and 32. The department has rule making authority for CIHCP under Health and Safety, Code

§14.109. Employment Services.

(a) Employment Services. Counties have the option of implementing an employment services program.

(b) The following are guidelines to be used if a county implements an employment services program.

(1) Notify all CIHCP eligible residents and those with pending applications of the program requirements at least 30 days before the program begins.

(2) Allow an exemption from employment services if applicants or CIHCP eligible residents meet one of the following criteria:

(A) receive food stamp benefits;

(B) receive unemployment insurance benefits or have applied but not yet been notified of eligibility (both food stamp and unemployment insurance benefits require recipients to register for work with the Texas Workforce Commission (TWC) and report for job interviews and accept suitable offers of employment);

(C) physically or mentally unfit for employment. The county may require proof, such as a doctor's statement, before allowing this exemption;

(D) undocumented alien (because an undocumented alien cannot legally register for work with TWC);

(E) distance from the applicant's or CIHCP eligible resident's home to available employment or training resources is too remote. Too remote means that the distance from the applicant's or CIHCP eligible resident's home to the job or training requires commuting time of more than two hours a day (not including taking a child to and from a child care facility); or prohibits walking, and transportation is not available;

(F) age 15 or younger;

(G) age 16, 17, or 18 and attending elementary, secondary, vocational, or technical school full time;

(H) age 60 or older;

(I) a parent or other household member who personally provides care for a child under age 6 or a disabled person of any age living with the CIHCP household;

(J) employed or self employed at least 30 hours per week, or receive earnings equal to 30 hours per week multiplied by the federal minimum wage;

(K) migrant or seasonal farm worker under contract or similar agreement with employer or crew chief to begin work within 30 days;

(L) full-time volunteer for the Volunteers In Service To America (VISTA) program; or

(M) pregnant.

(3) An applicant or CIHCP eligible resident is considered non-exempt if he or she does not meet one of the above-listed exemptions. A non-exempt applicant or CIHCP eligible resident must register for work with TWC and may be required to report for job interviews and accept an offer of suitable employment. In order to track job search activities (reporting for interviews and accepting an offer of suitable employment), individual contracts or agreements may be necessary between the local TWC office and the county.

(4) If a non-exempt applicant or CIHCP eligible resident fails without good cause to comply with employment services requirements, disqualify him or her from CIHCP benefits:

(A) for one month or until he or she agrees to comply, whichever is later, for the first non-compliance;

(B) for three consecutive months or until he or she agrees to comply, whichever is later, for the second non-compliance;

(C) for six consecutive months or until he or she agrees to comply, whichever is later, for the third or subsequent non-compliance;

(5) Counties, who wish to set up an optional employment services program, should contact their local TWC office to determine how to set up their program and negotiate what type of information can be provided.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 5, 2001.

TRD-200107587
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: January 1, 2002
Proposal publication date: August 31, 2001
For further information, please call: (512) 458-7236

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SUBCHAPTER C. PROVIDING SERVICES

25 TAC §§14.201 - 14.204

The amendments are adopted under Health and Safety Code Chapter 61; and Human Resources Code, Chapters 22 and 32. The department has rule making authority for CIHCP under Health and Safety, Code Chapter 61.

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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Susan K. Steeg
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CHAPTER 97. COMMUNICABLE DISEASES

SUBCHAPTER B. IMMUNIZATION REQUIREMENTS IN TEXAS ELEMENTARY AND SECONDARY SCHOOLS AND INSTITUTIONS OF HIGHER EDUCATION

25 TAC §97.63

The Texas Department of Health (department), adopts an amendment to §97.63, concerning immunizations requirements for children in Texas child-care facilities, elementary and secondary schools, and institutions of higher education. This

section is adopted without changes to the proposed text as published in the August 31, 2001, issue of the *Texas Register* (26 TexReg 6541), and therefore the section will not be republished.

This section gives the department greater flexibility to respond to increased incidence rates of hepatitis A disease in geographic areas specified by the department as those rates increase to a minimum of twice the national average, as recommended by the Centers for Disease Control and Prevention's Advisory Committee on Immunization Practices.

Following each comment is the department's response and any resulting change(s).

Comment: The American Liver Foundation, Mexican American Legislative Caucus (Texas House of Representatives), Texas Liver Coalition, and National Association of School Nurses supported the additional hepatitis A vaccination requirement, however, they supported the requirement of hepatitis A vaccination in the specific counties as legislated by the 77th Legislature through Rider 49 to Senate Bill 1.

Dr. Alan P. Glombicki, President of the American Liver Foundation South Texas Chapter, testified on behalf of the American Liver Foundation. He expressed the foundation's concern that the proposed rule does not implement the original mandate passed by the 77th Legislature. The rider included language that required hepatitis A immunization for children residing in select Texas counties and the department's proposal falls short of that requirement. In their opinion, the department's proposal would require hepatitis A immunization only when high rates of the disease are identified in specific areas or after an outbreak has already occurred. The foundation feels the department's proposal, as written, is reactive rather than proactive. The 77th legislative mandate was neither unfunded nor conditional. The American Liver Foundation urged the department to amend the proposed rule to reflect the rider directive and implement a mandatory immunization program as originally intended.

Response: The department disagrees with the foundation's premise that the proposed rule does not implement the mandate passed by the 77th Legislature. The proposed rule allows the department to expand its hepatitis A program on a county-by-county basis, as the science dictates. Rider 49 in the General Appropriations Act requires the department to allocate a minimum of $400,000 per year providing hepatitis A vaccine to residents of specific counties. The department will comply with Rider 49. No change was made as a result of the comments.

Comment: The Texas Medical Association (TMA) wrote to express their support of the department's goal to control hepatitis A. They cited the Texas Department of Health 1999 Epidemiology Report stating hepatitis A rates for Texas were dropping. Considering this evidence, member physicians are concerned that the new requirement may displace funding for vaccines to immunize children against other more serious diseases. They expressed concern that hepatitis A vaccination would be required when funding currently cannot provide uniform access for pneumococcal conjugate vaccine. They further added that if the new hepatitis A requirement presents budget constraints that would affect the availability of other vaccines the department could recommend hepatitis A vaccination rather than require it.

Response: The department's proposal to require hepatitis A vaccination is based on Centers for Disease Control and Prevention (CDC) recommendation to immunize in areas where the incidence rates for hepatitis A are at least twice the national average. There are numerous counties in Texas where the incidence rate for hepatitis A meets this criterion. TMA's concern regarding funding is a valid one. The legislative budget rider clearly stated that a certain dollar amount must be allocated to cover the cost of required hepatitis A vaccination but additional dollars were not appropriated.

Therefore, covering the cost of the proposed requirement will adversely affect the amount of money the department has to cover the cost of vaccinating against other childhood diseases that could be considered more serious and more contagious than hepatitis A. The department is currently under a two-tiered system of vaccine availability for pneumococcal conjugate vaccine due to the high cost of each dose of this particular vaccine and the constraints of our vaccine budget. No change was made as a result of the comments.

Comment: Physicians from San Antonio Metropolitan Health District and Baylor College of Medicine advocated for universal vaccination against hepatitis A.

Response: The Centers for Disease Control and Prevention does not routinely recommend hepatitis A vaccination. They recommend such vaccination only when the incidence rate is twice the national average. Geographic areas where the incidence rate is at this level are the areas that would be covered under the department's proposal. In addition, based on current funding the cost of universal hepatitis A vaccination would be in excess of funds available. No change was made as a result of the comments.

This amendment is adopted under Health and Safety Code §81.023, which requires the Board of Health (board) to develop immunization requirements for children; Education Code §38.001, which allows the board to develop immunization requirements for admission to any elementary or secondary school; Education Code §51.933, which allows the board to develop immunization requirements for students at any institution of higher education who are pursuing a course of study in a health profession; Texas Human Resources Code, §42.043, which requires the department to make rules regarding the immunization of children admitted to child-care facilities; and Health and Safety Code §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department and the commissioner of health.

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 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER B. INSURANCE CODE, CHAPTER 5, SUBCHAPTER B

DIVISION 9. BEST PRACTICES FOR RISK MANAGEMENT AND LOSS CONTROL FOR FOR-PROFIT AND NOT-FOR-PROFIT NURSING HOMES

28 TAC §5.1740, §5.1741

The Commissioner of Insurance adopts new Division 9, §5.1740 and §5.1741 concerning best practices for risk management and loss control for for-profit and not-for-profit nursing homes. Section 5.1741 is adopted with changes to the proposed text as published in the October 19, 2001, issue of the *Texas Register* (26 TexReg 8322). Section 5.1740 is adopted without changes to the proposed text and will not be republished.

The new sections implement legislation enacted by the 77th Legislature in Senate Bill (SB) 1839. SB 1839, among other things, adds Article 5.15-4 to the Insurance Code which requires the Commissioner of Insurance to adopt best practices for risk management and loss control that may be used by for-profit and not-for-profit nursing homes. Article 5.15-4 further provides that a nursing home's adoption and implementation of these best practices may be considered by an insurance company or the Texas Medical Liability Insurance Underwriting Association (JUA) in determining rates for professional liability insurance applicable to a for-profit or not-for-profit nursing home. The best practices adopted pursuant to Article 5.15-4 do not establish standards of care for nursing homes applicable in a civil action against a nursing home. Rather, in accord with the legislative focus, these best practices concentrate on procedures to minimize insurance claims. Quality of care issues, although related to the new rules, are not the subject of these rules. Pursuant to SB 1839, quality of care issues are the responsibility of other health and human services agencies. In developing the best practices for risk management and loss control, Article 5.15-4 also requires the commissioner to consult with the Texas Health and Human Services Commission and a task force appointed by the commissioner that is composed of representatives of insurance companies that write professional liability insurance for nursing homes, the JUA, nursing homes, and consumers. By Commissioner's Order Number 01-0809 dated August 23, 2001, a task force was appointed consisting of the General Manager of the JUA and three representatives of each of the other categories of entities set forth in Article 5.15-4. Based on input from consultations and meetings with the Health and Human Services Commission and the task force and on review of various treatises and publications in the field of risk management and loss control, such as Mehr and Hedges, Risk Management, Concepts and Applications and MMI Companies, Inc. (St. Paul Insurance Companies), "Long Term Care," Clinical Risk Modification Program, the department establishes initial best practices for risk management and loss control that set forth guidelines to handle and respond to the following nursing home risk exposure areas: falls, resident abuse, pressure ulcers, nutrition and hydration, medication management, restraints (if used), infection control, burns and scalds, and elopement. The task force helped to identify these nine key risk exposure areas for attention by nursing home loss control programs and reached a consensus on the guidelines, which were also reviewed by representatives of the Health and Human Services Commission. Due to the individual characteristics of each nursing home and ongoing research and development in nursing home care, the task force consensus was that the best practices would outline a basic structure for risk management and loss control as a starting point for a nursing home. Accordingly, the new rules contain this basic structure which over time may be subject to further refinement.

Based on the comments, the department has made certain editorial and clarifying changes to the text of §5.1741. Specifically, based on a commenter's suggestion, the department has defined "risk management and loss control" consistent with Insurance Code Article 21.14-1. Further, the department has re-formatted §5.1741 by placing the reference to the nine key risk exposure areas at the beginning for a clearer focus and has made further refinements in the wording of the elements regarding documentation and modify/improve as suggested by a commenter. Also in response to comments, the department has made clarification changes to the definition of "resident abuse" by adding the words "or pain" and has substituted "individual needs or clinical condition" for "special dietary needs" in the definition of "nutrition and hydration."

Adopted §5.1740 describes the purpose and scope of the sections. Adopted §5.1741 sets forth the enumerated best practices for risk management and loss control that may be used by for-profit and not-for-profit nursing homes and that may be considered by an insurance company or the JUA in determining a nursing home's rates for professional liability insurance.

Comment: One commenter stated general support for the proposal to improve nursing home risks in the high loss areas identified by insurers and nursing home representatives, and further stated that these rules are a positive step toward reducing risk in the nursing home industry and decreasing insurance rates. The commenter also stated concerns regarding whether nursing homes will receive information about the program and how it will benefit their industry and suggested that it would be useful for the department or one of the other entities involved in the process, such as the Health and Human Services Commission, the Department of Human Services, or the nursing home associations to develop an outreach component to ensure that nursing homes know about the rules and how to use them for possible rate reductions.

Agency Response: The department appreciates the comment and agrees that it is important for nursing homes to receive this information. The department has already worked with several associations and nursing home-related groups to make known the rule proposal and will continue these notification efforts concerning the adopted rules. The department intends to share these comments with the other entities for use in any outreach programs they may choose to pursue.

Comment: A commenter stated that the section of the law implemented by these rules is intended to ensure a safer environment for nursing home residents, and therefore it is important to monitor incentives insurance companies use to promote nursing home compliance with the best practices set out in the rule. The commenter further recommended that the department, for the purposes of reporting to the legislature, include underwriting

guidelines in its data call to insurance companies to determine the extent to which the rules have been integrated into insurance company practices and how they are utilizing the new rules. The commenter further stated that a review of the guidelines may reveal other concerns that need to be addressed in the future by altering or expanding these rules to determine eligibility for insurance as well as rates.

Agency Response: The department will perform all appropriate monitoring to determine whether insurers writing professional liability insurance policies for nursing institutions are passing along savings to those institutions as a result of reduction in risk from the new legislation and to study the effect of the legislative changes in fostering the development of a competitive market and improving the availability and affordability of professional liability insurance for nursing institutions. Regarding the commenter's statement concerning expanding these rules to determine eligibility for insurance as well as rates, the department notes that Article 5.15-4 is specific in its reference only to rates.

Comment: Two commenters stated their belief that there should be more consultation with the insurance industry on this subject and that there was not enough participation by the industry in order to get their ideas on the subject.

Agency Response: The department notes that insurance industry representatives participated in each task force meeting and reiterates that these are initial best practices; therefore, the opportunity exists for future consultation with the insurance industry as well as other groups.

Comment: One commenter suggested several editorial and clarification changes concerning defining risk management and loss control, which the commenter based on the definition of risk manager in Insurance Code Article 21.14-1; placing the reference to the nine key risk exposure areas at an earlier point for a clearer focus; and refining the wording of the elements of the best practices.

Agency Response: The department agrees to define risk management and loss control (within the "Best Practices for Risk Management and Loss Control" section), to re-format the placement of the nine key risk exposure areas (albeit at the beginning of the section rather than within the five elements of the best practices), and to refine the wording of the elements regarding documentation and modify/improve. The department disagrees with inserting the commenter's suggestion regarding identifying "all" hazards in the loss prevention/mitigation element, as the department feels that the current wording is clear. In addition, the rule already states that the list of the risk exposure areas is not inclusive and that additional areas may be determined to be risk exposures.

Comment: One commenter suggested changes to the terms "adverse event," "near adverse event," "event response," and "assessment" and further suggested changes to some of the definitions of the nine key risk exposure areas. The commenter stated that these changes are intended to minimize unintended duplication of efforts and to provide consistency in terminology commonly used in nursing home operations.

Agency Response: The department agrees in part and disagrees in part. The department has made clarification changes to the definition of "resident abuse" by adding the words "or pain" and has substituted "individual needs or clinical condition" for "special dietary needs" in the definition of "nutrition and hydration." The department has not made the other suggested changes. Based on the discussions with the task force and representatives of the Health and Human Services Commission as to the appropriateness of these terms as they are used in the risk management and loss control process and the possibility for confusion with the terms suggested by the commenter, the department believes that the current terms are acceptable. For example, the task force noted that an "incident report" means something different in the nursing home context than in the insurance context; therefore, the department selected and defined the term "adverse event" to establish a term consistent with the risk management and loss control process that would not be confused with nursing home terminology used for other purposes.

Comment: Several commenters commended the commissioner and the department in the development of the best practices for risk management and loss control and in the openness of the process. One commenter stated that the commissioner took a very difficult issue and made it look easy. Another commenter committed to getting the word out to nursing homes concerning these best practices and also stated his concerns about nursing homes not being able to obtain insurance.

Agency Response: The department appreciates the comments and also commends the task force for its efforts in facilitating the development of these best practices. The department appreciates the comments concerning the availability problems and believes that implementation of best practices for risk management and loss control may contribute to better loss experience and premium stability, thus hopefully enhancing market availability and eventually lowering rates.

For: Office of Public Insurance Counsel and Texas Association of Homes and Services for the Aging.

For with changes: American Association of Retired Persons, Texas Health Care Association, and Texas Advocates for Nursing Home Residents.

The new sections are adopted pursuant to the Insurance Code Article 5.15-4 and §36.001. Article 5.15-4, as enacted by the 77th Legislature under SB 1839, requires the Commissioner of Insurance to adopt best practices for risk management and loss control that may be used by for-profit and not-for-profit nursing homes and further prescribes the consideration and use of such practices. Section 36.001 authorizes the Commissioner of Insurance to adopt rules for the conduct and execution of the duties and functions of the Texas Department of Insurance as authorized by statute.

§5.1741. Best Practices for Risk Management and Loss Control.

(a) A nursing home's adoption and implementation of the best practices for risk management and loss control set forth in this section should focus on the following risk exposure areas, which are exposure areas that appear often in claim lists and claim prevention materials published by leading nursing home insurers, and any additional areas as may be determined to be risk exposures. The list is not inclusive and the descriptions are illustrative only, but a nursing home focusing initially in these areas may be more likely to succeed with its program.

(1) Falls--Slips and trips by a resident in or about a nursing home.

(2) Resident Abuse--Infliction of injury or mistreatment with resulting physical harm or pain or mental anguish.

(3) Pressure Ulcers--A clinical risk, also referred to as bedsores or decubitus ulcers, that is a result of unrelieved pressure on a part of the body.

(4) Nutrition and Hydration--Providing adequate and nutritious food and liquid to nursing home residents, including attention to individual needs or clinical condition.

(5) Medication Management--Prevention of drug-related problems including but not limited to over- or under-prescribing; improper drug selection; and over-dosage.

(6) Restraints (if used)--Physical restraints such as manual methods or physical devices that restrict freedom of movement or access to a resident's body. Chemical restraints can be described as psychotropic or behavior modifying drugs used to prevent a resident from exhibiting behavioral symptoms.

(7) Infection Control--Preventing, containing, and treating infections within a nursing home facility.

(8) Burns and Scalds--Injury due to exposure to heat, sun, or chemicals.

(9) Elopement--To slip away or run away from a facility. For risk management purposes this includes wandering or movement away from the usual or normal place within the nursing home facility.

(b) The Commissioner of Insurance establishes the following best practices for risk management and loss control that may be used by for-profit and not-for-profit nursing homes. Risk management and loss control in this section mean the examination, assessment, and evaluation of risks and an advice process for the reduction of risks. The following elements are essential to a loss control program.

(1) Personnel Responsible for Program Operation. The nursing home should create an organizational structure that delegates authority to specific personnel for the day-to-day operation of a loss control program and which functions to ensure the program is established and implemented correctly. The nursing home can show it has met this element by:

(A) Appointing a program lead or leads to be responsible for the administration of the program in one or more exposure areas as identified in subsection (a) of this section. The designated program lead(s) should report to the administrator or the administrator's designee, such as the risk manager. The program lead(s) should have the authority to recommend and take immediate action upon observing a potential hazard, and this authority should be recognized in the program lead's job description. A program lead(s) should have available assistants and responsible parties to assist during off-hour periods.

(B) Appointing a Risk Management/Loss Control Committee.

(C) Appointing training instructors for new employees and in-service training.

(2) Loss Prevention/Mitigation. The nursing home should make a proactive effort to identify hazards and prevent losses before they occur. This element can be demonstrated by:

(A) Establishing and implementing policies and procedures to mitigate losses.

(i) Conducting ongoing analysis of actual and potential hazards in each individual exposure area. Policies and procedures should be created that will prevent situations that could give rise to an adverse event, which is defined as an occurrence that has the potential to produce a claim, including a minor event or situation with accident causing potential.

(ii) Conducting ongoing assessment to identify residents that may be susceptible to events occurring in each exposure area.

(iii) Establishing facility maintenance and inspection procedures that allow for preventive maintenance and inspections to be conducted on a regularly scheduled basis, such as daily, weekly, or otherwise.

(B) Establishing and implementing policies and procedures for responding to an adverse event.

(i) Establishing policies and procedures that allow for the family and/or guardian to be informed as soon as possible in the event of injury.

(ii) Including documentation in the resident's or other appropriate record by noting interventions, injury, and prevention measures, and filing an adverse event report with the program lead(s).

(C) Establishing and implementing policies and procedures for conducting an investigation of an adverse event. The investigator will document the event and recommend prevention efforts for the resident and report the recommendation(s) to the Risk Management/Loss Control Committee and any other committee responsible for quality assurance and assessment.

(D) Establishing and implementing policies and procedures for training.

(i) Establishing a policy to orient new residents and families to the facility and to each exposure area prevention program.

(ii) Establishing a training program for new hires and conducting periodic in-service training to refresh and supply new information gathered through the risk management/loss control tracking and trending process.

(3) Documentation. The nursing home should maintain documentation of its risk management and loss control program, which documentation should include but not be limited to the following:

(A) The Risk Management/Loss Control Committee should record minutes of meetings and document any actions recommended or taken by the committee or a program lead(s).

(B) Inspection/safety reports should be sent to the respective program lead(s) and the facility manager.

(C) All individual and in-service training should be documented.

(D) Individual resident or other appropriate records, such as a resident care plan, should be documented.

(E) Adverse events should be recorded as well as a follow-up in risk management program records.

(4) Monitor Results. The nursing home should monitor the results of the risk management and loss control program to evaluate the effectiveness and overall performance of the program. Monitoring allows identification of problem areas that are not producing desired results and can be demonstrated by:

(A) Tracking adverse events and near adverse events.

(B) Documenting the adverse events and near adverse events through the event response and investigation reports.

(C) Employing tracking methods through charting frequency, location of events by facility area, and by category of event.

(D) Using the tracking process to identify trends in problem areas for correction.

(5) Modify and Improve the Risk Management/Loss Control Program Based on Results. The nursing home should timely modify and improve the program based on monitoring to achieve loss control objectives of the program. This element can be demonstrated by:

(A) Developing and implementing procedures for reporting risk management and loss control improvement suggestions to the Risk Management/Loss Control Committee and any other committee responsible for quality assurance and assessment.

(B) Developing and implementing policies and procedures for examining the event tracking and correction process for improvements in accuracy and utility.

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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General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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CHAPTER 19. AGENT'S LICENSING
SUBCHAPTER T. SPECIALTY INSURANCE LICENSE

28 TAC §§19.1902, 19.1905, 19.1909

The Commissioner of Insurance adopts amendments to §§19.1902, 19.1905 and 19.1909 concerning specialty insurance licenses. Sections 19.1902 and 19.1909 are adopted without changes to the proposed text as published in the November 2, 2001 issue of the *Texas Register* (26 TexReg 8709) and will not be republished. Section 19.1905 is adopted with changes.

The adopted amendments are necessary to maintain effective regulation of the specialty insurance license by conforming the licensing requirements to the business operations that use these licenses and to provide the public with insurance products through trained persons without disruption of the public's access to or the availability of the associated consumer transactions. The adopted amendments will apply equally to all specialty insurance licenses including the telecommunications specialty license added by amendments to Article 21.09 in Senate Bill 466, 77th Legislature.

The adopted amendments allow a specialty license holder to register all locations, except franchises, where its associated consumer transactions occur and specialty insurance products are sold and require the specialty license holder to train those persons selling insurance under its license. The adopted amendments also redefine the terms franchisee and franchisor and enable a specialty license holder to register non-franchise locations at which its associated consumer transactions occur and insurance is sold. For the purposes of this subchapter, the amendments also broaden the definition of employee beyond a direct contractual relationship.

The department has determined that a clarification change is necessary in §19.1905 (b). The first sentence of that section has been changed to clarify that the word "only" is intended to relate to the word "location" and not the word "register."

The adopted amendments to §19.1902, the definitions section, revise the definitions of franchisee and franchisor to prevent the specialty license holder's business relationships from being classified as a franchise solely because of its type of business activity. The adopted amendments also add a definition of registered location to standardize this term throughout the subchapter; remove contractual references from the definition of employee; and add a definition of supervision to support the definition of employee. The adopted amendments also delete the term franchise location and define the term location as a place of business. The adopted amendment to §19.1905(a) removes the requirement that insurance sales may only be conducted at locations owned and operated by the specialty license holder. The adopted amendments to §19.1905(b) and (f) require applicants and specialty license holders to register locations at which both the associated consumer transaction and the sale of insurance occur under the specialty license. The adopted amendments to §19.1905(d) and (e) clarify the licensing relationships of franchisees and franchisors under this subchapter.

The adopted amendment to §19.1909(a) reflects the term employee is not limited to the scope of the individual's employment.

Finally, this adoption deletes the word business where the term business location is used in the subchapter.

No comments were received.

The amendments are adopted under Insurance Code Article 21.09 and §36.001. Article 21.09 §6 provides the Commissioner may adopt rules necessary to implement the specialty license. Section 36.001 provides that the Commissioner of Insurance may adopt rules to execute the duties and functions of the Texas Department of Insurance only as authorized by statute.

§19.1905. Place of Business.

(a) An applicant may obtain a single specialty license which authorizes the applicant to conduct insurance business under Article 21.09 at registered locations.

(b) An applicant for a specialty license under Article 21.09 shall register with the department only those locations where applicant's associated consumer transactions occur and insurance sales will be conducted under the specialty license. All existing locations where applicant's associated consumer transactions occur and insurance sales will be conducted must be included with the applicant's original license application form. An applicant may submit a separate registration form as required under §19.902(c) of this title (relating to One Agent, One License) for each location or a single notarized list containing the physical address of each location.

(c) The registration of an additional location shall be treated as an expansion of the specialty license holder's authority, and a fee equal to the license fee shall be paid for each additional location as provided by §19.902 of this title.

(d) An applicant or specialty license holder that is also a franchisor may not register a location of a franchisee.

(e) An applicant or specialty license holder that is a franchisee may not register a location of the franchisor or another franchisee. The independent owner of each franchisee must submit an application for specialty license and location registration separate from any application and location registration submitted by the franchisor.

(f) A specialty license holder who transfers locations, opens an additional location or acquires a location already in operation is required to register each new location where specialty license holder's associated consumer transactions occur and insurance sales will be conducted which was not registered by the license holder at the time the original license application was filed with the department. The requirements set out in §19.902(c) of this title shall govern a registration under this subsection.

(g) No applicant for or holder of a specialty license shall be required to file multiple registrations for a previously registered location as a result of seeking more than one specialty license authority.

(h) A specialty license holder may not solicit insurance from a location which the license holder has not registered with the department under this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lynda Nesenholtz
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For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 39. PUBLIC NOTICE
SUBCHAPTER H. APPLICABILITY AND GENERAL PROVISIONS

30 TAC §39.420

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §39.420, Transmittal of the Executive Director's Response to Comments and Decision. Section 39.420 is adopted *with change* to the proposed text as published in the September 28, 2001 issue of the *Texas Register* (26 TexReg 7459).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The primary purpose of the adopted amendment is to clarify certain procedural requirements associated with the processing of House Bill (HB) 801 permit applications. In 1999, the 76th Legislature enacted HB 801, which revised the public participation procedures applicable to environmental permits issued under Chapters 26 and 27 of the Texas Water Code (TWC) and Chapters 361 and 382 of the Texas Health and Safety Code (THSC). House Bill 801 provides for early notice of applications, expanded public participation opportunities, and a streamlined contested case hearing process.

The commission is adopting certain changes to Chapter 39 to clarify commission rules regarding the circumstances under which there is an opportunity to file requests for hearing and reconsideration in response to the chief clerk's transmittal of the executive director's response to comments in HB 801 proceedings.

SECTION DISCUSSION

In adopted §39.420(a), the commission has changed the word "chapter" to "title" to conform with *Texas Register* style requirements.

Adopted new §39.420(c)(3) provides that where no timely hearing requests have been filed in response to a Notice of Receipt of Application and Intent to Obtain Permit for air applications, then the chief clerk's transmittal will not include instructions for requesting a hearing or reconsideration of the executive director's decision. Under HB 801, where no timely hearing request is filed in response to issuance of the first notice, an air application may be processed as an uncontested matter. The new rule is a clarification of existing subsection (c)(3) (adopted to be renumbered as subsection (c)(4)) which provides that when a hearing request is filed and then withdrawn, the transmittal does not include instructions for requesting a hearing or reconsideration. If there is no opportunity to request a hearing when a hearing request is filed but timely withdrawn, then it follows that there is no opportunity to request a hearing if a timely hearing request was not filed at all. The adopted rule now explicitly provides for the scenario where no timely hearing request is filed in response to Notice of Receipt of Application and Intent to Obtain Permit for air applications. If there are no timely hearing requests, but there are timely comments, the executive director's response to comments is required. However, there is no further opportunity to file a request for hearing or reconsideration. Adopted subsection (c)(4) is also modified to expressly reflect that only those hearing requests that are timely are covered by this subsection. Previous subsection (c)(4) is renumbered as subsection (c)(5) due to the addition of new subsection (c)(3).

Adopted §39.420(d) describes the effect of withdrawal of all timely comments before the filing of the executive director's response to comments. This adopted subsection makes clear that if all comments received are withdrawn in writing prior to the filing of the executive director's response to comment, then the transmittal of the executive director's response to comment will not provide an opportunity to request a hearing or reconsideration of the executive director's decision. The statutes do not address the effect that the withdrawal of comments has on subsequent procedural steps in the permitting process. (See TWC, Chapter 5, Subchapter M and THSC, §382.056.) But, under commission rules, the executive director must prepare a response to timely, relevant and material, or significant comment, whether or not withdrawn. Thus, under commission rules, the fact that a comment is withdrawn does not affect the requirement that the executive director prepare and file a response to comment. However, commission rules also provide under 30 TAC §55.201(c) that a request for contested case hearing may not be based on an issue that was raised solely in public comment withdrawn before the filing of the executive director's response to comment. Therefore, if all timely comments have been withdrawn before the response to comment is filed, then commission rules provide that no hearing request may be granted by the commission. (See 30 TAC §55.211(b)(3)(A) and (c)(2)(A).) If no hearing request may be granted by the commission, then providing for an opportunity for hearing requests to

be filed with the transmittal of the executive director's response to comment fails to be a meaningful exercise. As stated in the preamble to the adoption of the 30 TAC Chapter 55 rules implementing HB 801, "{t}he commission believes that only current, live disputed issues of fact should be the basis for a referral to SOAH." (See the October 15, 1999 issue of the *Texas Register* (24 TexReg 9026).) Further, under HB 801, while the time period for filing requests for hearing and requests for reconsideration generally follows the transmittal of the executive director's response to comment (see TWC, §5.555 and THSC, §382.056), there are circumstances where the opportunity to file requests for hearing or reconsideration after the transmittal of the executive director's response to comment does not exist. For example, if no timely hearing requests are received in response to Notice of Receipt of Application and Intent to Obtain Permit for an air application, then further notice is not required and the matter can be processed as an uncontested permit. (See THSC, §382.056(g).) Therefore, in such cases, the failure to file a hearing request in response to first notice not only removes the opportunity for filing hearing requests, but also results in no further solicitation of requests for reconsideration. That is, under HB 801, the opportunity to file requests for reconsideration only exists where there is an opportunity to file hearing requests. Thus, this adopted rule clarifies that instructions for filing a request for hearing or reconsideration will not be provided where all timely comments have been withdrawn in writing prior to the filing of the executive director's response to comment. To further clarify the rule as proposed, a phrase has been added to adopted subsection (d) to reflect that upon the withdrawal of timely comments and requests, the application may be processed as an uncontested permit. Under such circumstances, any person seeking commission review of the action would still have the opportunity to file a Motion to Overturn under 30 TAC §50.139.

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. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and clarifies the circumstances under which there is an opportunity for filing requests for hearing or reconsideration, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the adopted rule is a major environmental rule, a regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. This rule does not exceed a standard set by federal law. This rule does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and TWC, Chapter 5, Subchapter M, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. This rule does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rule is consistent with, and does not exceed federal requirements. This rule does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., TWC, Chapter 5, Subchapter M and THSC, §382.056). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission performed a preliminary analysis for this adopted rule in accordance with Texas Government Code, §2007.043. The following is a summary of that analysis. The specific primary purpose of the rulemaking is to clarify certain existing procedural requirements that apply to permitting actions subject to HB 801. The adopted rule will substantially advance this stated purpose by providing specific provisions on the aforementioned matter. Promulgation and enforcement of this rule will not affect private real property which is the subject of the rule because the rule language consists of amendments relating to the commission's procedural rules rather than substantive requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and determined that the adopted section is not subject to the Texas Coastal Management Program (CMP). The rulemaking action concerns only the procedural rules of the commission, is not substantive in nature, does not govern or authorize any actions subject to the CMP, and is not itself capable of adversely affecting a coastal natural resource area (Title 31 Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40, et seq.).

HEARING AND COMMENTERS

The commission provided notice of a public hearing on the proposed rulemaking to be held on October 25, 2001. No one appeared to provide formal comment, therefore the public hearing was not convened. The comment period closed at 5:00 p.m. on October 29, 2001. No comments were submitted on the proposed rule changes to Chapter 39.

STATUTORY AUTHORITY

The amendment is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, and 5.556; and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures. Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; and §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

§39.420. Transmittal of the Executive Director's Response to Comments and Decision.

(a) When required by and subject to §55.156 of this title (relating to Public Comment Processing), after the close of the comment period, the chief clerk shall transmit to the people listed in subsection (b) of this section the following information:

(1) the executive director's decision;

(2) the executive director's response to public comments;

(3) instructions for requesting that the commission reconsider the executive director's decision; and

(4) instructions for requesting a contested case hearing.

(b) The following persons shall be sent the information listed in subsection (a) of this section:

(1) the applicant;

(2) any person who requested to be on the mailing list for the permit action;

(3) any person who submitted comments during the public comment period;

(4) any person who timely filed a request for a contested case hearing;

(5) Office of the Public Interest Counsel; and

(6) Office of Public Assistance.

(c) For air applications which meet the following conditions, items listed in subsection (a)(3) and (4) of this section are not required to be included in the transmittals:

(1) applications for initial issuance of voluntary emission reduction permits under Texas Health and Safety Code, §382.0519;

(2) applications for initial issuance of electric generating facility permits under Texas Utilities Code, §39.264;

(3) applications for which no timely hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain a Permit;

(4) applications for which a timely hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain Permit and the request is withdrawn before the date the preliminary decision is issued; or

(5) the application is for any amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted unless the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

(d) For applications for which all timely comments and requests have been withdrawn before the filing of the executive director's response to comments, the chief clerk shall transmit only the items listed in subsection (a)(1) and (2) of this section and the executive director may act on the application under §50.133 of this title (relating to Executive Director Action on Application or WQMP Update).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2001.

TRD-200107620
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 27, 2001
Proposal publication date: September 28, 2001
For further information, please call: (512) 239-0348

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CHAPTER 55. REQUESTS FOR RECONSIDERATION AND CONTESTED CASE HEARINGS; PUBLIC COMMENT

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §55.156, Public Comment Processing, and §55.209, Processing Requests for Reconsideration and Contested Case Hearing, and new §55.210, Direct Referrals. Sections 55.156 and 55.210 are adopted *with changes* to the proposed text as published in the September 28, 2001 issue of the *Texas Register* (26 TexReg 7462). Section 55.209 is adopted *without change* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The primary purpose of the adopted amendments and new section is to implement portions of Senate Bill (SB) 688 (an act relating to requirements for public notice and hearing on applications for certain permits that may have environmental impact), 77th Legislature, 2001. More specifically, this rulemaking would implement the SB 688 provisions related to direct referrals of certain permit applications to the State Office of Administrative Hearings (SOAH) for contested case hearing.

In 1999, the 76th Legislature enacted House Bill (HB) 801. House Bill 801 revised the public participation procedures applicable to environmental permits issued under Chapters 26 and 27 of the Texas Water Code (TWC) and Chapters 361 and 382 of the Texas Health and Safety Code (THSC). House Bill 801 provides for early notice of applications, expanded public participation opportunities, and a streamlined contested case hearing process. While the provisions of HB 801 allowed an applicant or the executive director to request referral of a permitting matter to SOAH for contested case hearing, the procedural steps to be followed limited the opportunities for this option to be exercised. Essentially, since agreement regarding the list of disputed issues and maximum expected duration of the hearing had to be reached with all timely hearing requesters and all timely hearing requesters could not be identified until 30 days after transmittal of the executive director's decision and response to comments, generally a direct referral to SOAH was only practicable late in the permitting process. The relevant portions of SB 688 now explicitly provide the applicant or the executive director the option of proceeding directly to a contested case hearing immediately after the executive director issues a preliminary decision.

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. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and revises procedures for direct referrals of applications subject to HB 801 to SOAH for hearing, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the rules are major environmental rules, a regulatory impact assessment is not required because the rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law. This adoption does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and TWC, Chapter 5, Subchapter M, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. In addition, the adoption is in direct response to SB 688, 77th Legislature, and does not exceed the requirements of this bill. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rules are consistent with, and do not exceed federal requirements. This adoption does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., TWC, §5.557). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission performed a preliminary analysis for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that analysis. The specific primary purpose of the rulemaking is to revise commission rules relating to procedures for direct referrals in certain permitting proceedings as provided by TWC, §5.557. The rules will substantially advance this stated purpose by providing specific provisions on the aforementioned matter. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the adopted language consists of amendments relating to the commission's procedural rules rather than substantive requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The rulemaking action concerns only the procedural rules of the commission which are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (Title 31 Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40, et seq.).

HEARING AND COMMENTERS

The commission provided notice of a public hearing on the proposed rulemaking to be held on October 25, 2001. No one appeared to provide formal comment, therefore the public hearing was not convened. The comment period closed at 5:00 p.m. on October 29, 2001. Written comments related to Chapter 55 and related provisions were submitted by: Baker Botts L.L.P on behalf of the Texas Industry Project (TIP); Bracewell & Patterson L.L.P. on behalf of interested clients (Bracewell & Patterson); Texas Natural Resource Conservation Commission Public Interest Counsel (PIC); and Vinson & Elkins L.L.P. (Vinson & Elkins).

All the commenters suggested changes to the proposal as stated in the SECTION BY SECTION DISCUSSION AND RESPONSE TO COMMENTS section of the preamble. Overall, TIP supported the rules as an important step in the commission's continuing efforts to promote fairness and efficiency in its procedural rules. Vinson & Elkins stated that the rules greatly improve the direct referral process. No commenter expressly opposed the rulemaking.

SECTION BY SECTION DISCUSSION AND RESPONSE TO COMMENTS

General

Certain comments were received requesting that this rulemaking include additional rule changes beyond those included in Chapter 55 and this rulemaking proposal. These suggested changes primarily related to clarification of notice requirements applicable in direct referrals. These comments are more specifically described later in this preamble.

TIP commented that this rulemaking or a subsequent rulemaking should clarify by rule the public notice requirements associated with notice of hearing in a case for which a request for direct referral has been submitted under §55.210. The commenter stated that, while the commission's existing rules on issuance of notice of contested case hearing (§39.423) should be followed, it is unclear how the commission's rules on issuance of notice of application and preliminary decision apply to such notice events (§39.411(c) and §39.419). The commenter pointed out the elements of the notice of application and preliminary decision that would not apply in a direct referral case include statements regarding the limited scope of the hearing and the opportunity to request a public meeting.

The commission agrees that some of the language of §39.411(c) would not apply when the Notice of Application and Preliminary Decision is issued after, or concurrent with, the chief clerk's referral to SOAH under §55.210. Specifically, since SB 688 provides that TWC, §§5.554 - 5.556 and Texas Government Code, §2003.047(e) and (f) (which relate to certain public meeting requirements and the limitation of issues) do not apply to an application that is directly referred, the commission has added §55.210(e) to address this inconsistency. This subsection provides that if Notice of Application and Preliminary Decision is provided after, or concurrent with a direct referral under this section, the text of the notice shall not include statements that relate to these inapplicable statutory requirements. The commission has not made corresponding changes to the Chapter 39 rulemaking (which is being adopted concurrently in this issue of the *Texas Register*) because the commission did not propose

changes to the applicable sections in this rulemaking. The commission will address such changes in a future rulemaking.

TIP also commented that the notice of contested case hearing and any required elements of the notice of application and preliminary decision should be combined so that there are not multiple, different publication requirements for a direct referral case. TIP also commented that if a public meeting is required by law on a case that is the subject of a direct referral, and that public meeting is held during the preliminary hearing, notice of that public meeting should also be combined with any notice of contested case hearing.

The commission agrees that notices may be combined under certain circumstances. The commission responds, however, that there may be certain instances where the applicant may elect not to combine notices and it would not be appropriate to eliminate this flexibility. Further, existing §39.405(d) authorizes combined notice. Thus, no change to the rule has been made as a result of this comment.

PIC commented that the Notice of Receipt of Application and Intent to Obtain Permit would need to provide accurate information to the public that a request for direct referral had been filed and would not solicit requests for public meetings or requests for hearing. Otherwise the notices would be misleading or confusing. PIC acknowledged that modifying the notices is an implementation issue that need not be addressed in the rulemaking but must be considered in order to ensure that the new procedural rules are workable.

The commission agrees that, where appropriate, the notices need to conform to the new rule changes. No changes are being made to the text of the Notice of Receipt of Application and Intent to Obtain a Permit because, under SB 688, procedures do not change until the matter is referred to SOAH.

Subchapter E, Public Comment and Public Meetings

Adopted §55.156, Public Comment Processing, describes applicable public comment procedures. This adopted section has been modified from the proposal to ensure consistency with the changes to the Chapter 39 rulemaking (which is being adopted concurrently in this issue of the *Texas Register*). Specifically, subsection (c) has been modified to reflect that instructions for requesting a hearing or reconsideration need not be included for applications described in newly adopted §39.420(d).

In addition, adopted §55.156 sets forth the provisions of this section that do not apply to a case that is referred to SOAH under §55.210. Subsection (e) has been modified from the proposal to clarify that subsection (b)(1) and (3) still applies when matters are directly referred pursuant to 55.210. That is, a response to comment is required before an application may be approved and the deadline for filing a response to comment is retained. This modification is consistent with TWC, §5.557(c), that requires the commission by rule to provide for public comment and the executive director's response to public comment to be entered into the administrative record of decision for matters that are directly referred. The commission has also made grammatical changes to this section to conform with *Texas Register* style requirements.

Subchapter F, Requests for Reconsideration or Contested Case Hearing

Adopted §55.209, Processing Requests for Reconsideration and Contested Case Hearing, is amended to delete subsection (h) relating to procedures for requesting that a matter be referred directly to SOAH for contested case hearing. This subsection is repealed because a new section is being adopted in this rulemaking to apply to direct referrals authorized by the provisions of SB 688.

Adopted new §55.210, Direct Referrals, allows either the executive director or the applicant to file a request with the chief clerk that the application be sent directly to SOAH for a hearing on whether the application complies with all relevant statutory and regulatory requirements. As provided by SB 688, the adopted rule also provides that the application may be referred after the executive director has issued his preliminary decision on the application and thus, completed his technical review. The adopted rule also provides that the chief clerk may then refer the matter to SOAH.

This section further states that the provisions of HB 801 relating to public meetings do not apply to cases referred under this section. In the rule as proposed, the public meeting procedures and requirements that do apply to direct referrals were set forth by cross-reference to 30 TAC §55.25(b)(2). However, for purposes of clarity and in response to comment as described later in this preamble, this adopted section now specifically describes applicable public meeting requirements. In addition, applicable public comment processing and text of notice requirements are clarified.

PIC commented that proposed §55.210(a) should be adopted with the following sentence added as a second sentence in this subsection: "A request for direct referral that is filed with the chief clerk cannot be withdrawn." PIC explained that this sentence should be added because under the proposed rule, an applicant may request a referral, avoid otherwise applicable procedures such as the §55.154 public meeting requirements, then withdraw the request before the preliminary decision is issued unless prohibited from withdrawing the request.

To address the potential problem identified by PIC and to more closely track the language of the statute, the commission has changed §55.210(c). Under the new rule, the trigger for exempting certain procedural requirements will be referral of the matter to SOAH rather than the filing of a request for direct referral. This language is also consistent with §55.156(e).

TIP and Vinson & Elkins commented that proposed §55.210(b) could be interpreted to require a contested case hearing in a proceeding that has been directly referred under §55.210 even if no person appears at the preliminary hearing and seeks to be admitted as a party. Both also commented that even under direct referral, each protestant should be required to prove that he or she is an affected person before being allowed to participate in the contested case hearing.

The rule does not change the requirement that the administrative law judge determine at the preliminary hearing who shall be admitted as a party in accordance with 30 TAC 80.109.SOAH's authority to remand a matter in accordance with 30 TAC §80.101 is also not affected by this rule. Thus, no change to the rule has been made.

TIP and Bracewell & Patterson commented that under TWC, §5.557(b), the public meeting requirements of TWC, §5.554 do not apply to an application that is the subject of a direct referral. The commenters concluded that once a direct referral request has been filed, there is no opportunity for a member of the public to request a public meeting under the standards in TWC, §5.554 and therefore, there is no reason to provide additional notice of such an opportunity. TIP further commented that under proposed new §55.210, the commission's intent with respect

to the holding of a public meeting in proceedings that have been directly referred to SOAH is unclear. TIP commented that it does not believe that a public meeting should be mandatory in every case that is subject to the direct referral process which appears to be the intent of §55.25, but instead should be held only when required by some law other than TWC, §5.554.

The commission acknowledges that TWC, §5.557 provides that applications that are directly referred to SOAH are no longer subject to the TWC, §5.554 public meeting requirements. However, the statute does not prohibit the imposition of regulatory public meeting requirements or affect public meeting requirements otherwise imposed by law (e.g., THSC, §361.0791). The commission notes that federal regulations for authorized programs include public meeting requirements (e.g., 40 CFR §124.10 and §124.12). Under the adopted rule, an applicant is subject to the mandatory §55.154 public meeting requirements until the matter is directly referred to SOAH. After the direct referral, the public meeting requirements are set forth in §55.210(c). Under §55.210(c), the executive director must hold a public meeting when there is a significant degree of public interest in a draft permit (the standard set forth by federal regulations for federally authorized programs). Although not all the permitting programs subject to these rules are governed by the requirements for federally authorized programs, the commission has applied this standard to all permitting programs subject to these rules for procedural consistency. In addition, public meeting requirements required by law other than TWC, §5.554, continue to apply.

TIP commented that if a public meeting is not held, notice of opportunity to submit written comments could still be provided in the required notice of hearing.

The commission responds that notice of the opportunity to provide written comments is included in both the Notice of Receipt of Application and Intent to Obtain Permit and the Notice of Application and Preliminary Decision whether or not a public meeting is held. Further, the commission has elected to retain the bifurcated public comment and contested case hearing process for direct referrals. Thus, no rule change has been made as a result of this comment.

Vinson & Elkins commented that since proposed §55.210(c) provides that directly referred applications are subject to the public meeting requirements of §55.25(b)(2), the commission is missing an opportunity to streamline the public meeting requirements for direct referrals because this section allows the executive director to specify that the public meeting be held at a different time and location separate and apart from the preliminary hearing. Vinson & Elkins commented that to streamline this process, the commission should instead provide that any public meeting held after direct referral must be held as part of the preliminary hearing but only in the procedural sense. That is, Vinson & Elkins expressed the belief that the public meeting and preliminary hearing should be coordinated, but that the two should be kept separate. TIP also commented that if any public meeting is held on a permit application, it is appropriate in many cases to have that meeting held in conjunction with the preliminary hearing.

The commission has clarified §55.210 in response to comment. The intent of new §55.210(c) is to provide that the time and location of the public meeting and the preliminary hearing should coincide to the extent practicable. The commission anticipates that this will be the case for the majority of applications. However, some flexibility needs to be built into the rule. For example, the hearing location may not have enough capacity to accommodate the number of people anticipated to attend the public meeting or there may not be enough time to conduct both on the same day. The situation may also arise where requests for a public meeting are filed after the preliminary hearing has been scheduled but there is insufficient time to provide the required notice of the public meeting prior to the preliminary hearing date. The new rule provides for a shorter notice time period of ten days, unless longer notice is required by statute or federal regulation to minimize the possibility that this would occur.

SUBCHAPTER E. PUBLIC COMMENT AND PUBLIC MEETINGS

30 TAC §55.156

STATUTORY AUTHORITY

The amendment is adopted under SB 688, §5, 77th Legislature, 2001 (the Act), which requires the agency to adopt rules to implement TWC, §5.557 and THSC, §382.056, as added and amended by the Act; TWC, §5.557; and THSC, §382.056. Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority to carry out its jurisdiction; and §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of the agency; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

§55.156. Public Comment Processing.

(a) The chief clerk shall deliver or mail to the executive director, the Office of Public Interest Counsel, the Office of Public Assistance, the director of the Alternative Dispute Resolution Office, and the applicant copies of all documents filed with the chief clerk in response to public notice of an application.

(b) If comments are received, the following procedures apply to the executive director.

(1) Before an application is approved, the executive director shall prepare a response to all timely, relevant and material, or significant public comment, whether or not withdrawn, and specify if a comment has been withdrawn. The response shall specify the provisions of the draft permit that have been changed in response to public comment and the reasons for the changes.

(2) The executive director may call and conduct public meetings, under §55.154 of this title (relating to Public Meetings), in response to public comment.

(3) The executive director shall file the response to comments with the chief clerk within the shortest practical time after the comment period ends, not to exceed 60 days.

(c) After the executive director files the response to comments, the chief clerk shall mail (or otherwise transmit) the executive director's decision, the executive director's response to public comments, and instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing. Instructions for requesting reconsideration of the executive director's decision or requesting a contested case hearing are not required to be included in this transmittal for the applications listed in §39.420(c) and (d) of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision). The chief clerk shall provide the information required by this section to the following:

(1) the applicant;

(2) any person who submitted comments during the public comment period;

(3) any person who requested to be on the mailing list for the permit action;

(4) any person who timely filed a request for a contested case hearing in response to the Notice of Receipt of Application and Intent to Obtain a Permit for an air application;

(5) the Office of Public Interest Counsel; and

(6) the Office of Public Assistance.

(d) The instructions sent under §39.420(a) of this title regarding how to request a contested case hearing shall include at least the following statements:

(1) for air applications, that a person who may be affected by emissions of air contaminants from the facility or proposed facility is entitled to request a contested case hearing from the commission;

(2) that a contested case hearing request must include the requestor's location relative to the proposed facility or activity;

(3) that a contested case hearing request should include a description of how and why the requestor will be adversely affected by the proposed facility or activity in a manner not common to the general public, including a description of the requestor's uses of property which may be impacted by the proposed facility or activity;

(4) that only relevant and material disputed issues of fact raised during the comment period can be considered if a contested case hearing request is granted; and

(5) that a contested case hearing request may not be based on issues raised solely in a comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(e) Subsections (b)(2), (c), and (d) of this section do not apply to a case referred to SOAH under §55.210 of this title (relating to Direct Referrals).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2001.

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Stephanie Bergeron
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SUBCHAPTER F. REQUESTS FOR RECONSIDERATION OR CONTESTED CASE HEARING

30 TAC §55.209, §55.210

STATUTORY AUTHORITY

The amendment and new section are adopted under SB 688, §5, 77th Legislature, 2001 (the Act), which requires the agency to adopt rules to implement TWC, §5.557 and THSC, §382.056, as added and amended by the Act; TWC, §5.557; and THSC, §382.056. Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority to carry out its jurisdiction; and §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of the agency; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

§55.210. Direct Referrals

(a) The executive director or the applicant may file a request with the chief clerk that the application be sent directly to SOAH for a hearing on the application.

(b) After receipt of a request filed under this section and after the executive director has issued his preliminary decision on the application, the chief clerk shall refer the application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements.

(c) A case which has been referred to SOAH under this section shall not be subject to the public meeting requirements of §55.154 of this title (relating to Public Meetings). The agency may, however, call and conduct public meetings in response to public comment. A public meeting is intended for the taking of public comment, and is not a contested case proceeding under the APA. Public meetings held under this section shall be subject to following procedures.

(1) The executive director shall hold a public meeting when there is a significant degree of public interest in a draft permit, or when required by law.

(2) To the extent practicable, the public meeting for any case referred under this section shall be held prior to or on the same date as the preliminary hearing.

(3) Public notice of a public meeting may be abbreviated to facilitate the convening of the public meeting prior to or on the same date as the preliminary hearing, unless the timing of notice is set by statute or a federal regulation governing a permit under a federally authorized program. In any case, public notice must be provided at least ten days before the meeting.

(4) The public comment period shall be extended to the close of any public meeting.

(5) The applicant shall attend any public meeting held.

(6) A tape recording or written transcript of the public meeting shall be filed with the chief clerk and will be included in the chief clerk's case file to be sent to SOAH as provided by §80.6 of this title (relating to Referral to SOAH).

(d) A case which has been referred to SOAH under this section shall be subject to the public comment processing requirements of §55.156(a) and (b)(1) and (3) of this title (relating to Public Comment Processing).

(e) If Notice of Application and Preliminary Decision is provided at or after direct referral under this section, this notice shall include, in lieu of the information required by §39.411(c) of this title (relating to Text of Public Notice), the following:

(1) the information required by §39.411(b)(1) - (3), (4)(A), (6) - (9), (10)(A), (B)(i) - (iii), and (C)- (D), (11), (12), and (14) of this title;

(2) the information required by §39.411(c)(4) and (5) of this title; and

(3) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted, the deadline to file public comments or request a public meeting, and a statement that a public meeting will be held by the executive director if there is significant public interest in the proposed activity. These public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2001.

TRD-200107622

Stephanie Bergeron

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Texas Natural Resource Conservation Commission

Effective date: December 27, 2001

Proposal publication date: September 28, 2001

For further information, please call: (512) 239-0348

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CHAPTER 80. CONTESTED CASE HEARINGS

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §80.6, Referral to SOAH, and §80.105, Preliminary Hearings, and new §80.126, Public Comment in Direct Referrals. Sections 80.6, 80.105, and 80.126 are adopted *with changes* to the proposed text as published in the September 28, 2001 issue of the *Texas Register* (26 TexReg 7465).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The primary purpose of the adopted amendments and new section is to implement portions of Senate Bill (SB) 688 (an act relating to requirements for public notice and hearing on applications for certain permits that may have environmental impact), 77th Legislature, 2001. More specifically, this rulemaking would implement the SB 688 provisions related to direct referrals of certain permit applications to the State Office of Administrative Hearings (SOAH) for contested case hearing.

In 1999, the 76th Legislature enacted House Bill (HB) 801. House Bill 801 revised the public participation procedures applicable to certain environmental permits issued under Chapters 26 and 27 of the Texas Water Code (TWC) and Chapters 361 and 382 of the Texas Health and Safety Code (THSC). House Bill 801 provides for early notice of applications, expanded public participation opportunities, and a streamlined contested case hearing process. While the provisions of HB 801 allowed an applicant or the executive director to request referral of a permitting matter to SOAH for contested case hearing, the procedural steps to be followed limited the opportunities for this option to be exercised. Essentially, since agreement regarding the list of disputed issues and maximum expected duration of the hearing had to be reached with all timely hearing requesters and all timely hearing requesters could not be identified until 30 days after transmittal of the executive director's decision and response to comments, generally a direct referral to SOAH was only practicable late in the permitting process. The relevant portions of SB 688 now explicitly provide the applicant or the executive director the option of proceeding directly to a contested case hearing immediately after the executive director issues a preliminary decision in matters subject to HB 801.

In addition, the commission is also adopting certain changes to modify commission rules to expressly provide for the judge to take public comment in certain water utilities matters.

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. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and revises procedures for direct referrals of applications to SOAH for hearing and taking public comment at certain preliminary hearings, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the rules are major environmental rules, a regulatory impact assessment is not required because the rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law. This adoption does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and TWC, Chapter 5, Subchapter M, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. In addition, the adoption is in direct response to SB 688, 77th Legislature. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rules are consistent with, and do not exceed federal requirements. This adoption does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., SB 688). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission performed a preliminary analysis for these adopted rules in accordance with Texas Government Code, §2007.043. The following is a summary of that analysis. The specific primary purpose of the rulemaking is to revise commission rules relating to procedures for direct referrals in certain permitting proceedings as required by SB 688. In addition, the rules also modify certain existing procedural requirements relating to taking public comment at certain preliminary hearings. The rules will substantially advance these stated purposes by providing specific provisions on the aforementioned matter.

Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the adopted language consists of amendments relating to the commission's procedural rules rather than substantive requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The rulemaking action concerns only the procedural rules of the commission which are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (Title 31 Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40, et seq.).

HEARING AND COMMENTERS

The commission provided notice of a public hearing on the proposed rulemaking to be held in Austin on October 25, 2001. No one appeared to provide formal comment, therefore the public hearing was not convened. Four commenters submitted written comments related to the changes proposed for Chapter 80 during the comment period which closed at 5:00 p.m. on October 29, 2001. Written comments were submitted by: Baker Botts, L.L.P. on behalf of the Texas Industry Project (TIP); Bracewell & Patterson L.L.P. on behalf of interested clients (Bracewell & Patterson); Brown McCarroll L.L.P. on behalf of several clients (Brown McCarroll); and Vinson & Elkins, L.L.P. (Vinson & Elkins).

All commenters suggested changes to the proposal as stated in the SECTION BY SECTION DISCUSSION AND RESPONSE TO COMMENTS section of the preamble. Overall, TIP supported the rules as an important step in the agency's continuing efforts to promote fairness and efficiency in its procedural rules. Vinson & Elkins stated that the rules would greatly improve the direct referral process. Brown McCarroll generally supported the agency's approach in the proposed rules. No commenter expressly opposed the rulemaking.

SECTION BY SECTION DISCUSSION AND RESPONSE TO COMMENTS

Adopted §80.6, Referral to SOAH, is amended to reflect that: 1.) the chief clerk is not required to send the commission's list of disputed issues or maximum expected duration of the hearing; and 2.) the provisions of subsection (d) regarding the limitation of issues that may be considered by the judge do not apply when an application is referred under adopted new §55.210, implementing the direct referral provisions of SB 688. Consistent with new §5.557(a) - (b) of the TWC, as added by SB 688, the adopted rule reflects that contested case hearings on matters that are referred directly to SOAH will address all applicable statutory and regulatory requirements. In addition, subsection (b)(4) of this section has been modified to incorporate the provisions of recently adopted new 30 TAC §80.118, relating to Administrative Record, (see the November 9, 2001 issue of the *Texas Register* (26 TexReg 9105)) setting forth certain components of the chief clerk's case file on permitting matters. This subsection has also been modified from the proposal to reflect that for direct referrals, public comments and the executive director's response to comments will be included in the chief clerk's case file. This change is consistent with TWC, §5.557(c) which provides that the commission by rule shall provide for public comment and the executive director's response to comment to be entered into the administrative record of decision and with new §80.126 adopted in this rulemaking. This change is also made, in part, to respond to the comments made by TIP that, in direct referrals, comments and the executive director's response to comments should be added to the list of items included in newly adopted §80.118. While the commission agrees that inclusion of these items in the administrative record of the proceeding more closely tracks the language of SB 688, §80.118 was not included in this rulemaking proposal. Thus, changes to that section cannot be made at adoption in this rulemaknng. However, because the commission does agree that the comments and the executive director's response to comments should be included in the chief clerk's case file, the commission has modified §80.6 accordingly. The commission notes, however, that since a referral under §55.210 may occur immediately after the executive director's preliminary decision and the Notice of Application and Preliminary Decision and Notice of Hearing may be combined provided that all statutory and regulatory requirements are met, it is likely that the public comment period may not have closed at the time of the chief clerk's referral to SOAH. Under these circumstances, at the time of referral, the chief clerk's case file may not contain all timely public comment or the executive director's response to public comment. Therefore, the rule provides that the chief clerk may later transmit to SOAH the subsequently filed public comment and response to public comment.

Adopted §80.105, Preliminary Hearings, is amended to reflect that preliminary hearings shall be held in all matters referred under adopted new 30 TAC §55.210. Given that the direct referral process eliminates certain procedural steps that would be applicable otherwise and that the request for direct referral is made precisely so that a hearing may be convened on the application, it is appropriate to provide that in all such matters a preliminary hearing must be held. At the preliminary hearing, the judge may undertake any actions as set forth in §80.105 and this may include, among other things, the naming of parties and providing the parties an opportunity for settlement negotiations. Section 80.105 is also amended to provide that the judge shall accept public comment not only in enforcement hearings, but also in certain water utilities matters.

As part of the rulemaking implementing HB 801 provisions in September of 1999, §80.105 was amended to provide that the judge shall, for enforcement hearings only, take public comment. Prior to that time, it was fairly common for a judge to begin a preliminary hearing with the acceptance of public comment. Generally, the change adopted in 1999, was intended to maintain the distinction between informal public comment and the evidentiary hearing in permitting matters. In particular, this also effectuated the framework established by HB 801 whereby the public comment period occurs early in the process, public comments are addressed in the executive director's response to comment, and only limited issues are referred for contested case hearing.

While maintaining these distinctions is of continued importance, in particular, for matters undergoing the HB 801 permitting process, certain water utilities matters (which are not subject to the provisions of HB 801) may be better suited to different procedures. For these matters, the preliminary hearing may be the first opportunity for affected citizens to express their views regarding an application and provide public comment. While existing rules do not prohibit the taking of public comment by the judge in any matter, they do not currently explicitly address the public comment procedures for such water utilities matters. Thus, this rule change is adopted to explicitly provide for the taking of public comment at preliminary hearings held in connection with certain water utilities matters. Bracewell &

Patterson commented that, despite the clear language of TWC, §5.557(b) which renders the public meeting and public comment process inapplicable in direct referrals, the proposed rules preserve the public comment process in proposed §80.105(b)(2). The commenter stated that SB 688 makes no provision for any additional public comment, but merely preserves any comments that may have been filed in response to the initial notice of intent to obtain a permit. The commenter also stated the belief that the proposal is based on a misconstruction of SB 688, §3(c), which preserves in the direct referral case a provision "for public comment and the executive director's response to comments to be entered into the administrative record of decision on an application." Bracewell & Patterson also commented that the proposal goes so far as to put SOAH in charge of taking public comment, rather than the executive director. Finally, the commenter stated that, even under existing law (standard HB 801 procedures), the collection and evaluation of all public comments and the management of public meetings was by the commission's staff, not SOAH judges.

The commission does not agree with the commenter's interpretation of SB 688 provisions. Texas Water Code, §5.557(b) provides that §§5.554, 5.555, and 5.556, do not apply to an application that is referred for hearing under the direct referral provisions of TWC, §5.557(a). Sections 5.554 - 5.556 of the TWC relate to the statutory public meeting, response to comment, and request for hearing and request for reconsideration requirements of the HB 801 process. The commission notes that TWC, §5.553, relating to Preliminary Decision; Notice and Public Comment, is not included among the provisions of HB 801 that are made inapplicable to applications that are direct referred. Thus, nothing in TWC, §5.557(b) or elsewhere in SB 688 abbreviates or repeals any notice or comment provisions that would otherwise be applicable. In addition, notice of draft permit and public comment on the draft permit is required for federally authorized permitting programs. (See, for example, 40 CFR §124.10.) Thus, the commission cannot agree that the only public comment that may be considered by the commission is that comment which is received in response to Notice of Intent to Obtain Permit under TWC, §5.552. Further, SB 688 expressly requires that the commission by rule provide for public comment and the executive director's response to comment in the administrative record of decision.

With regard to the commenter's view that the executive director, rather than SOAH, is more appropriately charged with accepting public comment, the commission responds that while the HB 801 public participation process did result in a bifurcation of the public comment and SOAH hearing process as discussed earlier in this preamble, such a bifurcation did not always exist. In some cases (for example, water utilities matters), providing for public comment to be accepted at preliminary hearings may actually lead to a more efficient and effective public participation process. However, the commission does agree that, for HB 801 applications, including those that are directly referred to SOAH, agency staff should continue to be charged with taking public comment. While SB 688 does anticipate that public comment and the executive director's response to comment is to be entered into the administrative record of decision, it does not mandate that the judge be charged with taking public comment. Also, while the combination of a public meeting procedure and preliminary hearing procedure might have had a streamlining effect on the process, such a consequence might not actually be achieved in all cases. Further, the commission has also taken into consideration the effect of implementation of TWC, §5.228, as added by HB 2912, the agency's Sunset Bill, relating to executive director participation in contested permit hearings on the procedural steps to be established for SB 688 direct referrals. As reflected in commission rules implementing TWC, §5.228, the executive director may not be a party in all permit hearings. Since the executive director may not in all cases be participating in preliminary hearings, establishing a procedure whereby public comment (to which the executive director has a duty to respond) is taken at the preliminary hearing may not be appropriate. Therefore, the commission has modified the rule as originally proposed so that it no longer requires the judge to take public comment at preliminary hearings in matters that are directly referred under §55.210.

Vinson & Elkins commented that the rules should be revised to delete §80.105(b)(2)(C), which provides that the judge shall accept public comment on directly referred applications at the preliminary hearing. In the commenter's view, public comment should be left to the executive director's staff. Vinson & Elkins further commented that while the time and location of the public meeting and preliminary hearing should be coordinated, the two should be kept separate and the judge should not participate in the public meeting.

As previously stated and for the reasons set forth in this preamble, the commission agrees and adopted §80.105 no longer provides that the judge is to take public comment in direct referrals.

Adopted new §80.126, Public Comment in Direct Referrals, reflects the procedures for commission consideration of public comment and the executive director's responses to public comment in direct referrals. Consistent with the requirements of federal program authorization, it also specifically provides that commission decisions are to include consideration of public comment and the executive director's response to comment.

TIP, Vinson & Elkins, Brown McCarroll, and Bracewell & Patterson all opposed the provisions of §80.126 providing for inclusion of public comment and the executive director's response to comment in the evidentiary record of the proceeding. Each of these comments are described more specifically in the following paragraphs.

TIP expressed concern about the language in proposed §80.126 requiring that public comment and the executive director's responses to such comment be included in the "evidentiary record." The commenter stated that this requirement goes beyond the statutory mandate of SB 688 that public comment be made part of the "administrative record." TIP commented that the mandatory admission of unsworn public comments into the evidentiary record on a permit application is not in accordance with applicable evidentiary rules and could create unnecessary factual disputes in the record that the applicant would be forced to rebut. The commenter stated that public comment in a contested case hearing and the responses of the executive director should simply be added to the list of items included in the administrative record. TIP further stated that the proposed rule would conflict with evidentiary rules by admitting into evidence testimony in the form of public comment from persons not under oath and not subject to cross-examination. Finally the commenter stated that, if public comments are required to be admitted into evidence, then the applicant would have the right to, and would be forced to, cross-examine any commenters.

Vinson & Elkins commented that proposed §80.126 oversteps SB 688 by requiring that all timely public comments and the executive director's response to such comments be admitted into the "evidentiary record," and commented that such information belongs in the "administrative record" only. The commenter stated that it is unnecessary to allow the parties to present evidence on each issue raised in public comment or the executive director's responses, and that to allow such evidence would significantly lengthen the hearing process for directly referred applications. Vinson & Elkins further stated that, instead, the executive director should be allowed to respond to comments after the contested case hearing and before the commission's consideration of the administrative law judge's proposal for decision.

Brown McCarroll commented that SB 688 does not authorize public comments or the executive director's responses to be entered into the evidentiary record, and pointed out that the statutory language specifies that the commission by rule shall provide for public comment and the executive director's response to public comment to be entered into the administrative record. The commenter stated that the use of the words "evidence" and "evidentiary record" in the proposed rule must be a mistake, and provided comments regarding the meaning of "evidence." Brown McCarroll further stated that the proposed provision would allow any member of the public's comment on an application, as long as they are timely, to be considered part of the evidentiary record, regardless of the rules of evidence and whether the applicant has the opportunity to cross-examine the commenter. Finally, the commenter recommended that the proposed word "evidentiary" be replaced with the word "administrative" and the proposed word "evidence" be replaced with the word "comments" in the §80.126 adoption.

Bracewell & Patterson commented concerning proposed §80.126 that non-record comments cannot by commission rule be made "evidence" in a record on which the commission could base a decision, and stated that the evidence in contested cases must be adduced through sworn testimony that complies with the rules of evidence, subjected to cross-examination. The commenter concluded that the comments are not part of the evidentiary record, but of the administrative record, which is part of the agency file, but of course is not part of the evidence on which SOAH can base a proposal for decision or on which the commission can base any decision. Finally, the commenter stated that the administrative record may serve solely to inform the executive director's staff and perhaps influence the position it takes in an evidentiary hearing.

The commission does not agree with the analysis presented by the commenters in connection with §80.126. The commission is an administrative agency, not a trial court. A rule providing for inclusion of public comments and the executive director's response and consideration of public comment is entirely consistent with the requirements of the Administrative Procedure Act (APA). Specifically, Texas Government Code, §2001.060(7) provides that the record in a contested case includes all staff memoranda or data submitted to or considered by the hearing officer or members of the agency who are involved in making the decision. Further, Texas Government Code, §2001.090 authorizes official notice to be taken of all facts that are judicially cognizable and generally recognized facts within the area of the state agency's specialized knowledge. The administrative record, which under these rules includes public comment and the executive director's response to comment, does not serve only to inform the executive director as suggested. It serves as the basis for commission decisions. This result is not only authorized by the APA, it is required in order to meet federal program authorization requirements.

However, the commission does recognize that SB 688, by its terms, requires that public comment and the executive director's response to comment be admitted in the "administrative record of decision." The commission agrees that using this term in the rule would mirror the language of the statute. The commission has modified §80.6 to provide that the chief clerk's case file that is forwarded to SOAH at the time of referral, or as it is later supplemented, is to include public comment and the executive director's response to comment. The commission has also revised §80.126 to remove the reference to "evidentiary record." The rule continues to provide that any party may present evidence to issues raised in public comment or the executive director's response to comment. Since public comment and the executive director's response to comment are considered by the commission, it is appropriate to provide parties with the opportunity to respond and present any evidence related to the issues raised by that comment. The commission believes that such modifications are consistent with the statute, the provisions of APA describing the content of the record in a contested case, and the requirements of federal program authorization relating to the consideration of public comment.

SUBCHAPTER A. GENERAL RULES

30 TAC §80.6

STATUTORY AUTHORITY

The amendment is adopted under SB 688, §5, 77th Legislature, 2001 (the Act), which requires the agency to adopt rules to implement TWC, §5.557 and THSC, §382.056, as added and amended by the Act; TWC, §5.557; and THSC, §382.056. Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority to carry out its jurisdiction; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of the agency; §§11.036, 11.041, and 12.013, which establish the commission's authority to determine wholesale water rates; and §13.041, which establishes the commission's general authority over water and sewer utilities; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

§80.6. Referral to SOAH.

(a) Any application that is declared administratively complete on or after September 1, 1999 is subject to this section.

(b) When a case is referred to SOAH, the chief clerk shall:

(1) file with SOAH a Request for Setting of Hearing form, or Request for Assignment of Administrative Law Judge form, whichever is appropriate;

(2) coordinate with SOAH to determine a time and place for hearing;

(3) issue public notice of the hearing as required by law and commission rules;

(4) send a copy of the chief clerk's case file to SOAH which, in permitting matters, shall include the following certified copies of documents:

(A) the documents described in §80.118 of this title (relating to Administrative Record); and

(B) for cases referred under §55.210 of this title (relating to Direct Referrals) any public comment and the executive director's response to comments to be included in the administrative record, except that these documents may be sent to SOAH after referral of the case, if they are filed subsequent to referral; and

(5) send the commission's list of disputed issues and maximum expected duration of the hearing to SOAH unless the case is referred under §55.210 of this title.

(c) In an enforcement case, the executive director's petition or Executive Director Preliminary Report shall serve as the list of issues or areas that must be addressed.

(d) When a case is referred to SOAH, only those issues referred by the commission or added by the judge under §80.4(c)(16) of this title (relating to Judges) may be considered in the hearing. The judge shall provide proposed findings of fact and conclusions of law only on those issues. This subsection does not apply to a case referred under §55.210 of this title.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2001.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-0348

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SUBCHAPTER C. HEARING PROCEDURES

30 TAC §80.105, §80.126

STATUTORY AUTHORITY

The amendment and new section are adopted under SB 688, §5, 77th Legislature, 2001 (the Act), which requires the agency to adopt rules to implement TWC, §5.557 and THSC, §382.056, as added and amended by the Act; TWC, §5.557; and THSC, §382.056. Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority to carry out its jurisdiction; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of the agency; §§11.036, 11.041, and 12.013, which establish the commission's authority to determine water rates; and §13.401, which establishes the commission's general authority over water and sewer utilities; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

§80.105. Preliminary Hearings.

(a) After the required notice has been issued, the judge shall convene a preliminary hearing to consider the jurisdiction of the commission over the proceeding. A preliminary hearing is not required in an enforcement matter, except in those under federally authorized underground injection control (UIC) or Texas Pollutant Discharge Elimination System (TPDES) programs. A preliminary hearing is required for applications referred to SOAH under §55.210 of this title (relating to Direct Referrals).

(b) If jurisdiction is established, the judge shall:

(1) name the parties;

(2) accept public comment in the following matters:

(A) enforcement hearings; and

(B) applications under Texas Water Code (TWC), Chapter 13 and TWC, §§11.036, 11.041, or 12.013;

(3) establish a docket control order designed to complete the proceeding within the maximum expected duration set by the commission. The order should include a discovery and procedural schedule including a mechanism for the timely and expeditious resolution of discovery disputes; and

(4) allow the parties an opportunity for settlement negotiations.

(c) When agreed to by all parties in attendance at the preliminary hearing, the judge may proceed with the evidentiary hearing on the same date of the first preliminary hearing.

(d) One or more preliminary hearings may be held to discuss:

(1) formulating and simplifying issues;

(2) evaluating the necessity or desirability of amending pleadings;

(3) all pending motions;

(4) stipulations;

(5) the procedure at the hearing;

(6) specifying the number and identity of witnesses;

(7) filing and exchanging prepared testimony and exhibits;

(8) scheduling discovery;

(9) setting a schedule for filing, responding to, and hearing of dispositive motions; and

(10) other matters that may expedite or facilitate the hearing process.

§80.126. Public Comment in Direct Referrals

In permit cases referred under §55.210 of this title (relating to Direct Referrals), all timely public comment on the application and the executive director's responses to timely, relevant and material, or significant public comment shall be admitted into the administrative record as defined by §80.118 of this title (relating to Administrative Record). The response shall specify the provisions of the draft permit that have been changed in response to public comment and the reasons for the changes. The parties may be allowed to respond and to present evidence on each issue raised in public comment or the executive director's responses. The commission shall consider all public comment in making its decision and shall either adopt the executive director's response to public comment or prepare its own response.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron
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For further information, please call: (512) 239-0348

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CHAPTER 290. PUBLIC DRINKING WATER
SUBCHAPTER E. FEES FOR PUBLIC WATER SYSTEMS

30 TAC §290.51

The Texas Natural Resource Conservation Commission (commission) adopts the amendment to §290.51, Fees for Services to Drinking Water System *with changes* to the proposed text as published in the October 12, 2001 issue of the *Texas Register* (26 TexReg 7981) and it will be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

House Bill (HB) 2912, §3.07, 77th Legislature, 2001 mandates the commission to consider equity in the establishment of the public drinking water fee rates. The adopted amendment to this chapter is intended to consider equity while maintaining the existing revenue stream. Based on the new assessment, the revenue generated from the fee does not exceed the amount appropriated by the legislature for fiscal year (FY) 2002, nor is it greater than the revenue generated in FY 2001. This rulemaking results in a more equitable distribution of fees assessed on all size water systems.

SECTION DISCUSSION

In response to public comment, §290.51(a)(3) is adopted with changes to the proposed text. The adopted amendment to §290.51(a)(3) deletes the existing language and replaces it with a new §290.51(a)(3) that calculates the fees the commission will charge for services provided to community and nontransient noncommunity water systems using a more simplified and equitable method. The adopted amendment provides that for a system with fewer than 25 connections, the fee will be $75; for systems with 25 - 99 connections, the fee will be $150; and for a system with greater than or equal to 100 connections, the fee will be calculated as $c^{0.70}$ X $7.40, where "c" is the number of connections. The remaining language in the section has been reformatted for readability.

Based on analysis of public comment, the fee calculation will be adopted with changes. The proposed fee calculation included the formula $c^{0.75}$ X $4.80; the adopted fee calculation will be $c^{0.70}$ X $7.40. For noncommunity water systems and water systems under 100 connections, the fee rates will remain the same as proposed. The adopted amendment will continue to assess, on average, decreased fees to the smaller water systems (less than 2,000 connections) and will reduce the increase to larger water systems (greater than or equal to 5,000 connections). This adopted amendment will make no changes to over 55% of the fee payers from the proposed rule. The adopted amendment will only increase the fees an average of less than 2% from the proposed rule to the approximately 250 water systems that have between 2,000 and 4,999 connections. The approximately 175 water systems with greater than or equal to 5,000 connections will pay, on average, less than was originally proposed.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and that determined the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule." "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, 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 is administrative only and considers equity while generating overall revenue at the current revenue stream. Therefore, the rulemaking does not meet the definition of "major environmental rule" because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Furthermore, the adopted rule does not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rule does not exceed a standard set by federal law. The adopted rule does not exceed an express requirement of state law, because it is authorized by and consistent with the requirements of Texas Health and Safety Code (THSC), §341.041(a), as amended by HB 2912, §3.07. The adopted rule does not exceed the requirements of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rule is consistent with, and does not exceed, federal requirements and is in accordance with THSC, §341.041(a), which requires the commission to establish fees sufficient to cover the costs of administering the federal Safe Drinking Water Act. The adopted rule is not adopted solely under the general powers of the agency, but will be adopted under the express requirements of THSC, §341.041(a).

The commission solicited comments on the draft regulatory impact analysis determination. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission conducted a takings impact assessment for this rule under Texas Government Code, §2007.043. The specific purpose of this rulemaking is to consider equity while generating overall revenue at the current revenue stream. The rulemaking contains administrative rule changes only and does not affect private real property. Therefore, the rulemaking will not constitute a takings under the Texas Government Code.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the adopted rulemaking is neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules subject to the Texas Coastal Management Program (CMP), nor does it affect any action or authorization identified in §505.11. This rulemaking concerns only administrative rules of the commission intended to consider equity while generating overall revenue at the current revenue stream. Therefore, the rulemaking is not subject to the CMP.

The commission solicited comments on the consistency determination. No comments were received on the consistency determination.

HEARING AND COMMENTERS

A public hearing was held on November 8, 2001 in Austin. The comment period closed on November 12, 2001. The commission received comments from Alliance for a Clean Texas (ACT); Cedar Ridge R.V. Park (CRRVP); the City of Austin (COA); the City of Greenville (COG); the City of Houston (COH); Glen Haven Utility Company (GHUC); Oakwood Property Owners Association (OPOA); Ratcliff Water Supply Corporation (RWSC); the Texas Department of Criminal Justice (TDCJ); the Texas Rural Water Association (TRWA); and West Houston Mobile Home and Greens Road Mobile Home (WH&GR MH). Oral comments were provided at the public hearing by ACT. Nine commenters generally supported the rulemaking, or supported the rulemaking with suggested changes. Two commenters opposed the rulemaking.

RESPONSE TO COMMENTS

ACT commented that while it believes the commission has taken an important first step toward meeting the legislative intent of HB 2912, it believes the rulemaking does not go far enough in promoting equity among users and does not allow the commission to charge fees sufficient to cover the reasonable costs of administering the Safe Drinking Water Act Program. ACT stated that the effect of the rulemaking would be to increase fees on the largest utilities in the state, keep fees on medium-sized utilities relatively stable, and decrease fees on the smaller systems slightly. ACT further stated that while the rulemaking is certainly more equitable than the present structure, it does not substantially change the present system, nor does it ensure the long-term funding needs of the water program.

The commission believes that the fee structure included in the rulemaking results in a more equitable distribution of fees assessed on all size water systems. The fees generated will be sufficient to meet the legislative appropriations for this biennium and the current needs of the drinking water program. The fee structure of this rulemaking is intended to address the equity language in HB 2912. However, the commission is aware of the importance of continually addressing program needs in order to satisfy federal requirements and to ensure the safe delivery of drinking water to all Texans; it is through this ongoing evaluation that long-term funding needs are better addressed.

The commission recognizes that the larger systems do not require as much agency oversight in proportion to the number of connections as the smaller water systems; although the adopted amendment does increase the fees from the current rates for the larger water systems, it does reduce the fees from the proposed version of the rule, thus reflecting the economies of scale of the larger water systems.

ACT also commented that the rulemaking is specifically designed to be revenue-neutral and only raise approximately the same amount, and while the commission is obligated to make the fee revenue neutral for the coming two years, it is also reasonable to adopt rules now that will allow the commission to raise the fee in the future should the legislature allow it, and thus ACT believes that the rulemaking is not equitable and has not been designed to raise sufficient funds.

The commission currently has the authority to raise fees and funding flexibility in order to support the cost of the program. The commission also has the authority to raise fees over what is appropriated, up to a maximum, if needed. The fee structure of this rulemaking is intended to address the equity language in HB 2912. However, the commission is aware of the importance of continually addressing funding needs and it is through this ongoing evaluation that long-term funding needs are better addressed.

ACT supplied suggested rule language that would charge a flat per-connection rate with minimum and maximum fees as well as rule language for a request to require the commission to submit a report of the results of the program to the legislature by the beginning of each regular legislative session. ACT stated that its suggested rule language would allow the agency to establish the annual per-connection rate on an annual basis to raise the amount budgeted through the appropriations process; would allow the commission to report the results of its program to the legislature assuring that the fee charged is fair and adequate and the money is being used to assure the health and safety of all Texans; and that with these adjustments to the rulemaking, the commission should be able to implement an annual safe drinking water fee which is fair and adequate.

The commission disagrees with a flat per-connection fee because such a fee does not reflect the economies of scale which are exhibited in the drinking water regulatory program. A flat per-connection fee to all water systems would place a great burden on the large water systems; also, a flat per-connection fee to all water systems does not recognize that larger water systems do not require as much agency oversight in proportion to the number of connections as the smaller water systems. The commission does currently report on the performance of the program through quarterly and annual performance measures. The commission believes that the rulemaking will be fair and adequate.

CRRVP commented that fees are a hardship on the smaller size systems and requested that the commission not increase fees for the smaller systems and to please consider them during the rulemaking by reducing or eliminating the fees on the smaller size systems.

The commission analyzed the fiscal impact to smaller water systems and determined that the majority of water systems with less than 100 connections would pay a reduced fee.

The COA commented that it supports the commission's drinking water program and the concept of paying for it with fees levied on drinking systems, but suggests lowering further the proposed fees for the two smallest system size categories and that the magnitude of the fee increase on large systems be reduced. COA stated that the proposed fee structure inadequately addresses the most extreme inequities and exacerbates bias built into the current fee structure and the formula for calculating the proposed fee does not reflect economies of scale. COA stated that the public drinking water fee should not be looked at in isolation.

The commission believes that the rulemaking addresses inequities in the current system. The commission analyzed the fiscal impact to the two smallest system size categories and determined that the majority of those water systems with less than 100 connections would pay a reduced fee. As a result of public comment, the commission adjusted the fee formula to reduce the increase to the largest water systems.

The commission recognizes that the larger systems do not require as much agency oversight in proportion to the number of connections as the smaller water systems; although the adopted amendment does increase the fees from the current rates for

the larger water systems, it does reduce the fees from the proposed version of the rule, thus reflecting the economies of scale of the larger water systems. The commission believes that the fee structure included in the rulemaking results in a more equitable distribution of fees assessed on all size water systems.

The fee structure of this rulemaking is intended to address the equity language in HB 2912, §3.07 and is not intended to address the funding structure of all the commission programs. However, the commission is aware of the importance of continually addressing funding needs and it is through this ongoing evaluation that long-term funding needs are better addressed.

COG commented that it opposes the fee changes because it will not experience lower fees such as the majority of other systems between 100 and 11,000 connections will experience.

This rulemaking is intended to implement the language in HB 2912, §3.07, addressing equity language. The rulemaking therefore requires a change in the manner in which the agency will assess this fee. To address inequities in the current system, the larger water systems will be required to pay a greater percentage of the overall revenue generated, which requires a slight increase from the current fee. The number of connections that the COG currently carries will result in a fee increase because COG falls into the category of the top 5% of larger water systems.

COH commented that while it applauds the commission's desire to infuse equity into the exiting rate structure, it believes the larger systems are being placed in the position of subsidizing the smaller water systems, and objects to the rulemaking. COH stated that while the existing "cost per connection" could be viewed as an inequity to the smaller systems, the actual fee is quite small and it could be argued that the rulemaking does not accurately reflect the expenses associated with the administration of the commission's program if examined on a system-by-system basis. COH further stated that if the commission provided information that would substantiate its expenses to administer its program among the various water systems, then the city would be supportive of the rulemaking.

The commission is attempting to reflect the economies of scale which are exhibited in the drinking water regulatory program. The commission recognizes that the larger systems do not require as much agency oversight in proportion to the number of connections as the smaller water systems; although the adopted amendment does increase the fees from the current rates for the larger water systems, it does reduce the fees from the proposed version of the rule, thus reflecting the economies of scale of the larger water systems. As a result of public comment, the commission adjusted the fee formula to reduce the increase to the largest water systems.

The intent of this fee is not to collect a system-by-system cost, but to cover the costs of the program. However, the commission is aware of the importance of continually addressing funding needs and it is through this ongoing evaluation that long-term funding needs are better addressed.

GHUC commented that it supports the reduction of fees for small water systems and appreciates the commission's concern for the rising costs to run its small system.

The commission appreciates GHUC's comment.

OPOA commented that it believes the rulemaking represents a more equitable distribution of costs to administer the programs and services of the federal Safe Drinking Water Act and it fully supports the rulemaking.

The commission appreciates OPOA's comment.

RWSC commented that it opposes the fee changes because its fees will increase and believes the commission should have another break in fee charges for systems of 100 to 300 connections with a fee of not more than $3.00 per connection.

This rulemaking is intended to implement the language in HB 2912, §3.07, addressing equity language. The rulemaking therefore requires a change in the manner in which the agency will assess this fee. To address inequities in the current system, some systems will be required to pay a slight increase from the current fee. The commission analyzed the fiscal impact and determined that the increases to such water systems would be minimal. Therefore, the commission does not agree with the proposal made by RWSC.

TDCJ commented on the inaccuracy of inspection report data used for billing purposes and supplied updated information to be used to determine the number of connections for the purpose of calculating its fees.

The commission appreciates the information provided by the TDCJ and will adjust the TDCJ data used to determine the number of connections for the purpose of calculating TDJC's fees.

TRWA commented that it commends the commission for proposing a new fee structure that seeks to remedy the current inequities contained within the fees for public water systems, and that while equity will be improved with the rulemaking, true equity will not be achieved. TRWA stated that it supports the flat per-connection fee that was proposed by ACT. TRWA stated that regardless of the location, it remains a statewide responsibility for the commission to ensure that all public water systems provide acceptable services and therefore it only seems logical that a fee designed to ensure adequate funding for the state's drinking water program be funded on a per capita basis.

The commission disagrees with a flat per-connection fee because such a (per capita) fee does not reflect the economies of scale which are exhibited in the drinking water regulatory program. A flat per-connection fee to all water systems would place a great burden on the large water systems; also, a flat per-connection fee to all water systems does not recognize that larger water systems do not require as much agency oversight in proportion to the number of connections as the smaller water systems.

TRWA stated that the rulemaking improves equity when considering the smallest public water systems but still results in striking differences between the cost paid per-connection for small systems as compared to large systems. TRWA further stated that large cities will likely argue that they should be charged less due to economies of scale or because the commission costs for administering the program for their systems is less than for small systems, but TRWA is aware of no empirical evidence that substantiates that claim.

The commission is attempting to reflect the economies of scale which are exhibited in the drinking water regulatory program. The commission recognizes that the larger systems do not require as much agency oversight in proportion to the number of connections as the smaller water systems. The intent of this fee is not to collect a system-by-system cost, but to cover the costs of the program.

WH&GR MH commented that it is a burden to comply with the commission rules and requested that the commission consider

waiving the fees to water systems that are not charging any fees for the water.

The commission analyzed the fiscal impact to such systems and determined that the fee is a minimal expense. Even the smallest of systems affect the regulatory workload and its subsequent costs which must be recovered through fees collected.

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 THSC, §341.041(a), as amended by HB 2912, §3.07, which states that the commission may charge fees sufficient to cover the reasonable costs of administering the programs and services of the federal Safe Drinking Water Act and requires the commission to consider equity among persons required to pay the fees when setting the amount of the fees.

§290.51. Fees for Services to Drinking Water System.

(a) Purpose and scope.

(1) The purpose of this section is to establish fees for services provided by the commission to public water systems.

(2) The commission will provide services to public water systems, as follows:

(A) scheduling of analysis of drinking water for chemical content;

(B) collection of samples of drinking water for chemical analyses;

(C) review system data for evaluation of sampling waivers;

(D) inspect public water systems;

(E) review plans for new systems and major improvements to existing systems; and

(F) provide technical assistance as needed.

(3) The fees which the commission will charge for services provided to community and nontransient noncommunity water systems under this subsection will be according to the following schedule.

(A) For a system with fewer than 25 connections, the fee will be $75.

(B) For systems with 25 - 99 connections, the fee will be $150.

(C) For a system with greater than or equal to 100 connections, the fee = $c^{0.70}$ X $7.40, where "c" is the number of connections.

(i) The number of connections will be determined from data collected from the latest agency inspection report.

(ii) All nontransient noncommunity systems, state, federal, and other community water system installations determined by the commission to serve large populations through a few connections will have the number of connections for fee purposes determined by dividing the population served by a value of ten.

(iii) Examples of such installations include, but are not limited to, universities, children's homes, correctional facilities, and military facilities which generally do not bill customers for water service.

(4) New public water systems will not be assessed a fee for services until water is supplied to the first connection.

(5) The commission will charge a fee of $75 for services provided to noncommunity water systems which are not addressed in paragraph (3) of this subsection.

(6) All fees are due by January 1 of each year, shall be paid by check or money order, and shall be made payable to the Texas Natural Resource Conservation Commission. Penalties and interest for the late payment of fees shall be assessed in accordance with Chapter 12 of this title (relating to Payment of Fees).

(b) Failure to make payments as required under this section will subject the violator to the penalty provisions of the Texas Health and Safety Code, Chapter 341, Subchapter C.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107635
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 30, 2001
Proposal publication date: October 12, 2001
For further information, please call: (512) 239-6087

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 431. FIRE INVESTIGATION

SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE INVESTIGATOR CERTIFICATION

37 TAC §431.201

The Texas Commission on Fire Protection (TCFP) adopts amendments to §431.201, concerning minimum standards for fire investigation personnel, without changes to the text published in the July 20, 2001, issue of the *Texas Register* (26 TexReg 5375).

These amendments raise the qualifications of fire investigators by increasing training requirements.

The amendments change the TCFP certifications for fire investigators from voluntary to mandatory and establish minimum certification requirements for persons who are employed as full-time investigators.

There were no comments received on the proposed amendments.

The amendments are adopted under Texas Government Code, §419.008, which provides the TCFP with authority to adopt rules for the administration of its powers and duties; Texas Government Code, §419.022, which provides the TCFP with the authority to establish minimum training standards for admission to employment as fire protection personnel; and Texas Government Code, §419.032, which provides the TCFP with authority

to adopt rules to establish qualifications for fire protection personnel.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2001.

TRD-200107625
Jake Soteriou
Director of Fire Service Standards and Certification Division
Texas Commission on Fire Protection
Effective date: December 27, 2001
Proposal publication date: July 20, 2001
For further information, please call: (512) 239-4921

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CHAPTER 433. MINIMUM STANDARDS FOR DRIVER/OPERATOR--PUMPER

37 TAC §433.1, §433.3

The Texas Commission on Fire Protection (TCFP) adopts amendments to §433.1 and §433.3, concerning minimum standards for driver/operator--pumper, without changes to the text published in the July 20, 2001, issue of the *Texas Register* (26 TexReg 5376).

The amendments raise qualifications for driver/operator--pumpers by standardizing requirements for eligibility to take the certification examination.

The amendments remove references to the effective dates of the sections and remove language which provided a one-year window of opportunity from the sections' effective dates for individuals with previous training to challenge the certification examination.

There were no comments received on the proposed amendments.

The amendments are adopted under Texas Government Code, §419.008, which provides the TCFP with authority to adopt rules for the administration of its powers and duties; Texas Government Code, §419.022, which provides the TCFP with the authority to establish minimum training standards for admission to employment as fire protection personnel; and Texas Government Code, §419.032, which provides the TCFP with authority to adopt rules to establish qualifications for fire protection personnel.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2001.

TRD-200107626
Jake Soteriou
Director of Fire Service Standards and Certification Division
Texas Commission on Fire Protection
Effective date: December 27, 2001
Proposal publication date: July 20, 2001
For further information, please call: (512) 239-4921

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CHAPTER 439. EXAMINATIONS FOR CERTIFICATION

SUBCHAPTER A. EXAMINATIONS FOR ON-SITE DELIVERY TRAINING

37 TAC §§439.1, 439.3, 439.5, 439.7, 439.17

The Texas Commission on Fire Protection (TCFP) adopts amendments to §§439.1, 439.3, 439.5, 439.7, and 439.17, concerning examinations for certification, including new Subchapter A, Examinations for On-Site Delivery Training, without changes to the text published in the September 28, 2001 issue of the *Texas Register* (26 TexReg 7516).

These amendments standardize the certification examinations for the different disciplines and reduce travel costs for both examinees and state employees.

By expanding the definition of "staff examiner," the amendments allow the TCFP's executive director to designate entities or individuals not employed by the TCFP to administer certification examinations, so examinations can be conducted at regional sites and administered by local personnel. The amendments also establish a two-year expiration date for all examinations.

There were no comments received on the proposed amendments.

The amendments are adopted under Texas Government Code, §419.008, which provides the TCFP with authority to adopt rules for the administration of its powers and duties; Texas Government Code, §419.026, which provides the TCFP with the authority to give examinations to fire protection personnel for basic certification; and Texas Government Code, §419.032, which provides the TCFP with the authority to establish standards for basic certification tests for fire protection personnel and qualifications relating to basic certification tests.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2001.

TRD-200107627
Jake Soteriou
Director of Fire Service Standards and Certification Division
Texas Commission on Fire Protection
Effective date: December 27, 2001
Proposal publication date: September 28, 2001
For further information, please call: (512) 239-4921

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SUBCHAPTER B. EXAMINATIONS FOR DISTANCE TRAINING

37 TAC §§439.201, 439.203, 439.205

The Texas Commission on Fire Protection (TCFP) adopts amendments to Chapter 439, concerning examinations for certification, including new §§439.201, 439.203, and 439.205 in new Subchapter B, Examinations for Distance Training, without changes to the text published in the September 28, 2001, issue of the *Texas Register* (26 TexReg 7518).

The new sections establish additional opportunities for fire fighters to receive quality, advanced training on their own schedule at home or at the fire station and explain evaluation and examination procedures for distance learners.

The new sections delineate the process for distance trainers to provide students the course completion form and the process for distance learners to apply for the state exam.

There were no comments received on the proposed amendments.

The new sections are adopted under Texas Government Code,§419.008, which provides the TCFP with authority to adopt rules for the administration of its powers and duties, and Texas Government Code, §419.032, which provides the TCFP with authority to establish standards for basic certification tests for fire protection personnel.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2001.

TRD-200107628
Jake Soteriou
Director of Fire Service Standards and Certification Division
Texas Commission on Fire Protection
Effective date: December 27, 2001
Proposal publication date: September 28, 2001
For further information, please call: (512) 239-4921

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CHAPTER 451. FIRE OFFICER

SUBCHAPTER A. MINIMUM STANDARDS FOR FIRE OFFICER I

37 TAC §451.1

The Texas Commission on Fire Protection (TCFP) adopts an amendment to §451.1, concerning Fire Officer I certification, without changes to the text published in the July 20, 2001 issue of the *Texas Register* (26 TexReg 5377).

The amendment helps clarify the certification process for Fire Officer I.

The amendment requires individuals to take the examination for Fire Officer I before applying for certification as Fire Officer I.

There were no comments received on the proposed amendment.

The amendment is adopted under Texas Government Code, §419.008, which provides the TCFP with authority to adopt rules for the administration of its powers and duties; and Texas Government Code, §419.032(d), which provides the TCFP with authority to adopt rules to establish qualifications for certification of fire protection personnel.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2001.

TRD-200107629
Jake Soteriou
Director of Fire Service Standards and Certification Division
Texas Commission on Fire Protection
Effective date: December 27, 2001
Proposal publication date: July 20, 2001
For further information, please call: (512) 239-4921

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SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE OFFICER II

37 TAC §451.201

The Texas Commission on Fire Protection (TCFP) adopts an amendment to §451.201, concerning certification for Fire Officer II, without changes to the text published in the July 20, 2001 issue of the *Texas Register* (26 TexReg 5377).

The amendment helps clarify the certification process for Fire Officer II.

The amendment clarifies that individuals must take the commission examination for Fire Officer II before applying for certification as Fire Officer II.

There were no comments received on the proposed amendment.

The amendment is adopted under Texas Government Code, §419.008, which provides the TCFP with authority to adopt rules for the administration of its powers and duties; and Texas Government Code, §419.032(d), which provides the TCFP with authority to adopt rules to establish qualifications for certification of fire protection personnel.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2001.

TRD-200107630
Jake Soteriou
Director of Fire Service Standards and Certification Division
Texas Commission on Fire Protection
Effective date: December 27, 2001
Proposal publication date: July 20, 2001
For further information, please call: (512) 239-4921

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 10. MEDICAID FOR TRANSITIONING FOSTER CARE YOUTH

SUBCHAPTER A. ELIGIBILITY REQUIREMENTS

40 TAC §§10.1002, 10.1004, 10.1006, 10.1008

The Texas Department of Human Services (DHS) adopts new sections §§10.1002, 10.1004, 10.1006, and 10.1008 without changes to the proposed text published in the October 12, 2001 issue of the *Texas Register* (26 TexReg 8003).

Justification for the new sections is comply with Senate Bill 51, which was enacted by the 77th Legislature, authorizing DHS to provide medical assistance to eligible individuals making the transition from foster care to independent living.

The department received no comments regarding the adoption of the new sections.

The new sections are adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The sections implement the Human Resources Code, §§22.001-22.030 and §§32.001-32.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 5, 2001.

TRD-200107593
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: December 25, 2001
Proposal publication date: October 12, 2001
For further information, please call: (512) 438-3734

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CHAPTER 79. LEGAL SERVICES

The Texas Department of Human Services adopts amendments to §79.1204, §79.1302, §79.1306, §79.1312, and §79.1313 in its Legal Services chapter. The amendments are adopted without changes to the proposed text in the October 5, 2001, issue of the *Texas Register* (26 TexReg 7821) and will not be republished.

Justification for the amendments is to clarify program and agency names that have changed. These changes will make DHS rules current.

The department received no comments regarding adoption of the amendments.

SUBCHAPTER M. APPEALS PROCESS

40 TAC §79.1204

The amendment is adopted under the Human Resources Code, Title 2, Chapters 22, 31, 32, 33, 34, and 35, which authorizes the department to administer public, financial and nutritional assistance programs.

The section implements the Human Resources Code, §22.018, §31.034, and §§33.001-33.025.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107693
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: October 5, 2001
For further information, please call: (512) 438-3734

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SUBCHAPTER N. HEARING PROCEDURE

40 TAC §§79.1302, 79.1306, 79.1312, 79.1313

The amendments are adopted under the Human Resources Code, Title 2, Chapters 22, 31, 32, 33, 34, and 35, which authorizes the department to administer public, financial and nutritional assistance programs.

The amendments implement the Human Resources Code, §22.018, §31.034, and §§33.001-33.025.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107694
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 2002
Proposal publication date: October 5, 2001
For further information, please call: (512) 438-3734

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PART 2. TEXAS REHABILITATION COMMISSION

CHAPTER 117. SPECIAL RULES AND POLICIES

40 TAC §117.9

The Texas Rehabilitation Commission (TRC) adopts an addition to Title 40, Chapter 117, new §117.9, concerning special rules and policies, without changes to the proposed text as published in the September 14, 2001, issue of the *Texas Register* (26 TexReg 7079) and will not be republished. The change is

adopted to implement the new Government Code Chapter 559, which was effective September 1, 2001.

No comments were received regarding adoption of the new rule.

The new section is adopted under the Texas Human Resources Code, Title 7, Chapter 111, §7111.018 and §7111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2001.

TRD-200107634
Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
Effective date: December 30, 2001
Proposal publication date: September 14, 2001
For further information, please call: (512) 424-4050

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PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 362. DEFINITIONS

40 TAC §362.1

The Texas Board of Occupational Therapy Examiners adopts amendments to §362.1, concerning Definitions, with changes to the proposed text as published in the August 31, 2001, issue of the *Texas Register* (26 TexReg 6639).

The section was amended to add a definition for Face-to-face, real time, and to make the reference to the Act current to Statute.

One comment was received stating that the definition was too vague in terms of telecommunications. The board decided to add the word "visual" to clarify the definition.

The amendment is adopted under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by this amended section.

§362.1. Definitions.

The following words, terms, and phrases, when used in this part shall have the following meaning, unless the context clearly indicates otherwise.

(1) Act--The Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454 of the Occupations Code.

(2) AOTA--American Occupational Therapy Association.

(3) Applicant--A person who applies for a license to the Texas Board of Occupational Therapy Examiners.

(4) Application Review Committee--Reviews and makes recommendations to the board concerning applications which require special consideration.

(5) Board--The Texas Board of Occupational Therapy Examiners (TBOTE).

(6) Certified Occupational Therapy Assistant (COTA)--An alternate term for a Licensed Occupational Therapy Assistant. An individual who uses this term must hold a regular or provisional license to practice or represent self as an occupational therapy assistant in Texas and must practice under the general supervision of an OTR or LOT. An individual who uses this term is responsible for ensuring that he or she is otherwise qualified to use it.

(7) Class A Misdemeanor--An individual adjudged guilty of a Class A misdemeanor shall be punished by:

(A) A fine not to exceed $3,000;

(B) Confinement in jail for a term not to exceed one year; or

(C) Both such fine and imprisonment (Vernon's Texas Codes Annotated, Penal Code, §12.21).

(8) Complete Application--Notarized application form with photograph, license fee, jurisprudence examination with at least 70% of questions answered correctly and all other required documents.

(9) Complete Renewal--Contains renewal fee, renewal form with signed continuing education affidavit, home/work address(es) and phone number(s), and jurisprudence examination with at least 70% of questions answered correctly.

(10) Consultation--The provision of occupational therapy expertise to an individual or institution. This service may be provided on a one time only basis or on an ongoing basis.

(11) Continuing Education Committee--Reviews and makes recommendations to the board concerning continuing education requirements and special consideration requests.

(12) Coordinator of Occupational Therapy Program--The employee of the Executive Council who carries out the functions of the Texas Board of Occupational Therapy Examiners.

(13) Direct Service--Refers to the provision of occupational therapy services to individuals to develop, improve, and/or restore occupational functioning.

(14) Endorsement-The process by which the board issues a license to a person currently licensed in another state, the District of Columbia, or territory of the United States that maintains professional standards considered by the board to be substantially equivalent to those set forth in the Act, and is apply for a Texas license for the first time.

(15) Evaluation--Refers to a process of determining an individual's status for the purpose of determining the need for occupational therapy services or for implementing a treatment program.

(16) Examination--The Examination as provided for in Section 17 of the Act. The current Examination is the initial certification Examination given by the National Board for Certification in Occupational Therapy (NBCOT).

(17) Executive Council--The Executive Council of Physical Therapy and Occupational Therapy Examiners.

(18) Executive Director--The employee of the Executive Council who functions as its agent. The Executive Council delegates implementation of certain functions to the Executive Director.

(19) Face-to-face, real time--Refers to live interactions either in person or via visual telecommunications.

(20) First Available Examination--Refers to the first scheduled Examination after successful completion of all educational requirements.

(21) Health Care Condition--See Medical Condition

(22) Investigation Committee--Reviews and makes recommendations to the board concerning complaints and disciplinary actions regarding licensees and facilities.

(23) Investigator--The employee of the Executive Council who conducts all phases of an investigation into a complaint filed against a licensee, an applicant, or an entity regulated by the board.

(24) Jurisprudence Examination--An examination covering information contained in the Texas Occupational Therapy Practice Act and Texas Board of Occupational Therapy Examiners rules. This test is an open book examination with multiple choice or true-false questions. The passing score is 70%.

(25) License--Document issued by the Texas Board of Occupational Therapy Examiners which authorizes the practice of occupational therapy in Texas.

(26) Licensed Occupational Therapist (LOT)--A person who holds a valid regular or provisional license to practice or represent self as an occupational therapist in Texas.

(27) Licensed Occupational Therapy Assistant (LOTA)--A person who holds a valid regular or provisional license to practice or represent self as an occupational therapy assistant in Texas and who is required to practice under the general supervision of an OTR or LOT.

(28) Medical Condition--A condition of acute trauma, infection, disease process, psychiatric disorders, addictive disorders, or post surgical status Synonymous with the term health care condition

(29) Monitored Services--The checking on the status/condition of students, patients, clients, equipment, programs, services, and staff in order to make appropriate adjustments and recommendations. Minimum contact for the purpose of monitoring will be one time a month.

(30) NBCOT (formerly AOTCB)--National Board for Certification in Occupational Therapy (formerly American Occupational Therapy Certification Board).

(31) Non-licensed Personnel--OT Aide or OT Orderly or other person not licensed by this board who provides support services to occupational therapists and occupational therapy assistants, and whose activities require on-the-job training and close personal supervision.

(32) Non-Medical Condition--A condition where the ability to perform occupational roles is impaired by developmental disabilities, learning disabilities, the aging process, sensory impairment, psychosocial dysfunction, or other such conditions which does not require the routine intervention of a physician.

(33) Occupational Therapist (OT)--A person who holds a Temporary License to practice as an occupational therapist in the state of Texas, who is waiting to receive results of taking the first available Examination, and who is required to be under continuing supervision of an OTR or LOT.

(34) Occupational Therapist, Registered (OTR)--An alternate term for a Licensed Occupational Therapist. An individual who uses this term must hold a regular or provisional license to practice or represent self as an occupational therapist in Texas. An individual who uses this term is responsible for ensuring that he or she is otherwise qualified to use it.

(35) Occupational Therapy--The use of purposeful activity or intervention to achieve functional outcomes. Achieving functional outcomes means to develop or facilitate restoration of the highest possible level of independence in interaction with the environment. Occupational Therapy provides services to individuals limited by physical injury or illness, a dysfunctional condition, cognitive impairment, psychosocial dysfunction, mental illness, a developmental or learning disability or an adverse environmental condition, whether due to trauma, illness or condition present at birth. Occupational therapy services include but are not limited to:

(A) The evaluation/assessment, treatment and education of or consultation with the individual, family or other persons;

(B) interventions directed toward developing, improving or restoring daily living skills, work readiness or work performance, play skills or leisure capacities;

(C) intervention methodologies to develop restore or maintain sensorimotor, oral-motor, perceptual or neuromuscular functioning; joint range of motion; emotional, motivational, cognitive or psychosocial components of performance.

(36) Occupational Therapy Assistant (OTA)--A person who holds a Temporary License to practice as an occupational therapy assistant in the state of Texas, who is waiting to receive results of taking the first available Examination, and who is required to be under continuing supervision of an OTR or LOT.

(37) Occupational Therapy Plan of Care--A written statement of the planned course of Occupational Therapy intervention for a patient/client. It must include goals, objectives and/or strategies, recommended frequency and duration, and may also include methodologies and/or recommended activities.

(38) Occupational Therapy Practitioners--Occupational Therapists and Occupational Therapy Assistants licensed by this board.

(39) Place(s) of Business--Any facility in which a licensee practices.

(40) Practice--Providing occupational therapy as a clinician, practitioner, educator, or consultant. Only a person holding a license from TBOTE may practice occupational therapy in Texas.

(41) Recognized Educational Institution--An educational institution offering a course of study in occupational therapy that has been accredited or approved by the American Occupational Therapy Association.

(42) Regular License--A license issued by TBOTE to an applicant who has met the academic requirements and who has passed the Examination.

(43) Rules--Refers to the TBOTE Rules.

(44) Screening--A process or tool used to determine a potential need for occupational therapy interventions. This information may be compiled using observation, medical or other records, the interview process, self-reporting, and/or other documentation.

(45) Supervision--See Chapter 373 of this title (relating to Supervision)

(46) Temporary License--A license issued by TBOTE to an applicant who meets all the qualifications for a license except taking the first available Examination after completion of all education requirements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2001.

TRD-200107615
John Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Effective date: December 27, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 305-6962

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CHAPTER 374. DISCIPLINARY ACTIONS/DETRIMENTAL PRACTICE/COMPLAINT PROCESS/CODE OF ETHICS

40 TAC §374.4

The Texas Board of Occupational Therapy Examiners adopts new §374.4, concerning Code of Ethics, without changes to the proposed text as published in the August 31, 2001, issue of *Texas Register* (26 TexReg 6641) and will not be republished.

The section is adopted to add a new Code of Ethics to the Chapter.

No comments were received regarding adoption of the section.

The new section is adopted under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by the new section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2001.

TRD-200107616
John Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Effective date: December 27, 2001
Proposal publication date: August 31, 2001
For further information, please call: (512) 305-6962

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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

Proposed Action on Rules

TEXAS DEPARTMENT OF INSURANCE EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96

The Commissioner of Insurance, at a public hearing under Docket No. 2509 scheduled for January 22, 2002 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), by adding Rule 82 and new Endorsement 505 in order to establish a rule that provides for an optional mile-based rating plan that insurers may use with the Texas Personal Auto Policy. The purpose of this amendment is to adopt rules that are necessary to govern mile-based rating plans filed by insurers in conjunction with amendments to the Personal Auto Policy as required under new Insurance Code Article 5.01-4, adopted by the 77th Legislature in HB 45. Staff's petition (Ref. No. A-1201-21-I), was filed on December 11, 2001.

Staff proposes a new Manual Rule 82 that will allow an insurer the option to use a mile-based rating plan for the Texas Personal Auto Policy. The policy form used under the mile-based rating plan will be the same as the form used for other policies, except it will be amended by the Mile-Based Rating Plan Endorsement (Endorsement 505), which Staff also proposes. Proposed Rule 82, as provided in Insurance Code Article 5.01-4, specifies that each insurer that offers the mile-based rating plan shall annually file with the Department for approval a schedule of the rates to be used for that plan.

As specified in Insurance Code Article 5.01-4, Section 5(b)(3), the proposed rule and the proposed endorsement provide for the insurer to audit the mileage of a covered auto at any time by checking the odometer or using some other method to determine whether coverage is in effect. A policy issued through the mile-based rating plan must comply with Manual Rule 6, except coverage will terminate on the expiration date shown in the Declarations or upon a "covered auto" or autos exceeding specified mileage, whichever comes first. If the specified mileage is exceeded prior to the policy's specified termination date, coverage for that auto terminates, but the policy will remain in effect until the specified termination date. Coverage will continue until the specified termination date in the Declarations for covered autos that have not exceeded their allotted mileage. The insured may purchase additional mileage, during the current policy period, for an auto in exchange for additional premium. For any unused mileage that may exist on the termination date of the policy, the insurer, according to its rating plan, may give the insured a refund of unearned premium or a credit to be applied to the renewal policy.

Proposed Rule 82 provides that no other rating rule in the Manual shall apply to a mile-based rating plan. The following Manual rules are applicable to a mile-based rating plan: Rule 6 (Policy Term and Renewal Certificate), Rule 12 (Continuation of Coverage - Cancelled or Terminated Policy), Rule 13 (Cancellations), Rule 14 (Installments for Premium Payments), Rule 15 (Automobile Theft Prevention Authority Pass-Through Fee), Rule 71 (Definitions), Rule 72 (Personal Auto Policy and Coverage - Eligibility).

The 77th Texas Legislature, through House Bill 45, enacted new Insurance Code Article 5.01-4. This statute, effective September 1, 2001 requires the Commissioner to "adopt rules as necessary or appropriate to govern the use of a mile-based rating plan...." Article 5.01-4, which expires September 1, 2005, applies only to a policy that becomes effective on or after January 1, 2002.

Although an insurer's rates under the mile-based rating plan are exempt from Insurance Code Article 5.101, the Commissioner will have the authority to approve such rates under Article 5.01-4, or to reject them if the filed rates are found to be excessive in comparison to rates charged for similar coverage under the current regulatory system. Such rejection cannot be later than the 60th day after the rates are filed. Prior to any rejection, the insurer will have to be given notice and the opportunity for a hearing.

Although the provisions of Insurance Code Article 5.01-4 appear to require that a mile-based rating plan policy be written for a term that expires when the covered auto has been driven a specified number of miles, Staff believes this would conflict with Insurance Code Article 21.49-2B, concerning cancellation and nonrenewal. For example, if coverage under a mile-based rating plan policy were to expire after a specified number of miles driven, an insurer would not have knowledge of the number of miles driven in order to provide the required 30 days notice of nonrenewal set forth in Article 21.49-2B, Section 5. Staff's position is that Article 21.49-2B will apply to a policy issued through

the mile-based rating plan, as the legislature did not choose to amend the existing statute with regard to policies written on a mile-based rating plan. Conversely, if a policy's term were to be determined by the number of miles driven, the policy would never expire if the specified number of miles were never driven. It would be impossible to determine a fair rate for a policy that may never expire and an insurer may not terminate, even for a driver with multiple at-fault accidents.

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 Sylvia Gutierrez at (512)463-6327; refer to (Ref. No. A-1201-21-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, MC104-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-200107791
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 12, 2001

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

Finance Commission of Texas

Title 7, Part 1

The Finance Commission of Texas files this notice of intention to review Texas Administrative Code, Title 7, Chapter 29, consisting of §§29.1-29.11, regarding sales of checks. This review is undertaken pursuant to Government Code §2001.039, which requires an agency to review each of its rules within four years of its effective date, and each four years thereafter. The commission will accept comments for 30 days following the publication of this notice in the *Texas Register* as to whether the reasons for adopting the sections under review continue to exist. Final consideration of this rules review is scheduled for the Finance Commission meeting to be held on February 22, 2002.

Any questions or written comments pertaining to this notice of intention to review should be directed to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705, or by e-mail to everette.jobe@banking.state.tx.us. Any proposed changes to rules as a result of the review will be published in the Proposed Rules Section of the *Texas Register* and will be open for an additional 30 day comment period prior to final adoption or repeal by the commission.

TRD-200107710
Everette D. Jobe
Certifying Official
Finance Commission of Texas
Filed: December 10, 2001

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Texas Commission on Fire Protection

Title 37, Part 13

The Texas Commission on Fire Protection (the "TCFP") will review and consider for readoption, review, or repeal sections of Chapter 421, Standards for Certification, of Title 37, Part 13 of the Texas Administrative Code, in accordance with the General Appropriations Act, Article IX, §167, 75th Leg. and Texas Government Code, §2001.039.

Specifically, the following sections of Chapter 421 shall be reviewed: §421.1 Procedures for Meetings, §421.3 Minimum Standards Set by the Commission, §421.5 Definitions, §421.7 Recognition of Previous Volunteer Training, §421.9 Designation of Fire Protection Duties, §421.11 Requirement to be Certified Within One Year, and §421.13 Individual Certificate Holders.

As required by the above authorities, the TCFP will consider, among other things, whether the reasons for adoption of these rules continue to exist. As part of the review process, the TCFP is proposing amendments to §421.5 Definitions, new §421.15 Requirement to be Certified Within One Year, and new §421.17 Requirements to Maintain Certification. The proposed amendments and new sections may be found in the Proposed Rules section of this issue of the *Texas Register*.

The comment period will last for 30 days beginning with the publication of this notice of intention to review. Comments on the proposal may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Gary L. Warren, Sr., Executive Director.

Any questions pertaining to this notice of intention to review should be directed to the Texas Register Liaison, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

TRD-200107782
Jake Soteriou
Fire Service Standards and Certification Division Director
Texas Commission on Fire Protection
Filed: December 11, 2001

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The Texas Commission on Fire Protection (the "TCFP") will review and consider for readoption, review, or repeal sections of Chapter 423, Fire Suppression, of Title 37, Part 13 of the Texas Administrative Code, in accordance with the General Appropriations Act, Article IX, §167, 75th Leg. and Texas Government Code, §2001.039.

The following sections of Chapter 423, Subchapter A, Minimum Standards for Structure Fire Protection Personnel Certification, shall be reviewed: §423.1 Minimum Standards for Structure Fire Protection Personnel, §423.3 Minimum Standards for Basic Structure Fire Protection Personnel Certification, §423.5 Minimum Standards for Intermediate Structure Fire Protection Personnel Certification, §423.7 Minimum Standards for Advanced Structure Fire Protection Personnel Certification, §423.9 Minimum Standards for Master Structure Fire Protection Personnel Certification, §423.11 Higher Levels of Certification, and §423.13 International Fire Service Accreditation Congress (IFSAC) Certification.

The following sections of Chapter 423, Subchapter B, Minimum Standards for Aircraft Rescue Fire Fighting Personnel, shall be reviewed: §423.201 Minimum Standards for Aircraft Rescue Fire Fighting Personnel, §423.203 Minimum Standards for Basic Aircraft Rescue Fire Fighting Personnel Certification, §423.205 Minimum Standards for Intermediate Aircraft Rescue Fire Fighting Personnel Certification, §423.207 Minimum Standards for Advanced Aircraft Rescue Fire Fighting Personnel Certification, §423.209 Minimum Standards for Master Aircraft Rescue Fire Fighting Personnel Certification, and §423.211 International Fire Service Accreditation Congress (IFSAC) Certification.

The following sections of Chapter 423, Subchapter C, Minimum Standards for Marine Fire Protection Personnel, shall be reviewed: §423.301 Minimum Standards for Marine Fire Protection Personnel, §423.303 Minimum Standards for Basic Marine Fire Protection Personnel Certification, §423.305 Minimum Standards for Intermediate Fire Protection Personnel Certification, §423.307 Minimum Standards for Advanced Fire Protection Personnel Certification, and §423.309 Minimum Standards for Master Marine Fire Protection Personnel Certification.

As required by the above authorities, the TCFP will consider, among other things, whether the reasons for adoption of these rules continue to exist. As part of the review process, the TCFP is proposing amendments to §423.13, International Fire Service Accreditation Congress (IFSAC) Certification. The proposed amendments may be found in the Proposed Rules section of this issue of the *Texas Register*.

The comment period will last for 30 days beginning with the publication of this notice of intention to review. Comments on the proposal may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Gary L. Warren, Sr., Executive Director.

Any questions pertaining to this notice of intention to review should be directed to the Texas Register Liaison, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

TRD-200107783

Jake Soteriou
Fire Service Standards and Certification Division Director
Texas Commission on Fire Protection
Filed: December 11, 2001

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Texas State Board of Pharmacy

Title 22, Part 15

The Texas State Board of Pharmacy files this notice of intent to review Chapter 305, (§§305.1, 305.2), concerning Educational Requirements, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules.

Comments regarding whether the reason for adopting the rule continues to exist, may be submitted to Steve Morse, R.Ph., Director of Compliance, Texas State Board of Pharmacy, 333 Guadalupe Street, Austin, Texas 78701. Comments must be received by 5 p.m., January 31, 2002.

TRD-200107738
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: December 11, 2001

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Adopted Rule Review

Office of the Attorney General

Title 1, Part 3

The Office of the Attorney General ("OAG") proposed a review of the rules in Chapter 62 in the June 22, 2001 issue of the *Texas Register* (26 TexReg 4745). The review assessed whether the reasons for the rules continue to exist. As a result of the review, the OAG determined that the reasons for the rules continue to exist, however the rules should be amended. No comments were received regarding this review and the OAG adopted the review of the rules in Chapter 62 in the August 17, 2001 issue of the *Texas Register* (26 TexReg 6124).

As a result of later review, the OAG determined that it is not necessary to propose amendments to the rules in Chapter 62 at this time.

For further information, please contact A.G. Younger, Agency Liaison, at 512/463-2110.

TRD-200107611
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: December 7, 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: 16 TAC §25.263(l)(1)

Calculation of True-up Balance	
	Net book value calculated pursuant to subsection (g)
-	Market value calculated pursuant to subsection (f)(1)
+/-	Value calculated by ECOM model pursuant to subsection (f)(2)
+/-	Final fuel balance calculated pursuant to subsection (h)
+/-	Capacity auction true-up calculated pursuant to subsection (i)
+/-	Regulatory asset amount calculated pursuant to subsection (k)
=	TDU/APGC True-up Balance

Figure: 16 TAC §401.305(e)(1)

Matching Combinations	Prize Category (One Play)	Odds of Winning
All six matching numbers in one play	First Prize (Jackpot)	1:25,827,165
Any five but not six matching numbers in one play	Second Prize	1:89,678
Any four but not five or six matching numbers in one play	Third Prize	1:1,526
Any three but not four, five or six matching numbers in one play	Fourth Prize	1:75

Figure: 16 TAC §401.312(e)(1)

MATCHING COMBINATIONS	PRIZE CATEGORY (ONE PLAY)	ODDS OF WINNING
Matching all four numbers drawn from the first field of 35 numbers in addition to matching the number drawn from the second field of 35 numbers drawn.	First Prize (Jackpot)	1:1,832,600
Matching all four numbers drawn from the first field of 35 numbers in addition to matching zero numbers from the second field of 35 numbers.	Second Prize	1:53,900
Matching three of four numbers drawn from the first field of 35 numbers in addition to matching the number drawn from the second field of 35 numbers.	Third Prize	1:14,779
Matching three of four numbers drawn from the first field of 35 numbers in addition to matching zero numbers from the second field of 35 numbers.	Fourth Prize	1:435
Matching two of four numbers drawn from the first field of 35 numbers in addition to matching the number drawn from the second field of 35 numbers.	Fifth Prize	1:657
Matching one of four numbers drawn from the first field of 35 numbers in addition to matching the number drawn from the second field of 35 numbers.	Sixth Prize	1:102
Matching zero of four numbers drawn from the first field of 35 numbers in addition to matching the number drawn from the second field of 35 numbers.	Seventh Prize	1:58

IN ADDITION

The ***Texas Register*** is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

Texas State Affordable Housing Corporation

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at Noon, at the RC Miller Branch Library, 1605 Dowlen Road, Beaumont, Texas, 77706, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Settler's Cove Apartments, containing 182 units, located in Jefferson County, at 4045 Treadway, Beaumont, Texas 77706. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107742
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at 6:00 p.m., at the Lake Highlands Recreation Center, 9940 Whiterock Trail, Dallas, Texas, 75238, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Bent Creek Apartments, containing 326 units, located in Dallas County, at 9750 Forest Lane, Dallas, Texas 75243. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107743
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at 6:00 p.m., at the Montgomery County Library, Central Branch, 104 I-45 North, Conroe, Texas, 77301, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Cimarron Park Apartments, containing 162 units, located in Montgomery County, at 2201 Montgomery Park Blvd., Conroe, Texas 77304. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107744
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Aston Brook Apartments, containing 152 units, located in Harris County, at 14101 Walters Road, Houston, Texas 77014. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107745
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at 6:00 p.m., at the Lake Highlands Recreation Center, 9940 Whiterock Trail, Dallas, Texas, 75238, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the

Creekwood Village Apartments, containing 362 units, located in Dallas County, at 10928 Audelia, Dallas, Texas 75243. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107746
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at noon, at the Wichita Falls Public Library, 600 11th Street, Room 204, Wichita Falls, Texas, 76301, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Fountaingate Apartments, containing 280 units, located in Wichita County, at 5210 Tower Drive, Wichita Falls, Texas 76310. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107747
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Northwoods Apartments, containing 200 units, located in Harris County, at 18001 Cypress Trace, Houston, Texas 77090. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107748

Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the One Willow Chase Apartments, containing 136 units, located in Harris County, at 8330 Willow Place South, Houston, Texas 77070. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107749
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the One Willow Park Apartments, containing 178 units, located in Harris County, at 8450 Willow Place, North, Houston, Texas 77070. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107750
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at 6:00 p.m., at the Montgomery County Library, Central Branch, 104 I-45 North, Conroe, Texas, 77301, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Pine Creek Village Apartments, containing 216 units, located in Montgomery County, at 229 1-45 North, Conroe, Texas 77304. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107751
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at 6:00 p.m., at the Lake Highlands Recreation Center, 9940 Whiterock Trail, Dallas, Texas, 75238, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Shadowridge Village Apartments, containing 144 units, located in Dallas County, at 9701 W. Ferris Branch Blvd., Dallas, Texas 75243. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107752
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at 6:00 p.m., at the Montgomery County Library, Central Branch, 104 I-45 North, Conroe, Texas, 77301, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Stony Creek Apartments, containing 252 units, located in Montgomery County, at 231 I-45 North, Conroe, Texas 77304. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107753
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch,

6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $140,000,000, the proceeds of which will be loaned to American Housing Foundation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of thirteen separate multifamily housing properties (collectively, the "Properties") located in the cities of Beaumont, Conroe, Dallas, Houston and Wichita Falls, Texas. The public hearing, which is the subject of this notice, will concern the Woodedge Apartments, containing 126 units, located in Harris County, at 10802 Green Creek Drive, Houston, Texas 77070. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107754
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern the Bayou Oaks Apartments, containing 210 units, located in Harris County, at 13800 Ella Blvd., Houston, Texas 77014. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107755
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern The Charleston Apartments, containing 312 units, located in Harris County, at 2800 Dairy Ashford Road, Houston, Texas 77082. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107756
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 4, 2002 at Noon, at the Corpus Christi Public Library, LaRetama Room, 805 Comanche, Corpus Christi, Texas, 78401, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern The Rafters Apartments, containing 250 units, located in Nueces County, at 11325 Interstate Highway 37, Corpus Christi, Texas 78410. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107758
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on December 28, 2001 at Noon, at The Brook Hollow Branch Library, 530 Heimer Road, San Antonio, Texas, 78232, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern the Remington Apartments, containing 158 units, located in Bexar County, at 1570 Thousand Oaks Drive, San Antonio, Texas 78232. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107760
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 4, 2002 at Noon, at the Corpus Christi Public Library, LaRetama Room, 805 Comanche, Corpus Christi, Texas, 78401, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will

concern The Wharf Apartments, containing 250 units, located in Nueces County, at 9320 South Padre Island Drive, Corpus Christi, Texas 78418. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107761
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 12:30 p.m., at the Harris County Library, Cypress Creek Branch, 6815 Cypresswood Drive, Spring, Texas, 77379, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the Briarcrest Apartments, containing 376 units, located in Harris County, at 25650 IH 45, Spring, Texas 77386. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107762
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Arlington Central Library, 101 E. Abram, Arlington, Texas, 76010, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the Clover Hill Apartments, containing 216 units, located in Tarrant County, at 903 Road to Six Flags West, Arlington, Texas 76012. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107763

Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 12:30 p.m., at the Harris County Library, Cypress Creek Branch, 6815 Cypresswood Drive, Spring, Texas, 77379, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the One Westfield Lake Apartments, containing 246 units, located in Harris County, at 2800 Hirschfield, Spring, Texas 77373. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107764
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the Polo Club on Cranbrook I Apartments, containing 228 units, located in Harris County, at 14619 Ella Blvd., Houston, Texas 77014. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107765
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the Polo Club on Cranbrook II Apartments, containing 292 units, located in Harris County, at 14531 Ella Blvd., Houston, Texas 77014. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107766
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the Timbers of Cranbrook Apartments, containing 274 units, located in Harris County, at 14000 Ella Blvd., Houston, Texas 77014. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107767
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 6:00 p.m., at the Houston Public Library, Collier Branch, 6200 Pinemont, Houston, Texas, 77092, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern the Monticello on Cranbrook Apartments, containing 244 units, located in Harris County, at 13913 Ella Blvd., Houston, Texas 77014. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107768
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on December 28, 2001 at Noon, at The Brook Hollow Branch Library, 530 Heimer Road, San

Antonio, Texas, 78232, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern the Summer Oaks Apartments, containing 256 units, located in Bexar County, at 1400 Patricia, San Antonio, Texas 78213. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107769
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 4, 2002 at Noon, at the Corpus Christi Public Library, LaRetama Room, 805 Comanche, Corpus Christi, Texas, 78401, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $92,000,000, the proceeds of which will be loaned to South Texas Affordable Properties Corporation, (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Corpus Christi, Houston and San Antonio, Texas. The public hearing, which is the subject of this notice, will concern the Willowick Apartments, containing 250 units, located in Nueces County, at 6947 Everhart Road, Corpus Christi, Texas 78413. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107770
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 3, 2002 at Noon, at the Grand Prairie Memorial Library, 901 Condover Road, Grand Prairie, Texas, 75051, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the Hillcrest Apartments, containing 310 units, located in Dallas County, at 1960 West Tarrant, Grand Prairie, Texas 75050. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107771
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on January 2, 2002 at 12:30 p.m., at the Harris County Library, Cypress Creek Branch, 6815 Cypresswood Drive, Spring, Texas, 77379, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in an aggregate principal amount not to exceed $105,000,000, the proceeds of which will be loaned to American Opportunity for Housing, Inc., (or a related person or affiliate thereof) (the "Borrower"), a Texas non-profit corporation exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, to finance the acquisition and rehabilitation of eight separate multifamily housing properties (collectively, the "Properties") located in the cities of Arlington, Grand Prairie, Houston and Spring, Texas. The public hearing, which is the subject of this notice, will concern the Mill Creek Apartments, containing 174 units, located in Harris County, at 16339 Stuebner Airline Road, Spring, Texas 77379. The Properties will be owned by Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Properties and the issuance of the Bonds. Questions or requests for additional information may be directed 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 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 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.org.

TRD-200107772
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: December 11, 2001

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Office of the Attorney General

Request for Proposal

This Request for Proposal is filed pursuant to Texas Government Code section 2254.021 et seq.

The Office of the Attorney General of Texas ("the OAG") requests that professional consultants with documented expertise and experience in the field of indirect cost recovery and cost allocation plans for governmental units submit proposals to prepare Indirect Cost Plans for State Fiscal Years 2001 ("FY01") (based on actual expenditures) and 2003 ("FY03") (based on budgeted expenditures) and to analyze and update standardized billing rates for legal services provided by the OAG. In accordance with Texas Government Code section 2254.029(b), the OAG hereby discloses that similar services related to indirect cost plans and legal billing rates covering earlier fiscal years have been previously provided to the OAG by a consultant.

The OAG administers millions of dollars of federal funds for the Child Support (Title IV-D) and Medicaid (Title XIX) programs. Currently, the OAG is recouping its indirect costs from these federal programs based on rates approved by the United States Department of Health and Human Services ("HHS").

The OAG also provides legal services to other state agencies. The consultant selected will be responsible for analyzing the existing billing rates and actual costs and then updating the legal services rates for use in FY03.

The consultant selected to prepare the Indirect Cost Plans and to develop current, standardized legal billing rates must demonstrate the necessary qualifications and experience listed in the "QUALIFICATIONS" section. The successful consultant will also be required to perform the services and generate the reports listed in the "SCOPE OF SERVICES" section. The acceptance of a proposal by the OAG, made in response to this Request for Proposal, will be based on the OAG's evaluation of the competence, knowledge, and qualifications of the consultant, in addition to the reasonableness of the proposed fee for services. If other considerations are equal, the OAG will give preference to a consultant whose principal place of business is in Texas or who will manage the consulting contract wholly from an office in Texas. The total contract award will not exceed Forty-Nine Thousand and NO/100 Dollars($49,000.00).

SCOPE OF SERVICES

The successful consultant will be required to render the following services and reports:

1. Prepare two (2) Indirect Cost Plans in accordance with OMB Circular A-87 one based on FY01 actual expenditures and one based on FY03 budgeted expenditures

* Identify the sources of financial information;

* Inventory all federal and other programs administered by the OAG;

* Classify all OAG divisions;

* Determine administrative divisions;

* Determine allocation bases for allotting services to benefitting divisions;

* Develop allocation data for each allocation base;

* Prepare allocation worksheets based upon actual FY01 expenditures and budgeted FY03 expenditures;

* Summarize costs by benefitting division;

* Collect cost data for all of the programs included in the inventory of federal and other programs administered by the OAG;

* Determine indirect cost rates throughout the OAG on an annual basis;

* Prepare and present draft Indirect Cost Plans to the OAG by April 8, 2002;

* Formalize the Actual FY01 and Budgeted FY03 Indirect Cost Plans and present them to HHS by April 30, 2002; and

* Negotiate the Indirect Cost Plans' approval with HHS by August 31, 2002.

2. Develop standardized billing rates for legal services

* Review current criteria used by the OAG for charging various agencies;

* Determine the types of legal services provided to the agencies;

* Compile direct hours for each type of service;

* Determine effort reporting requirements;

* Re-examine billing rate options;

* Determine the actual cost of services;

* Analyze and confirm revenues and cost analyses;

* Prepare and present a draft Legal Services Billing Schedule for FY 2001 actual costs to the OAG by May 22, 2002;

* Prepare and present a draft Legal Services Billing Schedule for FY 2003 budgeted costs to the OAG by June 19, 2002; and

* Formalize a Legal Services Billing Schedule by July 31, 2002.

The selected consultant will accumulate and analyze all data that are required. The OAG is not expected to provide any staff resources to the selected consultant. The OAG will provide a liaison with staff within the OAG and with other state agencies, as appropriate.

QUALIFICATIONS

Each individual, company, or organization submitting a proposal pursuant to this request, must present evidence or otherwise demonstrate to the satisfaction of the OAG that such entity:

1. Has the experience to prepare and successfully negotiate the type of Indirect Cost Plan described above;

2. Has a thorough understanding of cost allocation issues and preparation of Indirect Cost Plans at the state agency level;

3. Has a thorough understanding of legal services billing procedures and preparation of a Legal Services Billing Schedule; and

4. Can program and execute the Indirect Cost Plans and Legal Services Billing Schedule within the required time frames specified in the "SCOPE OF SERVICES" section.

Please provide evidence of the above qualifications and a proposal which includes:

1. A detailed description of the plan of action to fulfill the requirements described in the "SCOPE OF SERVICES" section;

2. Detailed information on the consultant staff to be assigned to the project; and

3. The proposed fee amount for provision of the desired services.

A signed original and five (5) copies of the proposal must be received in the OAG Purchasing Section, 300 West 15th Street, Third Floor, Austin, Texas 78701, no later than 3:00 p.m., Central Standard Time, January 22, 2002. Any proposal received after the specified time and date will not be given consideration. Conditioned on the OAG's receipt of the requisite finding of fact from the Governor's Budget and Planning Office pursuant to Texas Government Code section 2245.028, the OAG anticipates entering into the resultant contract on or about February 8, 2002.

A proposal must include all of the references and financial status information as specified below at the time of opening or it will be disqualified. Proposals should be sealed and clearly marked with the specified time and date and the title, "Proposal for Consulting Services for an Indirect Cost Recovery/Cost Allocation Plan and Legal Services Billing Schedule for the OAG."

REFERENCES AND FINANCIAL CONDITION

Prospective consultants will provide the names of at least three (3) different references meeting the following criteria:

1. The reference company or entity must have engaged the prospective consultant for the same or similar services as those to be provided in accordance with the terms of this Request for Proposal;

2. The services must have been provided by the prospective consultant to the reference company or entity within the five (5) years preceding the issuance of this Request for Proposal;

3. The reference company or entity must not be affiliated with the prospective consultant in any ownership or joint venture arrangement;

4. References must include the company or entity name, address, contact name, and telephone number for each reference. The OAG may not be used as a reference. The contact name must be the name of a senior representative of the reference company or entity who was directly responsible for interacting with the prospective consultant throughout the performance of the engagement and who can address questions about the performance of the prospective consultant from personal experience. References will accompany the proposal.

5. The prospective consultant will provide a signed release from liability for each reference provided in response to this requirement. The release from liability will absolve the specified reference company or entity from liability for information provided to the OAG concerning the prospective consultant's performance of its engagement with the reference.

6. The prospective consultant must disclose if and when it has filed for bankruptcy within the last seven (7) years. For prospective consultants conducting business as a corporation, partnership, limited liability partnership, or other form of artificial person, the prospective consultant must disclose whether any of its principals, partners, or officers have filed for bankruptcy within the last seven (7) years.

7. As part of any proposal submission, the prospective consultant must include information regarding financial condition, including income statements, balance sheets, and any other information which accurately shows the prospective consultant's current financial condition. The OAG reserves the right to request such additional financial information as it deems necessary to evaluate the prospective consultant, and by submission of a proposal, the prospective consultant agrees to provide same.

DISCLOSURE

Any individual who provides a proposal for consulting services in response to this Request for Proposal and who has been employed by the OAG or any other state agency(ies) at any time during the two (2) years preceding the tendering of the proposal will disclose in the proposal:

1. the nature of the previous employment with the OAG or any other state agency(ies);

2. the date(s) the employment(s) terminated; and

3. the annual rate(s) of compensation for the employment(s) at the time(s) of termination.

Each consultant that submits a proposal must certify to the following:

1. consultant has no unresolved audit exceptions(s) with the OAG. An unresolved audit exception is an exception for which the consultant has exhausted all administrative and/or judicial remedies and refuses to comply with any resulting demand for payment.

2. consultant certifies that the consultant's staff or governing authority has not participated in the development of specific criteria for award of this contract, and will not participate in the selection of consultant(s) awarded contracts.

3. consultant has not retained or promised to retain an agent or utilized or promised to utilize a consultant who has participated in the development of specific criteria for the award of contract, nor will participate in the selection of any successful consultant.

4. consultant agrees to provide information necessary to validate any statements made in consultant's response, if requested by the OAG. This may include, but is not limited to, granting permission for the OAG to verify information with third parties, and allowing inspection of consultant's records.

5. consultant understands that failure to substantiate any statements made in the response when substantiation is requested by OAG may disqualify the response, which could cause the consultant to fail to receive a contract or to receive a contract for an amount less than that requested.

6. consultant certifies that the consultant's organization has not had a contract terminated or been denied the renewal of any contract for noncompliance with policies or regulation of any state or federal funded program within the past five years nor is it currently prohibited from contracting with a government agency.

7. consultant certifies that its Corporate Texas Franchise Tax payments are current, or that it is exempt from or not subject to such tax.

8. consultant has not given nor intends to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted response.

9. Neither the consultant nor the firm, corporation, partnership or institution represented by the consultant, anyone acting for such firm, corporation partnership or institution has violated the antitrust laws of this State, the Federal antitrust laws nor communicated directly or indirectly its response to any competitor or any other person engaged in such line or business.

10. Under §231.006 Family Code (relating to child support), the consultant certifies that the individual or business entity named in this response is not ineligible to receive a specified payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate.

11. If the consultant is an individual not residing in Texas or a business entity not incorporated in or whose principal domicile is not in Texas, the consultant certifies that it either: (a) holds a permit issued by the Texas comptroller to collect or remit all state and local sales and use taxes that become due and owing as a result of the consultant's business in Texas; or (b) does not sell tangible personal property or services that are subject to the state and local sales and use tax.

12. consultant certifies that if a Texas address is shown as the address of the vendor, Vendor qualifies as a Texas Resident Bidder as defined in Rule 1 TAC 111.2.

13. consultant certifies that it has not received compensation for participation in the preparation of the specifications for this solicitation.

14. consultant must answer the following questions:

* If an award is issued, do you plan to utilize a subcontractor or supplier for any portion of the contract? If consultant plans to utilize a subcontractor, the subcontractor will comply with the same terms as the consultant as contained in this solicitation and other relevant OAG policy and procedure and the subcontractor must be approved in advance by OAG.

* If yes, what percentage of the total award would be subcontracted or supplied by Historically Underutilized Businesses (HUBs)?

* If no, explain why no subcontracting opportunities are available or what efforts were made to subcontract part of this project.

* Is consultant certified as a Texas HUB?

PAYMENT

Payment for services will be made upon receipt of invoices presented to the OAG in the form and manner specified by the OAG after certification of acceptance of all deliverables.

PROPOSAL PREPARATION AND CONTRACTING EXPENSES

All proposals must be typed, double spaced, on 8 1/2" x 11" paper, clearly legible, with all pages sequentially numbered and bound or stapled together. The name of the prospective consultant must be typed at the top of each page. Do not attach covers, binders, pamphlets, or other items not specifically requested.

A Table of Contents must be included with respective page numbers opposite each topic. The proposal must contain the following completed items in the following sequence:

1. Transmittal Letter: A letter addressed to Ms. Julie Geeslin (address at the end of this Request for Proposal) that identifies the person or entity submitting the proposal and includes a commitment by that person or entity to provide the services required by the OAG. The letter must state, "The proposal enclosed is binding and valid at the discretion of the OAG." The letter must specifically identify the project for this proposal. The letter must include "full acceptance of the terms and conditions of the contract resulting from this Request for Proposal." Any exceptions must be specifically noted in the letter. However, any exceptions may disqualify the proposal from further consideration at the OAG's discretion.

2. Executive Summary: A summary of the contents of the proposal, excluding cost information. Address services that are offered beyond those specifically requested as well as those offered within specified deliverables. Explain any missing or other requirements not met, realizing that failure to provide necessary information or offer required service deliverables may result in disqualification of the proposal.

3. Project Proposal

4. Cost Proposal

5. Relevant Technical Skill Statement (with references and vitae)

6. Relevant Experience Statement (with references and vitae)

To be considered responsive, a proposal must set forth full, accurate, and complete information as required by this request. A non-responsive proposal will not be considered for further evaluation. If the requirement that is not met is considered a minor irregularity or an inconsequential variation, an exception may be made at the discretion of the OAG and the proposal may be considered responsive.

A written request for withdrawal of a proposal is permitted any time prior to the submission deadline and must be received by Ms. Julie Geeslin (address at the end of this Request for Proposal). After the deadline, proposals will be considered firm and binding offers at the option of the OAG.

Preliminary and final negotiations with top-ranked prospective consultants may be held at the discretion of the OAG. The OAG may decide, at its sole option and in its sole discretion, to negotiate with one, several, or none of the prospective consultants submitting proposals pursuant to this request. During the negotiation process, the OAG and any prospective consultant(s) with whom the OAG chooses to negotiate, may adjust the scope of the services, alter the method of providing the services, and/or alter the costs of the services so long as the changes are mutually agreed upon and are in the best interest of the OAG. Statements made by a prospective consultant in the proposal packet or in other appropriate written form will be binding unless specifically changed during final negotiations. A contract award may be made by the OAG without negotiations if the OAG determines that such an award is in the OAG's best interest.

All prospective consultants of record will be sent written notice of which, if any, prospective consultant(s) is selected for the contract award on or about February 11,2002 or within ten (10) days of making an award, whichever is later.

All proposals are considered to be public information subsequent to an award of the contract. All information relating to proposals will be subject to the Public Information Act, Texas Government Code Annotated, Chapter 552, after the award of the contract. All documents will be presumed to be public unless a specific exception in that Act applies. Prospective consultants are requested to avoid providing information which is proprietary, but if it is necessary to do so, proposals must specify the specific information which the prospective consultant considers to be exempted from disclosure under the Act and those pages or portions of pages which contain the protected information must be clearly marked. The specific exemption which the prospective consultant believes protects that information must be cited. The OAG will assume that a proposal submitted to the OAG contains no proprietary or confidential information if the prospective consultant has not marked or otherwise identified such information in the proposal at the time of its submission to the OAG.

The OAG has sole discretion and the absolute right to reject any and all offers, terminate this Request for Proposal, or amend or delay this Request for Proposal. The OAG will not pay any cost incurred by a prospective consultant in the preparation of a response to this Request for Proposal and such costs will not be included in the budget of the prospective consultant submitted pursuant to this Request for Proposal. The issuance of this Request for Proposal does not constitute a commitment by the OAG to award any contract. This Request for Proposal and any contract which may result from it are subject to appropriation of State and Federal funds and the Request for Proposal and/or contract may be terminated at any time if such funds are not available.

The OAG reserves the right to accept or reject any or all proposals submitted in response to this request and to negotiate modifications necessary to improve the quality or cost effectiveness of any proposal to the OAG. The OAG is under no legal obligation to enter into a contract with any offeror of any proposal on the basis of this request. The OAG intends any material provided in this Request for Proposal only and solely as a means of identifying the scope of services and qualifications sought.

The State of Texas assumes no responsibility for expenses incurred in the preparation of responses to this Request for Proposal. All expenses associated with the preparation of the proposal solicited by this Request for Proposal will remain the sole responsibility of the prospective consultant. Further, in the event that the prospective consultant is engaged to provide the services contemplated by this Request for Proposal, any expenses incurred by the prospective consultant associated with the negotiation and execution of the contract for the engagement will remain the obligation of the consultant.

Please address responses to:

Ms. Julie Geeslin

Budget and Purchasing Division

Office of the Attorney General of Texas

300 W. 15th Street, Third Floor

Austin, Texas 78701

(Phone: 512-475-4495)

If you have any questions regarding this publication, please call A.G. Younger, Agency Liaison, at 512/463-2110.

TRD-200107732
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: December 11, 2001

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Texas Water Code and Texas Health and Safety Code Enforcement Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code and the Texas Health and Safety Code. Before the State may settle a judicial enforcement action under the Water Code or the Health and Safety 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 Water Code of the Health and Safety Code.

Case Title and Court: Harris County, Texas and the State of Texas v. Las Brisas Investment, Inc., Cause No. 2000-60470, in the 125th District Court of Harris County, Texas

Nature of Defendant's Operations: Defendant Las Brisas Investment, Inc., allegedly violated the Texas Water Code and the Texas Health and Safety Code by causing, suffering, allowing, or permitting the repeated discharge of sewage from its apartment building into or adjacent to waters in the state. The suit seeks civil penalties, a permanent injunction, attorney's fees, and court costs.

Proposed Agreed Judgment: Defendant will pay $60,000 in civil penalties, $13,000 in attorney fees, and court costs.

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 Grant Gurley, 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 further information, please call A.G. Younger, Agency Liaison, at 512/463-2110.

TRD-200107610
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: December 7, 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 November 30, 2001, through December 6, 2001. The public comment period for these projects will close at 5:00 p.m. on January 11, 2002.

FEDERAL AGENCY ACTIONS:

Applicant: Galveston Park Board of Trustees; Location: The proposed project site is located at the mouth of Boddecker Channel, adjacent to Boddecker Drive, at the northeast end of the Galveston Seawall. The temporary disposal area will be located south of the project area in Apffel Park near the south jetty of the Galveston Entrance Channel. The main beach nourishment area will be at the western end of the Galveston Seawall, adjacent to FM 3005, between 7 Mile Road and 7 1/2 Mile Road. Additional beach nourishment may take place at various locations along Seawall Boulevard in Galveston, Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: The Jetties, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 330201; Northing: 3246132. CCC Project No.: 01-0413-F1; Description of Proposed Action: The applicant proposes to hydraulically dredge approximately 120,000 cubic yards of sand from an area approximately 11 acres in size from the northern end of Big Reef Nature Area. The applicant also proposes to eliminate a previously authorized boat channel, known as Boddecker Channel, which would have run parallel to Boddecker Drive. This change is designed to eliminate boat access into Boddecker Channel and allow tidal exchange through the existing natural channel. The applicant proposes to temporarily place the material in a dredge material placement area (DMPA) in Apffel Park. The applicant proposes to conduct maintenance dredging for up to 10 years. Approximately 85% of the sand placed in the DMPA will be trucked to the west end of the Seawall and used as beach nourishment. Sand will be placed into an area approximately 2,500 feet long and 300 feet wide. This beach nourishment area is approximately 17 acres in size. The remaining material will either be uniformly spread across the proposed DMPA or trucked to selected areas along Seawall Boulevard that have been previously authorized. Type of Application: U.S.A.C.E. permit application #13914(04) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387). NOTE: The CMP consistency review for this project may be conducted by the Texas Natural Resource Conservation Commission as part of its certification under §401 of the Clean Water Act.

Applicant: Ms. Susan Quigley; Location: The proposed project site is located in the Sabine River at the intersection of Polk Avenue and Market Street in Orange, Orange County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Orange, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 429279; Northing: 3328457. CCC Project No.: 01-0414-F1; Description of Proposed Action: The applicant requests authorization to construct a recreational marina on an upland tract of land adjacent to the Sabine River. The applicant proposes to excavate the basin to a depth of 7.5 feet below mean sea level. The applicant also proposes to erect a sheet pile bulkhead around the inland perimeter of the marina basin. In addition, several floating docks, stabilized by 12-inch diameter timber pilings, would be constructed within the basin. Along the river shoreline, the applicant proposes to construct two additional floating docks, a fixed wooden dock, and a pivoting dock ramp. These structures would also be stabilized using 12-inch diameter timber pilings. Approximately 236 cubic yards of concrete riprap would be placed along 40 linear feet of shoreline at the northeastern corner of the marina opening. An additional 500 cubic yards of material would be mechanically excavated from the Sabine River to provide access to the marina. All dredged material would be placed on-site in an upland area. No wetlands or submerged aquatic vegetation would be impacted by the proposed activity. Type of Application: U.S.A.C.E. permit application #22531 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: East Beach Project Phase I, Ltd.; Location: The proposed project site is located on a 16.29-acre tract of land on East Beach Drive between The Galvestonian and The Islander condominium developments in Galveston, Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Galveston, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 329500; Northing: 3244000. The proposed mitigation site is located between 83rd Street and the 81st Street right-of-way between Harborside Drive and the Isle Bayside Subdivision and Galveston Bay, Galveston, Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Galveston, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 319200; Northing: 3241500. CCC Project No.: 01-0416-F1; Description of Proposed Action: The applicant proposes to fill 0.55 acres of dune swale wetlands with 800 cubic yards of clean fill during the construction of a multi-level condominium project. The proposed plans would allow public access to the beach. As compensatory mitigation for project site impacts, the applicant proposes to create 0.51 acres of shallow water wetlands, enhance 1.54 acres of existing upland areas, and 2.53 acres of wetland areas by removing salt cedar and Chinese tallow tree, and to preserve 0.42 acres of deep water habitat at the 5-acre Harborside Drive site. Type of Application: U.S.A.C.E. permit application #22354 is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: South Padre Island Development, L.P.; Location: The proposed project site is located approximately 1.3 miles northwest of the SH 100 and FM 510 intersection in Cameron County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Laguna Vista, Texas. Approximate UTM Coordinates: Zone: 14; Easting: 670311; Northing: 2888803. CCC Project No.: 01-0417-F1; Description of Proposed Action: The proposed project plan would consist of the excavation of a marina, the construction of residential housing around the marina, and the excavation of a recreational boat channel on Parcel 7, an 18.075-acre site. The basin and slips would be dredged from uplands. The applicant proposes to place 1.8 acres of fill in sparsely vegetated sand flats to raise the elevation of the waterfront area to approximately 10.5 feet above mean sea level prior to construction of the residential development. In addition, the applicant proposes to excavate a small boat channel for access to the Laguna Madre. This

would impact approximately 0.09 acres of shoalgrass. A retaining wall, approximately 1,010 feet long would be constructed approximately 5 feet landward of the black mangroves located along the natural shoreline of the project site. All measures would be taken to ensure that non-point source pollution to the basin would be minimized. To compensate for impacts to vegetated sandflats and seagrasses, the applicant proposes to provide seagrass habitat and mangrove wetland complex to the north of the project area. The applicant proposes to create approximately 0.3 acres of seagrass habitat from sparsely vegetated sandflats adjacent to the north side of the project area and approximately 1.0 acre of mangrove/wetland habitat from unvegetated sandflats further to the north in an area adjacent to existing habitat in the vicinity of Laguna Vista Cove. Type of Application: U.S.A.C.E. permit application #22525 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information 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-200107730
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: December 11, 2001

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Notice of Intent to Adopt Penalty Schedule and Request for Public Comment

The Texas General Land Office is proposing changes to the current schedule for assessing administrative penalties for violations of Texas Natural Resources Code (the Code)§51.302. Section 51.302 of the Code authorizes the Commissioner of the General Land Office (Commissioner) to assess administrative penalties against a person for constructing, maintaining, owning, or possessing a facility or structure on state-owned submerged land without a proper easement or lease from the state under Chapter 51 or Chapter 33 of the Code. Penalties may be not less than $50 or exceed $1,000 per violation per day. Section 17.7, Title 31, Texas Administrative Code (TAC), provides that the amount of the minimum penalty assessed shall be according to a penalty schedule, approved by the Commissioner with the concurrence of the School Land Board, and made available for public inspection and review. On November 15, 2001, the Commissioner and the School Land Board approved the proposed penalty schedule and requested that public comment be solicited prior to implementation.

The current penalty schedule is based upon a square footage calculation and does not specifically provide for consideration of various factors that would serve to mitigate the penalty. The purpose of the revised penalty schedule is to allow for consideration of these various factors as required by 31 TAC §17.7(1). These factors are: (A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation and the hazard and damage, including damage to natural resources, caused thereby; (B) the degree of cooperation of the owner and operator once that person was given notice of the violation; (C) the degree of culpability and the history of previous violations by the owner or operator; (D) the amount necessary to deter future violations; and (E) any other matter relevant to a fair and just result. The intent of the revised penalty schedule is to provide for the assessment of fair, consistent, uniform and appropriate penalties that take into account all relevant factors, and that allow for the consideration of mitigating factors such as the degree of cooperation of the person.

The General Land Office solicits public comment regarding the penalty schedule. Comments may be submitted to Ms. Melinda Tracy, Texas Register Liaison, General Land Office, P.O. Box 12873, Austin, Texas, 78711-2873, melinda.tracy@glo.state.tx.us, facsimile (512) 463-6311. In order to be considered, comments must be received by 5:00 p.m no later than 30 days after publication. The penalty schedule, including any revisions resulting from public comment, will be adopted by separate notice published in the *Texas Register* after the closure of the public comment period. For more information on the penalty schedule, please contact Barbara B. Deane, Director, Environmental Law Section, General Land Office, at (512) 463-5836, barbara.deane@glo.state.tx.us.

I. Introduction. The Texas Natural Resources Code (the Code) §51.302 confers authority on the Commissioner of the General Land Office (Commissioner) to assess administrative penalties against a person for constructing, maintaining, owning, or possessing a facility or structure on state-owned submerged land without a proper easement or lease from the state under Chapter 51 or under Chapter 33 of the Code. This penalty matrix ensures that all administrative enforcement actions are fair, uniform, consistent, and appropriate. Administrative penalties assessed may not exceed $1,000 per day. Additional remedies may be available to the Commissioner and the General Land Office (Land Office), such as removal of facilities or structures and assessing costs of removal and disposal, electing to accept ownership of facilities or structures, referrals for injunctive relief, and civil penalties. This matrix does not in any way limit the Commissioner or the Land Office solely to the assessment of administrative penalties. This matrix has been approved by the Commissioner with the concurrence of the School Land Board, and is effective immediately upon publication. This matrix supercedes the "Schedule of Administrative Penalties" previously adopted by the Land Office under §17.7 of Title 31, Texas Administrative Code.

II. Determining the appropriate penalty. Section 17.7 of Title 31, Texas Administrative Code, requires that the Commissioner consider certain factors when determining penalties to be assessed under the provisions of the Code, §§51.302 and 51.3021. The seriousness of the violation ("Type of Structure", "Location of Structure", and "Impediment to Access or Use of State-owned Lands") and the hazard and damage, including damage to natural resources ("Environmental Impacts") will be considered by referencing Table A of this matrix. Each of the four factors should be analyzed as minor, moderate, or major. The corresponding dollar amounts derived from the four factors should be added together for the base penalty. The base penalty will then be adjusted upward or downward based upon the factors in Table B, "Adjustments to Base Penalty." These factors include the "Degree of Cooperation" of the owner and/or operator (Respondent) once that person was given notice of the violation; the "Degree of Culpability and History of Previous Violations" by the owner and/or operator (Respondent); the "Amount Necessary to Deter Future Violations"; and any "Matters Relevant to a Fair and Just Result." The resulting adjustments should be totaled and then applied to the base penalty for a final penalty amount. The penalty will be assessed per day beginning thirty days after service of a Notice of Violation, unless otherwise agreed to in writing by the Land Office or the Commissioner. Pursuant to §51.302 of the Code, and subject to Paragraph IV of this matrix, the maximum penalty is $1,000 per day, and the minimum penalty is $50 per day, regardless of the result of the penalty matrix calculation.

III. Penalty Matrix for Unauthorized Structures.

TABLE A: BASE PENALTY

Determine the appropriate dollar amount for each of the four factors, then add the four dollar amounts together for the base penalty to be assessed per day.

Factors	Minor	Moderate	Major
Type of Structure	Pier, Walkway, Landing, Fish Cleaning Table, rip rap, etc., within rules and/or guidelines $25.00	Pier, Walkway, Landing, Fish Cleaning Table, rip rap, etc., outside rules and/or guidelines, or any Boat Lift or Boat Slip $125.00	Unauthorized Cabin, Dredging, Breakwater, Boathouse, Bulkhead, Fill, Groin, or other significant structure $250.00
Location of Structure	Location within guidelines and/or rules $25.00	Location outside of guidelines and/or rules $125.00	Location in critical habitat $250.00
Impedes Access to or use of State-owned lands	Minimal $25.00	Moderate $125.00	Substantial $250.00
Environmental Impacts	Temporary Impacts, Non-Critical Habitat $25.00	Temporary Impacts, Critical Habitat $125.00	Permanent Impacts $250.00

Degree of Cooperation - Increase or decrease base penalty up to 50%; maximum adjustment $250.00.

Degree of Culpability and History of Previous Violations - Increase or decrease base penalty up to 50%; maximum adjustment $250.00. Respondents with prior violations are subject to an automatic increase of $250.

Deter Future Violations - Increase or decrease base penalty up to 50%; maximum adjustment $250.00.

Matters Relevant to a Fair and Just Result - Increase or decrease base penalty up to 100%, subject to the minimum penalty of $50.

Total all Table B adjustments then add to (or subtract from) the base penalty for a final penalty amount to be assessed per day.

IV. Result of the Penalty Matrix Calculation. Penalties will not be formally assessed until thirty days after the issuance of a Notice of Violation, pursuant to §51.3021 of the Code. During this thirty-day period, Respondents are given an opportunity to come into compliance.

If the final penalty matrix calculation results in a penalty amount of $50 to $100.00, the Respondent will receive an Advisory Letter and, if the structure or facility qualifies for an easement or lease, an application form.

If the penalty matrix calculation results in a penalty amount of $101 to $200, the Respondent will receive a Notice of Noncompliance and, if the structure or facility qualifies for an easement or lease, an application form.

If the Respondent fails to come into compliance after receipt of an Advisory letter or a Notice of Noncompliance, the Commissioner, through the Land Office, may proceed to issue a Notice of Violation, regardless of the penalty amount.

If the penalty matrix calculation results in a penalty amount of $201 and up, the Respondent will receive a Notice of Violation. Penalties will be pursued in accordance with the procedures set forth in the Code §51.3021, 31 TAC §§17.1-17.50, and 1 TAC §§155.1-155.59.

TRD-200107729
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: December 11, 2001

♦ ♦ ♦

Comptroller of Public Accounts

Notice of Awards

Pursuant to Chapters 403, Section 2305.032, Chapter 2254, Subchapter A, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces this notice of contract awards.

The notice of request for proposals (RFP #121d) was published in the June 15, 2001, issue of the Texas Register at 26 TexReg 4547.

Notice of Contract Awards in connection with Comptroller's Request for Proposals (RFP #121d) for Energy Engineering Services for the Texas LoanSTAR Revolving Loan Program. The Request for Proposals was published in the June 15, 2001, issue of the Texas Register, at 26 TexReg 4547. Comptroller of Public Accounts, State Energy Conservation Office, announces the following contract awards under this RFP.

Two contracts each are awarded to the following firms for construction monitoring and design review for the LoanSTAR Program:

Two contracts are awarded to Kinsman and Associates, 1701 North Greenville Avenue, Suite 600, Richardson, Texas 75801. The total amount is not to exceed $150,000.00 each. The term of each contract is September 1, 2001 through August 31, 2002.

Two contracts are awarded to Energy Engineering Associates, Inc., 6615 Vaught Ranch Road, Austin, Texas 78730. The total amount is not to exceed $150,000.00 each. The term of each contract is September 1, 2001 through August 31, 2002.

TRD-200107740
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: December 11, 2001

♦ ♦ ♦

Notice of Coastal Protection Fee Reinstatement

The Comptroller of Public Accounts, administering agency for the collection of the Coastal Protection Fee, has received certification from the Commissioner of the General Land Office that the balance in the Coastal Protection Fund has fallen below the minimum amount allowed by law.

Pursuant to Natural Resource Code, §40.155 and §40.156, the comptroller hereby provides notice of the reinstatement of the coastal protection fee effective February 1, 2002.

The fee shall be collected on crude oil transferred to or from a marine terminal on or after February 1, 2002, or until notice of the suspension of the fee is published in the *Texas Register*.

Inquiries should be directed to Bryant Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas, 78711.

TRD-200107802
Martin Cherry
Deputy General Counsel for Taxation
Comptroller of Public Accounts
Filed: December 12, 2001

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003, 303.005, 303.008, 303.009, 304.003, and 346.101. Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and 303.009 for the period of 12/03/01 - 12/09/01 is 18% for Consumer [1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sec. 303.003 and 303.009 for the period of 12/03/01 - 12/09/01 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by Sec. 303.005 and 303.009[3]for the period of 12/01/01 -12/31/01 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The monthly ceiling as prescribed by Sec. 303.005 and 303.009 for the period of 12/01/01 - 12/31/01 is 18% for Commercial over $250,000.

The standard quarterly rate as prescribed by Sec. 303.008 and 303.009 for the period of - 01/01/02 - 03/31/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard quarterly rate as prescribed by Sec. 303.008 and 303.009 for the period of 01/01/02 - 03/31/02 is 18% for Commercial over $250,000.

The retail credit card quarterly rate as prescribed by Sec. 303.009 [1] for the period of 01/01/02 - 03/31/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The lender credit card quarterly rate as prescribed by Sec. 346.101 Tex. Fin. Code[1]for the period of 01/01/02 - 03/31/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard annual rate as prescribed by Sec. 303.008 and 303.009 [4]for the period of 01/01/02 - 03/31/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard annual rate as prescribed by Sec. 303.008 and 303.009 for the period of 01/01/02 - 03/31/02 is 18% for Commercial over $250,000.

The retail credit card annual rate as prescribed by Sec. 303.009[1]for the period of 01/01/02 - 03/31/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 12/01/01 - 12/31/01 is 10% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed Sec. 304.003 for the period of 12/01/01 - 12/31/01 is 10% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

[4]Only for open-end credit as defined in Sec. 301.002(14), Tex. Fin. Code.

Correction: The Office of Consumer Credit Commissioner amends the Texas Credit Letter, Volume 21, Number 22, November 27, 2001, to reflect the quarterly interest rates which were to be calculated and published on November 26, 2001. We apologize for any inconvenience this may have caused.

TRD-200107605
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 6, 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 12/17/01 - 12/23/01 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 12/17/01 - 12/23/01 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-200107788
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 12, 2001

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Texas Department of Criminal Justice

Notice of Award

The Texas Department of Criminal Justice hereby gives notice of a Contract Award for the modification of three existing paint booth exhaust stacks at the Daniel Unit, 938 South FM 1673, Snyder, Texas 79549, Solicitation Number 696-FD-B004.

The Contract was awarded to Stelco Industries, Inc., as a full award for a dollar amount of $72,839.00, Contract Number 696-FD-2-2-C0144.

TRD-200107596
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: December 5, 2001

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Notice of Bid Cancellation

The Texas Department of Criminal Justice hereby gives notice of a Cancellation for Bids for Construction of Enlarging the Outside Visitation Area at the Hutchins State Jail Facility, Requisition Number: 696-FD-2-B008.

TRD-200107707
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: December 10, 2001

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Deep East Texas Local Workforce Development Board, Inc.

Request for Proposals

The Deep East Texas Local Workforce Development Board, Inc. is seeking a qualified entity to provide a 12 station Wireless, mobile training lab. Bidder shall be an experienced reseller offering project management, delivery of equipment, and successful implementation.

RFP release date: 8:00 a.m., Tuesday, November 20, 2001.

Deadline for submission of proposal: 10:00 a.m. CST, Thursday, December 4, 2000

Requests for copies of the RFP can be made to:

Martha Ann Paine, Technology Manager

Deep East Texas Local Workforce Development Board, Inc.

1318 S. John Redditt Drive, Suite C

Lufkin, Texas 75904

(936) 639-8898

(936) 633-7332

Email: martha.paine@twc.state.tx.us

TRD-200107724
Charlene Meadows
Executive Director
Deep East Texas Local Workforce Development Board, Inc.
Filed: December 11, 2001

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Finance Commission of Texas

Notice of Public Hearing

Finance Commission of Texas

Tuesday, December 18, 2001, at 10:00 a.m.

William F. Aldridge Hearing Room

Finance Commission Building, 2601 North Lamar Boulevard

Austin, Texas 78705

A public hearing will be held on Tuesday, December 18, 2001, at 10:00 a.m., before a designee of the Finance Commission of Texas (commission), to receive comments from interested persons concerning proposed 7 TAC §§25.1-25.6, published in the November 2, 2001, issue of the *Texas Register* (26 TexReg 8631), as corrected in the November 23, 2001, issue (26 TexReg 9642). Any interested person may appear and offer comments or statements, either orally or in writing; however, questioning of commenters will be reserved exclusively to the person conducting the hearing on behalf of the commission and staff from the Texas Department of Banking, as may be necessary to ensure a complete record.

While any person with pertinent comments or statements will be granted an opportunity to present them during the course of the hearing, the commission reserves the right, to itself or its designee conducting the hearing, to restrict statements in terms of time or repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views or similar comments through a representative member where possible. Persons with disabilities who have special needs and who plan to attend the hearing should contact Grace Bartsch of the Texas Department of Banking at (512) 475-1301.

This hearing may be a continuation of, or a substitute for, the hearing on the same subject posted for Friday, December 14, 2001, at 10:30 a.m.

TRD-200107602
Everette D. Jobe
Certifying Official
Finance Commission of Texas
Filed: December 6, 2001

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Notice of Public Hearing

Finance Commission of Texas

Friday, December 14, 2001, at 10:30 a.m.

William F. Aldridge Hearing Room

Finance Commission Building, 2601 North Lamar Boulevard

Austin, Texas 78705

A public hearing will be held on Friday, December 14, 2001, at 10:30 a.m., before the Finance Commission of Texas (commission) or its designee, to receive comments from interested persons concerning proposed 7 TAC §§25.1-25.6, published in the November 2, 2001, issue of the *Texas Register* (26 TexReg 8631), as corrected in the November 23, 2001, issue (26 TexReg 9642). Any interested person may appear and offer comments or statements, either orally or in writing; however, questioning of commenters will be reserved exclusively to members of the commission, the person conducting the hearing on behalf of the commission, and staff from the Texas Department of Banking, as may be necessary to ensure a complete record.

While any person with pertinent comments or statements will be granted an opportunity to present them during the course of the hearing, the commission reserves the right, to itself or its designee conducting the hearing, to restrict statements in terms of time or repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views or similar comments through a representative member where possible. Persons with disabilities who have special needs and who plan to attend the hearing should contact Grace Bartsch of the Texas Department of Banking at (512) 475-1301.

TRD-200107603
Everette D. Jobe
Certifying Official
Finance Commission of Texas
Filed: December 6, 2001

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Texas Health and Human Services Commission

Request for Information

The Health and Human Services Commission (HHSC) requests information from interested parties concerning the implementation of an informal dispute resolution (IDR) procedure for certain long-term care providers under the provisions of §531.058, Government Code, and §247.051, Health and Safety Code. HHSC also seeks input from organizations that are interested in conducting IDRs for HHSC on a contracted basis.

In particular, HHSC requests recommendations concerning several issues surrounding the implementation of Senate Bill 1839, 77th Legislature, which assigned responsibility for the conduct of IDRs for certain long-term care facilities to HHSC, and Senate Bill 527, 77th Legislature, which established similar procedures for assisted living facilities.

These issues include the structure of IDR, qualifications of an independent review organization, coordination of IDR activities between HHSC and the external contracted organization, and other issues relating to a contracted model of IDR.

Interested parties may download a copy of the specific details of the Request for Information (RFI) from the following web site: www.hhsc.state.tx.us. Interested parties must submit their written responses to the RFI to Cindy Bourland, HHSC, 4900 North Lamar, Blvd., 4th Floor, Austin, Texas 78751, 512-424-6507, or facsimile to (512) 424-6590. by 4:00 p.m., Central Time on January 11, 2002.

This RFI does not constitute a solicitation of bids, proposals, or offers. HHSC reserves the right to procure services or not to procure services on the basis of information submitted in response to this RFI. All responses to the RFI are potentially subject to public disclosure and become the property of HHSC.

TRD-200107806
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: December 12, 2001

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Texas Department of Housing and Community Affairs

Notice of Public Hearing

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS TAXABLE JUNIOR LIEN SINGLE FAMILY MORTGAGE REVENUE BONDS

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Department") at 507 Sabine Street, Room 437, Austin, Texas, at 12:00 noon on January 14, 2002, with respect to an issue of taxable junior lien single family mortgage revenue bonds (the "Bonds") to be issued in an aggregate face amount of not more than $10,000,000.

The proceeds of the Bonds will be used to finance an estimated $8,600,000 of single family residential mortgage loans and/or downpayment assistance made to eligible very low income first-time home buyers for the purchase of homes located in rural and/or border regions of the State of Texas and to fund reserves and to pay costs of issuance of the Bonds.

For purposes of the Department's mortgage loan finance program to be implemented with the proceeds of the Bonds, eligible borrowers generally will include individuals and families whose family income does not exceed 60% of the area median gross income for the area in which the residence to be financed is located. Eligible borrowers may not have liquid assets in excess of $10,000. In addition, all of the borrowers under the program will be required to be persons who have not owned a principal residence during the preceding three years. Further, residences financed with loans under the program will be subject to certain other limitations, including a limit of $115,765 on the purchase prices of the residence being acquired. The income, purchase price and other limitations described in this paragraph are subject to revision and adjustment from time to time by the Department pursuant to Department policy.

All interested parties are invited to attend such public hearing to express their views with respect to the Department's mortgage loan finance program and the issuance of the Bonds. Questions or requests for additional information may be directed to Byron V. Johnson at the Texas Department of Housing and Community Affairs, 507 Sabine Street, 8th Floor, Austin, Texas 78701; (512) 475-3800.

Persons who intend to appear at the hearing and express their views are invited to contact Byron V. Johnson in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Byron V. Johnson prior to the date scheduled for the hearing. TDHCA WEBSITE: www.tdhca.state.tx.us/hf.htm

Individuals who require auxiliary aids for the hearing should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943, or Relay Texas at 1-800-735-2989 at least two days before the hearing so that appropriate arrangements can be made.

This notice is published and the above-described hearing is to be held in satisfaction of the requirements of State law.

TRD-200107801
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: December 12, 2001

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Texas Department of Human Services

Correction of Error

The Texas Department of Human Services (DHS) adopted repeals, amendments, and new sections under 40 TAC Chapter 97, concerning Licensing Standards for Home and Community Support Services Agencies. The rules appeared in the November 9, 2001, issue of the *Texas Register* (26 TexReg 9159). Because of the number of new requirements with which home and community support services agencies must comply, DHS corrects the effective date of the sections to February 1, 2002. As published, the effective date was January 1, 2002. This correction allows more time for DHS surveyor training.

On page 9166, second column, second response, fifth sentence, "January 1, 2002" should be "February 1, 2002."

On page 9170, second column, first complete response beginning with, "This rule requires an agency to adopt ..." contains a misspelled word in the second sentence. The word "rating" should be "relating," and should read as follows.

"Response: This rule requires an agency to adopt a policy governing its expectation for client conduct and responsibility and client rights. Along with each right the client has, the client must observe certain responsibilities, such as furnishing accurate and true statements relating the health problems, treating all staff with respect, and participating in the planning of their care. The policy should cover procedures that caregivers should follow when clients fail to comply with the client conduct policy."

On page 9180, first column, third response, fourth sentence, "January 1, 2002" should be "February 1, 2002."

On page 9180, second column, first response, "January 1, 2002" should be "February 1, 2002."

On page 9187, in §97.11(k)(1), the "Health Care Finance Administration (HCFA)" should be the "Centers for Medicare & Medicaid Services (CMS)." The paragraph should read as follows.

"(1) Pending approval by the USDHHS Centers for Medicare & Medicaid Services (CMS), the person:"

On page 9187, in §97.11(k)(2), "HCFA" should be "CMS." The paragraph should read as follows.

"(2) Upon becoming certified by CMS to participate in the Medicare program during the initial licensing period, DHS will send notice to the agency that the category of licensed and certified home health services has been added to the license. The agency must submit a written request for deletion or retention of the licensed home health services category."

On page 9202, in §97.401(c)(6), a reference to §97.405(q) is incorrect. The paragraph should read as follows.

"(6) If medical social service is provided, a social worker with a bachelor's degree in social work from an accredited college or university must be employed by or be under contract with the agency to provide services or supervision. When medical social service is provided in an agency with a home dialysis designation, the social worker must meet the qualifications in §97.405(e)(3) of this title (relating to Standards Specific to Agencies Licensed to Provide Home Dialysis Services)."

On page 9213, in §97.405(w)(1), the word "facility" in the second sentence should be "agency." The paragraph should read as follows.

"(1) An agency's reuse practice must comply with the American National Standard, Reuse of Hemodialyzers, 1993 Edition, published by the AAMI. An agency must adopt and enforce a policy for dialyzer reuse criteria (including any agency-set number of reuses allowed) which is included in client education materials."

On page 9215, in §97.501(c), the word "or" should be added to the first sentence between the Joint Commission on Accreditation of Healthcare Organizations and the Community Health Accreditation Program The subsection should read as follows.

"(c) Except for the investigation of complaints, an agency licensed by DHS is not subject to additional surveys relating to home health, hospice, or personal assistance services while the agency maintains deemed accreditation status for the applicable services from the Joint Commission on Accreditation of Healthcare Organizations or the Community Health Accreditation Program. An initial survey after issuance of an initial license will be done by DHS:"

On page 9215, in §97.501(d), the word "exit" in the first sentence should be deleted to be consistent with statutory language. The subsection should read as follows.

"(d) A DHS representative will hold a conference with the person in charge of the agency before beginning the on-site survey to explain the nature and scope of the survey. When the survey is completed, the DHS representative will hold an exit conference with the person in charge of the agency and will identify any records that were duplicated. Any records that are removed from an agency will be removed only with the consent of the agency."

On page 9215, in §97.501(f)(1)(C), the word "the" has been added to the beginning of the language. The subparagraph should read as follows.

"(C) the specific nature of any finding regarding an alleged violation or deficiency;"

On page 9218, in §97.602(a), the word "of" should be "or." The subsection should read as follows.

"(a) General. The Texas Department of Human Services (DHS) may assess an administrative penalty against a person who violates the statute or this chapter. A person under this section includes a licensed agency."

TRD-200107915

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Notice of Contract Award

The Texas Department of Human Services (DHS) announces this notice of contract award. The invitation for request for proposal was published in the June 15, 2001, issue of the *Texas Register*, 26 TexReg 4555.

Description of Services: Applicant organizations are needed to develop and operate a nutrition education program for food stamp recipients that follows the United States Department of Agriculture, Food and Nutrition Service (USDA/FNS) guidelines. The goal is to provide educational programs that increase, within a limited budget, the likelihood of all food stamp recipients making healthy food choices consistent with the most recent dietary advice as reflected in the Dietary Guidelines for Americans and the Food Guide Pyramid. Application organizations will be developing proposals for delivery on a county by county basis including appropriate administrative costs.

Name of Contractor: Texas Cooperative Extension, The Texas A&M University System, P.O. Box 2150, Bryan, Texas 77806-2150.

Terms and/or Amount: Term is from October 1, 2001, until September 30, 2002, and the total amount of the contract shall not exceed $8,068,056.00.

Report Due Date: The final semi-annual report will be due on November 1, 2002.

TRD-200107789
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Filed: December 12, 2001

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Texas Department of Insurance

Company Licensing

Application to change the name of MOUNTAIN STATES INSURANCE COMPANY to PRODUCERS AGRICULTURE INSURANCE COMPANY, a domestic fire and casualty company. The home office is in Amarillo, Texas.

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-200107805
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 12, 2001

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Great Northern Insurance Company proposing to use rates for homeowners insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting the following flex percent of -70% for all homeowners policy forms, territories and classifications. This overall rate change is 0.0%.

Copies of the filing may be obtained by contacting George Russell, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 305-7468.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by December 31, 2001.

TRD-200107608
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 7, 2001

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Athena Assurance Company proposing to use rates for commercial automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting the following flex percent of +10% for Physical Damage and +52.5% for Liability, including Private Passenger Types Liability, under all territories. This overall rate change is +20.9%.

Copies of the filing may be obtained by contacting Judy Deaver, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 322-3478.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by January 9, 2002.

TRD-200107797
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 12, 2001

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by St. Paul Fire and Marine Insurance Company proposing to use rates for commercial automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting the following flex percent of +10% for Physical Damage and +52.5% for Liability, including Private Passenger Types Liability, under all territories. This overall rate change is +18.8%.

Copies of the filing may be obtained by contacting Judy Deaver, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 322-3478.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by January 9, 2002.

TRD-200107796
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 12, 2001

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by St. Paul Insurance Company proposing to use rates for commercial automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting the following flex percent of +10% for Physical Damage and +52.5% for Liability, including Private Passenger Types Liability, under all territories. This overall rate change is +20.4%.

Copies of the filing may be obtained by contacting Judy Deaver, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 322-3478.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by January 9, 2002.

TRD-200107795
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 12, 2001

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by United States Fidelity and Guaranty Company proposing to use rates for commercial automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting the following flex percent of +10% for Physical Damage and +52.5% for Liability, including Private Passenger Types Liability, under all territories. This overall rate change is +19.1%.

Copies of the filing may be obtained by contacting Judy Deaver, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 322-3478.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by January 9, 2002.

TRD-200107794
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 12, 2001

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Notice of Public Hearing

The Commissioner of Insurance, at a public hearing under Docket No. 2509 scheduled for January 22, 2002 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), by adding Rule 82 and new Endorsement 505 in order to establish a rule that provides for an optional mile-based rating plan that insurers may use with the Texas Personal Auto Policy. The purpose of this amendment is to adopt rules that are necessary to govern mile-based rating plans filed by insurers in conjunction with amendments to the Personal Auto Policy as required under new Insurance Code Article 5.01-4, adopted by the 77th Legislature in HB 45. Staff's petition (Ref. No. A-1201-21-I), was filed on December 11, 2001.

Staff proposes a new Manual Rule 82 that will allow an insurer the option to use a mile-based rating plan for the Texas Personal Auto Policy. The policy form used under the mile-based rating plan will be the same as the form used for other policies, except it will be amended by the Mile-Based Rating Plan Endorsement (Endorsement 505), which Staff also proposes. Proposed Rule 82, as provided in Insurance Code Article 5.01-4, specifies that each insurer that offers the mile-based rating plan shall annually file with the Department for approval a schedule of the rates to be used for that plan.

As specified in Insurance Code Article 5.01-4, Section 5(b)(3), the proposed rule and the proposed endorsement provide for the insurer to audit the mileage of a covered auto at any time by checking the odometer or using some other method to determine whether coverage is in effect. A policy issued through the mile-based rating plan must comply with Manual Rule 6, except coverage will terminate on the expiration date shown in the Declarations or upon a "covered auto" or autos exceeding specified mileage, whichever comes first. If the specified mileage is exceeded prior to the policy's specified termination date, coverage for that auto terminates, but the policy will remain in effect until the specified termination date. Coverage will continue until the specified termination date in the Declarations for covered autos that have not exceeded their allotted mileage. The insured may purchase additional mileage, during the current policy period, for an auto in exchange for additional premium. For any unused mileage that may exist on the termination date of the policy, the insurer, according to its rating plan, may give the insured a refund of unearned premium or a credit to be applied to the renewal policy.

Proposed Rule 82 provides that no other rating rule in the Manual shall apply to a mile-based rating plan. The following Manual rules are applicable to a mile-based rating plan: Rule 6 (Policy Term and Renewal Certificate), Rule 12 (Continuation of Coverage - Cancelled or Terminated Policy), Rule 13 (Cancellations), Rule 14 (Installments for Premium Payments), Rule 15 (Automobile Theft Prevention Authority Pass-Through Fee), Rule 71 (Definitions), Rule 72 (Personal Auto Policy and Coverage - Eligibility).

The 77th Texas Legislature, through House Bill 45, enacted new Insurance Code Article 5.01-4. This statute, effective September 1, 2001 requires the Commissioner to "adopt rules as necessary or appropriate to govern the use of a mile-based rating plan...." Article 5.01-4, which expires September 1, 2005, applies only to a policy that becomes effective on or after January 1, 2002.

Although an insurer's rates under the mile-based rating plan are exempt from Insurance Code Article 5.101, the Commissioner will have the authority to approve such rates under Article 5.01-4, or to reject them if the filed rates are found to be excessive in comparison to rates charged for similar coverage under the current regulatory system. Such rejection cannot be later than the 60th day after the rates are filed. Prior to any rejection, the insurer will have to be given notice and the opportunity for a hearing.

Although the provisions of Insurance Code Article 5.01-4 appear to require that a mile-based rating plan policy be written for a term that expires when the covered auto has been driven a specified number of miles, Staff believes this would conflict with Insurance Code Article 21.49-2B, concerning cancellation and nonrenewal. For example, if coverage under a mile-based rating plan policy were to expire after a specified number of miles driven, an insurer would not have knowledge of the number of miles driven in order to provide the required 30 days notice of nonrenewal set forth in Article 21.49-2B, Section 5. Staff's position is that Article 21.49-2B will apply to a policy issued through the mile-based rating plan, as the legislature did not choose to amend the existing statute with regard to policies written on a mile-based rating plan. Conversely, if a policy's term were to be determined by the number of miles driven, the policy would never expire if the specified

number of miles were never driven. It would be impossible to determine a fair rate for a policy that may never expire and an insurer may not terminate, even for a driver with multiple at-fault accidents.

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 Sylvia Gutierrez at (512)463-6327; refer to (Ref. No. A-1201-21-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, MC104-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).

TRD-200107790
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 12, 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 admission to Texas of GLI Corporate Risk Solutions, Inc., a foreign third party administrator. The home office is Wilmington, Delaware.

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-200107731
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 11, 2001

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Texas Lottery Commission

Public Hearing

A public hearing to receive public comments regarding proposed amendments to 16 TAC §§401.305 and 401.312, concerning "Lotto Texas" on-line game rule and "Texas Two Step" on-line game rule, respectively will be held at 9:00 a.m. on Wednesday, January 9, 2002 at the Texas Lottery Commission headquarters building, first floor auditorium, 611 E. 6th Street, Austin, Texas 78701. Persons requiring any accommodation for a disability should notify Michelle Guerrero, Executive Assistant to the General Counsel, Texas Lottery Commission at (512) 344-5113 at least 72 hours prior to the public hearing.

TRD-200107668
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: December 10, 2001

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Texas Natural Resource Conservation Commission

Enforcement Orders

An agreed order was entered regarding APOLLO TECHNOLOGY CORPORATION, Docket No. 2000-1021-IHW-E on November 29, 2001 assessing $28,500 in administrative penalties with $27,900 deferred.

Information concerning any aspect of this order may be obtained by contacting JAMES BIGGINS, Staff Attorney at (210)403-4017, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MARKLINE PROPERTIES, INC., Docket No. 2000- 0252-MLM-E on November 29, 2001 assessing $1000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting DAVID SPEAKER, Staff Attorney at (512)239-2548, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TEEN CHALLENGE OF SOUTH TEXAS, INC., Docket No. 1998-0865-PWS-E on November 29, 2001 assessing $2,313 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting DARREN REAM, Staff Attorney at (817)588-5878, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BRANDENBURG PRODUCTS, INC. DBA GARAGE RADILLO, Docket No. 2001-0531-PST-E on November 29, 2001 assessing $6,300 in administrative penalties with $1,260 deferred.

Information concerning any aspect of this order may be obtained by contacting GLORIA STANFORD, Enforcement Coordinator at (512)239-1871, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding D & K DEVELOPMENT CORPORATION, Docket No. 2001-0029-MWD-E on November 29, 2001 assessing $6,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting JORGE IBARRA, Enforcement Coordinator at (817)588-5890, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF AZLE, Docket No. 2001-0186-PWS-E on November 29, 2001 assessing $1,110 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 WAELDER, Docket No. 2001-0129-MWD-E on November 29, 2001 assessing $7,000 in administrative penalties with $1,400 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 TOWN OF PONDER, Docket No. 2001-0128-MWD-E on November 29, 2001 assessing $7,500 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 ROBERT STATON DBA ALLIED RECYCLING SERVICES, Docket No. 2001-0620-MSW-E on November 29, 2001 assessing $250 in administrative penalties with $50 deferred.

Information concerning any aspect of this order may be obtained by contacting TEL CROSTON, Enforcement Coordinator at (512)239-5717, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ALAPSARA INC. DBA ALMEDA FOOD MART, Docket No. 2001-0398-PST-E on November 29, 2001 assessing $6,300 in administrative penalties with $1,260 deferred.

Information concerning any aspect of this order may be obtained by contacting REBECCA JOHNSON, Enforcement Coordinator at (713)422-8931, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding IESI TX LANDFILL LP, Docket No. 2000-0724-MSW-E on November 29, 2001 assessing $30,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting GEORGE ORTIZ, 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 SAN ANTONIO WATER SYSTEM, Docket No. 2001- 0273-MWD-E on November 29, 2001 assessing $10,000 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 ROBERT A. HOBBS, JR. DBA TWIN POINTS RESORT, Docket No. 2001-0449-PWS-E on November 29, 2001 assessing $1,938 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting JUDY FOX, Enforcement Coordinator at (817)588-5825, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF TAYLOR, Docket No. 2001-0216-PWS-E on November 29, 2001 assessing $6,469 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 TOM'S FOOD, INC., Docket No. 2001-0579-IHW-E on November 29, 2001 assessing $4,050 in administrative penalties with $810 deferred.

Information concerning any aspect of this order may be obtained by contacting CARL SCHNITZ, Enforcement Coordinator at (512)239-1892, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RAINBOW OILS OF SAN ANGELO, INC., Docket No. 2001-0394-PST-E on November 29, 2001 assessing $3,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting MARK NEWMAN, Enforcement Coordinator at (915)655-9479, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PNI DISTRIBUTION, INC., Docket No. 2001-0765- PST-E on November 29, 2001 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting A. SUNDAY UDOETOK, Enforcement Coordinator at (512)239-0739, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding EVANS SYSTEMS, INC., Docket No. 2001-0641-PST- E on November 29, 2001 assessing $2,500 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 CITY OF SNYDER, Docket No. 2001-0712-PST-E on November 29, 2001 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting CAROLYN EASLEY, 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 ANDREW M. GARNER DBA TECH MASTER, Docket No. 2001-0260-IRR-E on November 29, 2001 assessing $625 in administrative penalties with $125 deferred.

Information concerning any aspect of this order may be obtained by contacting LAURIE EAVES, Enforcement Coordinator at (512)239-4495, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ABILENE ROADWAY CONSTRUCTION COMPANY, INC., Docket No. 2001-0640-MSW-E on November 29, 2001 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting CAROLYN EASLEY, 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 HUMPHREY COMPANY, LTD., Docket No. 2001- 0402-PST-E on November 29, 2001 assessing $1,800 in administrative penalties with $360 deferred.

Information concerning any aspect of this order may be obtained by contacting REBECCA JOHNSON, Enforcement Coordinator at (713)422-8931, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WIEDENFELD WATER WORKS, INCORPORATED, Docket No. 2001-0258-PWS-E on November 29, 2001 assessing $1,438 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 HONEY GROVE, Docket No. 2001-0043- MWD-E on November 29, 2001 assessing $11,500 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 UVALDE HOUSING DEVELOPMENT CORPORATION DBA GRANADA APARTMENTS, LTD., Docket No. 2001-0372-MWD-E on November 29, 2001 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting MALCOLM FERRIS, Enforcement Coordinator at (210)403-4061, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding R. R. RAMSOWER, INC., Docket No. 2001-0321-IHW- E on November 29, 2001 assessing $7,000 in administrative penalties with $1,400 deferred.

Information concerning any aspect of this order may be obtained by contacting KEVIN KEYSER, Enforcement Coordinator at (713)422-8938, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding THOMPSON HEIGHTS DEVELOPMENT CO., Docket No. 2001-0643-PWS-E on November 29, 2001 assessing $125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting STEVEN LOPEZ, Enforcement Coordinator at (512)239-1896, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MR. WILLIE NELSON DBA PEDERNALES COUNTRY CLUB, Docket No. 2001-0250-MWD-E on November 29, 2001 assessing $4,000 in administrative penalties with $800 deferred.

Information concerning any aspect of this order may be obtained by contacting MARK NEWMAN, Enforcement Coordinator at (915)655-9479, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding AMERI-FORGE CORPORATION, Docket No. 2000- 1076-IWD-E on November 29, 2001 assessing $22,500 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. Texas Natural Resource Conservation Commission

Enforcement Orders

An order was entered regarding CYPRESS CREEK WATER SUPPLY CORPORATION, Docket No. 1999-0034-PWS-E on November 29, 2001 assessing $3,863 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kelly Mego, Staff Attorney at (713)422-8916, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200107777
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: December 11, 2001

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Notice of Availability and Request for Comments on a Draft Restoration Plan for Certain Aquatic Habitats at a Portion of the Motco Superfund Site, Lamarque, Texas

AGENCIES: Texas Natural Resource Conservation Commission (TNRCC), Texas Parks and Wildlife Department (TPWD), and Texas General Land Office (GLO), (collectively, the Trustees).

TPWD, GLO, and TNRCC are designated natural resource trustees under §107(f) of Comprehensive Environmental Responsibility, Compensation and Liability Act (CERCLA), 42 United States Code (U.S.C.) §9607(f); Federal Water Pollution and Control Act (FWPCA), 33 U.S.C. §1321; and other applicable federal or state laws, including Subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 Code of Federal Regulations §§300.600 - 300.615. The Trustees are authorized to act on behalf of the public under these authorities to assess and restore natural resources injured or lost as a result of discharges or releases of hazardous substances.

ACTION: Notice of availability of a Draft Restoration Plan (DRP) for the Motco National Priority List (NPL or Superfund) Site (site) for ecological injuries and service losses associated with certain aquatic habitats that were destroyed as a result of the remediation of the site and of a 30-day period for public comment on the draft plan beginning December 21, 2001.

SUMMARY: Notice is hereby given that a document entitled, "Draft Restoration Plan for Certain Aquatic Habitats at a Portion of the Motco Superfund Site, La Marque, Texas" is available for public review and comment. This document has been prepared by the Trustees to address natural resource injuries and ecological service losses attributable to the remediation associated with releases of hazardous substances from the Motco Superfund Site. As a result of the remedial activities, two borrow pits, located southwest of the Motco site, were backfilled with clay to serve as basins for storm surges. The filling of the two pits resulted in a loss of natural resources and their services through the elimination of the aquatic habitat, feeding and nursery services provided by the borrow pits. This DRP presents the Trustees' assessment of the natural resource injuries and service losses attributable to this portion of the site, and their proposed plan to compensate for those losses by restoring ecological resources and services. In summary, the proposed compensation consists of planting mulberry trees and other native plants beneficial to birds and installing birdhouses in Highland Bayou Park, a designated bird sanctuary in Galveston County.

DEADLINE: Comments may be submitted to Paula McCormick, Remediation Division, MC-142, P.O. Box 13087, Austin, Texas 78711-3087. All comments must be received by January 22, 2002. The Trustees will consider all written comments received during the comment period prior to finalizing the proposed Draft Restoration Plan. To receive a copy of the DRP or for further information, please contact Paula McCormick of the Texas Natural Resource Conservation Commission, (512) 239-2363 or by email; pmccormi@tnrcc.state.tx.us.

SUPPLEMENTARY INFORMATION: The Motco NPL site is located in La Marque, Galveston County, Texas, in the Gulf Coastal Plain, two miles south of Texas City, near the junction of Interstate Highway 45 and Texas Highway 3. The site is 11.3 acres in size, and was operated as a waste disposal and recycling facility beginning in about 1958. Unlined pits were used to contain water, organic liquids and various sludges, tars and other solids. In 1961, flood tides from Hurricane Carla destroyed the recycling operations. From then until 1964 the area was apparently used as an uncontrolled waste dumping ground by numerous waste haulers for a variety of industrial wastes.

In 1964, the Texas Water Pollution Control Board issued a permit to the operator authorizing the operation of a series of salvage ponds. Unauthorized discharges occurred frequently at the site between 1964 and 1968. The La Marque city council declared the area a health hazard and prohibited open pit disposal sites within the city limits.

From 1970 through 1977 the property changed ownership several times. In that interim, operations on the property included a copper, mercury and lead recovery operation utilizing styrene tars to fuel a rotary kiln and two styrene tar recycling ventures. Operations at the site were abandoned in about 1977. The United States Environmental Protection Agency (EPA) and the U.S. Coast Guard carried out response activities between 1980 and 1987, and in 1989 the Record of Decision was finalized. The EPA issued a Unilateral Administrative Order (UAO) for Remedial Design in 1992 and a Consent Decree in 1993.

In 1987, the Motco Trust Group (MTG) was formed, comprised of signatories of the 1987 consent decree that spelled out the remedial activity that was to take place and a settlement of the natural resource damages specific to the jurisdiction of the U.S. Department of Interior. This settlement resulted in the creation of the 230-acre Highland Bayou Park and its designation as a bird sanctuary. However, as a result of remedial activities at the site, two abandoned borrow pits, which had naturally evolved into a freshwater wetlands, were cleared and backfilled with clay to serve as basins for storm surges. The filling of the two pits resulted in an additional loss of natural resources and their services through the removal of the aquatic habitat, which had provided feeding and nursery services to the surrounding ecological community.

The DRP released today identifies the restoration actions which are preferred for use to restore, replace or acquire resources or services equivalent to those lost as a result of the filling of the freshwater wetlands.

TRD-200107798
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: December 12, 2001

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Notice of Industrial Hazardous Waste Permit

For the Period of November 13, 2001.

APPLICATION Lyondell Chemical Company, 10801 Choate Road, Pasadena, Texas 77507, a chemical manufacturing facility has applied to the Texas Natural Resource Conservation Commission (TNRCC) for renewal/major amendment to authorize the continued operation of two existing tanks and one existing container storage area, for the storage of hazardous waste, Class 1 and Class 2 industrial solid waste. The facility is located at the above address in Harris County, Texas. This application was submitted to the TNRCC on June 14, 2000.

The TNRCC executive director has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) in accordance with the regulations of the Coastal Coordination Council and has determined that the action is consistent with the applicable CMP goals and policies.

The TNRCC executive director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The executive director has made a preliminary decision that this permit, if issued, meet all statutory and regulatory requirements. The permit application, executive director's preliminary decision, and draft permit are available for viewing and copying at the LaPorte Public Library, 526 San Jacinto, LaPorte, Texas.

PUBLIC COMMENT / PUBLIC MEETING. You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. Generally, the TNRCC will hold a public meeting if the executive director determines that there is a significant degree of public interest in the application if requested in writing by an affected person, or if requested by a local legislator. A public meeting is not a contested case hearing.

Written public comments and requests for a public meeting must be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087 within 45 days from the date of newspaper publication of this notice.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for public comments, the executive director will consider the comments and prepare a response to all relevant and material or significant public comments. The response to comments, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments or is on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting a contested case hearing or reconsideration of the executive director's decision. A contested case hearing is a legal proceeding similar to a civil trial in a state district court.

A contested case hearing will only be granted based on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised during the public comment period and not withdrawn. Issues that are not raised in public comment may not be considered during a hearing.

EXECUTIVE DIRECTOR ACTION. The executive director may issue final approval of the application unless a timely contested case hearing request or request for reconsideration is filed. If a timely hearing request or request for reconsideration is filed, the executive director will not issue final approval of the [permit/compliance plan] and will forward the application and requests to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

MAILING LIST. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: (1) the mailing list for this specific application; (2) the permanent mailing list for a specific applicant name and permit number; and/or (3) the permanent mailing list for a specific county. Clearly specify which mailing list(s) to which you wish to be added and send your request to the TNRCC Office of the Chief Clerk at the address below. Unless you otherwise specify, you will be included only on the mailing list for this specific application.

INFORMATION. If you need more information about this permit application or the permitting process, please call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

Further information may also be obtained from Lyondell Chemical Company at the address stated above or by calling Mr. John R. Heil at 281- 474-4191.

TRD-200107775
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: December 11, 2001

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Notice of Industrial Hazardous Waste Permit

For The Period of December 07, 2001

APPLICATION U.S. Army Air Defense Artillery Center and Fort Bliss, Building 624, El Paso, Texas 79916-0058, a U.S. military installation, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a hazardous waste permit renewal to authorize the continued operation of eight container storage areas (at Biggs Field) for the storage of hazardous waste. The application also includes an Executive Director initiated minor amendment to update the application for rule changes that have occurred since the permit was last modified. The facility is located in El Paso, El Paso County, Texas. This application was submitted to the TNRCC on July 25, 2000.

The TNRCC executive director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The executive director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements. The permit application, executive director's preliminary decision, and draft permit are available for viewing and copying the El Paso Main Library, 501 N. Oregon, El Paso, Texas.

PUBLIC COMMENT / PUBLIC MEETING. You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. Generally, the TNRCC will hold a public meeting if the executive director determines that there is a significant degree of public interest in the application if requested by a local legislator. A public meeting is not a contested case hearing.

Written public comments and requests for a public meeting must be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087 within 45 days from the date of newspaper publication of this notice.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for public comments, the executive director will consider the comments and prepare a response to all relevant and material or significant public comments. The response to comments, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments or is on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting a contested case hearing or reconsideration of the executive director's decision. A contested case hearing is a legal proceeding similar to a civil trial in a state district court.

A contested case hearing will only be granted based on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised during the public comment period and not withdrawn. Issues that are not raised in public comment may not be considered during a hearing. The TNRCC may act on this application without providing an opportunity for a contested case hearing if certain criteria are met.

EXECUTIVE DIRECTOR ACTION. The executive director may issue final approval of the application unless a timely contested case hearing request or request for reconsideration is filed. If a timely hearing request or request for reconsideration is filed, the executive director will not issue final approval of the permit and will forward the application and requests to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

MAILING LIST. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: (1) the mailing list for this specific application; (2) the permanent mailing list for a specific applicant name and permit number; and/or (3) the permanent mailing list for a specific county. Clearly specify which mailing list(s) to which you wish to be added and send your request to the TNRCC Office of the Chief Clerk at the address below. Unless you otherwise specify, you will be included only on the mailing list for this specific application.

INFORMATION. If you need more information about this permit application or the permitting process, please call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

Further information may also be obtained from U.S. Army Air Defense Artillery Center and Fort Bliss at the address stated above or by calling Mr. Keith Landreth at (915) 568-1385.

TRD-200107776
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: December 11, 2001

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The TNRCC staff proposes a DO when the staff has sent an Executive Director's Preliminary Report and Petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance, and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the TNRCC pursuant to Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 21, 2002**. The TNRCC will consider any written comments received and the TNRCC may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that a proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's jurisdiction, or the TNRCC's orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each of the proposed DOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Comments about the DO should be sent to the attorney designated for the DO at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas

78711-3087 and must be **received by 5:00 p.m. on January 21, 2002**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, comments on the DOs should be submitted to the TNRCC in **writing**.

(1) COMPANY: Mariamma Oommen dba Super Stop Mart; DOCKET NUMBER: 2000-1196- PST-E; TNRCC ID NUMBER: 0058112; LOCATION: 2404 South Main Street, Pearland, Brazoria County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.246(7)(A), §115.246(3) - (6), and THSC, §382.085(b), by failing to maintain Stage II records onsite and available for review; specifically, including maintenance log, training certification for station representative and documentation of training for each employee, test results, and a daily inspection log; 30 TAC §334.105(a) and (b), by failing to maintain evidence of all financial mechanisms used to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily harm and property damage caused by accidental releases from the underground storage tank system (UST); 30 TAC §334.49(a), and TWC, §26.3475(d), by failing to protect the UST system from corrosion; 30 TAC §334.50(b)(1)(A) and §334.50(b)(2), and TWC, §26.3475(a) and (c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month; failing to monitor pressurized piping in a UST system in a manner designed to detect releases from any portion of the piping system; and by failing to test a line leak detector at least once per year for performance and operational reliability; 30 TAC §334.48(c), by failing to conduct inventory control for a retail facility; 30 TAC §334.22(a), by failing to pay outstanding UST fees; PENALTY: $21,250; STAFF ATTORNEY: Troy Nelson, Litigation Division, MC R-5, (903) 535-5100; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Ave., Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Restructure Petroleum Marketing Services, Inc. dba Sea Isle Supermarket; DOCKET NUMBER: 2001-0287-PST-E; TNRCC ID NUMBER: 0046589; LOCATION: 22220 Termini Road, Galveston, Galveston County, Texas; TYPE OF FACILITY: convenience store with retail gas sales; RULES VIOLATED: 30 TAC §115.245(3), and THSC, §382.085(b), by failing to successfully verify the proper operation of Stage II Vapor Recovery equipment; 30 TAC §115.246(5), and THSC, §382.085(b), by failing to maintain at the station the results of Stage II equipment testing conducted at the station; 30 TAC §334.21, by failing to pay UST fees; PENALTY: $3,750; STAFF ATTORNEY: Troy Nelson, Litigation Division, MC R-5, (903) 535- 5100; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Ave., Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Soheb Corporation dba Lasses Food Mart; DOCKET NUMBER: 2000-1241- PST-E; TNRCC ID NUMBERS: 39438 and 111109; LOCATION: 2703 Lasses Boulevard, San Antonio, Bexar County, Texas; TYPE OF FACILITY: underground storage tanks (USTs); RULES VIOLATED: 30 TAC §334.50, and TWC, §26.3475, by failing to maintain records of monitoring and testing results which would establish that a method, or combination of methods, of release detection has been provided for the UST systems which is capable of detecting a release from any portion of the UST systems that contain regulated substances; 30 TAC §334.49, and TWC, §26.3475, by failing to operate and maintain documentation of a corrosion protection system provided for the steel USTs; 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of a UST system; 30 TAC §334.7(d)(3), by failing to update registration information to reflect changes in the operational status of the UST system and changes in the operator information; PENALTY: $28,750; STAFF ATTORNEY: James Biggins, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Rd., San Antonio, Texas 78233-4480, (210) 490-3096.

(4) COMPANY: Thomas K. Lane dba Laboratory Testing Supply, Capcon Division; DOCKET NUMBER: 2000-0452-MSW-E; TNRCC ID NUMBER: FO293; LOCATION: south of County Road 4325, approximately one mile northwest of the intersection of Farm-to-Market Road 315, Poyner, Henderson County, Texas; TYPE OF FACILITY: manufacturing facility; RULES VIOLATED: 30 TAC §335.503(a)(2), and 40 Code of Federal Regulations, §262.11, by failing to make hazardous waste determinations; 30 TAC §335.6, by failing to comply with notification requirements; PENALTY: $6,250; STAFF ATTORNEY: Elisa Roberts, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

TRD-200107781
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: December 11, 2001

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (the Code), §7.075, which requires that the TNRCC may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 21, 2002**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable Regional Office listed as follows. Written comments about these AOs should be sent to the enforcement coordinator designated for each AO at the TNRCC's Central Office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 21, 2002**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The TNRCC enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing**.

(1) COMPANY: Baker Petrolite Corporation; DOCKET NUMBER: 2001-0195-AIR-E; IDENTIFIER: Air Account Number HG-0564-L; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: chemical preparations; RULE VIOLATED: 30 TAC §116.115(c), TNRCC Air Permit Number 3836, and THSC, §382.085(b), by failing to obtain authorization prior to use of new chemicals and keep records

of new chemicals, limit the number of product batches produced per day, sample scrubber Z-711 on a weekly basis, maintain records on scrubber Z-104 caustic concentration, obtain authorization prior to using in tanks, chemicals with a vapor pressure less than 0.5 pounds per square inch (psi) and a product of its volatile organic compound (VOC) vapor molecular weight times the VOC vapor pressure less than 60 psi, monitor the temperature on tank T- 259, and control approximately 250 pounds of ethylene oxide emissions; PENALTY: $51,875; ENFORCEMENT COORDINATOR: Kevin Keyser, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Bastrop County Water Control and Improvement District No. 3; DOCKET; NUMBER: 2001-0446-MWD-E; IDENTIFIER: Texas Pollutant Discharge Elimination System (TPDES) Permit Number 12963-001 and Water Quality Permit Number 12963-001; LOCATION:; Cedar Creek, Bastrop County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: Agreed Order Docket Number 1998-1454-MWD-E, by failing to comply with Ordering Provision Two; 30 TAC §305.125(1), Water Quality Permit Number 12963-001, TPDES Permit Number 12963-001, and the Code, §26.121, by failing to comply with permitted effluent limits and report effluent limits; PENALTY: $24,000; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(3) COMPANY: Bobby Clifton Barnard dba Cliff's Feedlot and the A.G. and Polly Cummings Trust; DOCKET NUMBER: 2001-0772-MWD-E; IDENTIFIER: Enforcement Identification Number 16388; LOCATION: Bee House, Coryell County, Texas; TYPE OF FACILITY: cattle feedlot; RULE VIOLATED: 30 TAC §321.31(a) and the Code, §26.121, by failing to prevent and/or contain the discharge of manure and/or wastewater; 30 TAC §321.33(e), by failing to properly locate, construct, and manage waste control facilities; 30 TAC §321.33(e) and §321.40(11), by failing to dispose of dead animals; and 30 TAC §321.33(e) and §321.39(f)(19)(J), by failing to develop and implement a pollution prevention plan; PENALTY: $6,500; ENFORCEMENT COORDINATOR: Michelle Harris, (512) 239-0492; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(4) COMPANY: The City of Eldorado; DOCKET NUMBER: 2001-0371-MWD-E; IDENTIFIER: TPDES Permit Number 10165-001; LOCATION: Eldorado, Schleicher County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 10165-001, and the Code, §26.121, by failing to comply with the five-day biochemical oxygen demand (BOD5) concentration limit, total suspended solids (TSS) daily average concentration limit, and the dissolved oxygen (DO) minimum concentration limit, submit notification of a noncompliance that deviates from the permitted effluent limitation by more than 40%; and 30 TAC §§305.125(1), 319.7(c), 319.11(b), and TPDES Permit Number 10165-00, by failing to record calibration information for pH and DO instrumentation; PENALTY: $15,000; ENFORCEMENT COORDINATOR: Mark Newman, (915) 655-9479; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(5) COMPANY: The City of El Paso; DOCKET NUMBER: 2001-0363-AIR-E; IDENTIFIER: Air Account Number EE-1118-M; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: fire station; RULE VIOLATED: 30 TAC §114.100(a) and THSC, §382.085(b), by allegedly having dispensed gasoline for use as a motor vehicle fuel which failed to meet the minimum oxygen content of 2.7% by weight; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(6) COMPANY: Rip Griffin Truck Service Center, Inc.; DOCKET NUMBER: 2001-0976-PST- E; IDENTIFIER: Enforcement Identification Number 16683; LOCATION: Lubbock, Lubbock County, Texas; TYPE OF FACILITY: trucking company; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator of the regulated underground storage tank (UST) systems had a valid, current delivery certificate; PENALTY: $2,800; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796-7092; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(7) COMPANY: U.S. Denro Steels, Inc. dba Jindal United Steel Corporation; DOCKET NUMBER: 2001-0210-IWD-E; IDENTIFIER: TPDES Permit Number 01332-000; LOCATION: Near Baytown, Chambers County, Texas; TYPE OF FACILITY: steel plate and pipe manufacturing; RULE VIOLATED: 30 TAC §305.125(1), (5), and (9), §319.7(d), TPDES Permit Number 01332- 000, and the Code, §26.121, by failing to submit discharge monitoring reports, operate and maintain the facility to comply with permitted effluent limits for fecal coliform, oil and grease, total chromium, TSS, and chemical oxygen demand, report verbally and in writing effluent violations, maintain the pumps at the pump station, and conduct proper housekeeping throughout the facility; 30 TAC §305.503, by failing to pay outstanding wastewater treatment inspection fees; 30 TAC §220.21 (formerly 30 TAC §320.21), by failing to pay outstanding water quality assessment fees; and 30 TAC §290.51(a)(3), by failing to pay outstanding public health system fees; PENALTY: $27,500; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: Jones Energy, Ltd.; DOCKET NUMBER: 2001-0509-AIR-E; IDENTIFIER: Air Account Number GH-0084-N; LOCATION: Pampa, Gray County, Texas; TYPE OF FACILITY: natural gas sweetening; RULE VIOLATED: 30 TAC §122.146(1) and THSC, §382.085(b), by failing to submit an annual compliance certification report; PENALTY: $1,800; ENFORCEMENT COORDINATOR: Ronnie Kramer, (806) 353-9251; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(9) COMPANY: Lakeview Water Co-Op; DOCKET NUMBER: 2001-0313-PWS-E; IDENTIFIER: Public Water Supply (PWS) Number 0610232; LOCATION: Denton, Denton County, Texas; TYPE OF FACILITY: public water system; RULE VIOLATED: 30 TAC §290.46(i), (j)(4), (m)(1)(A) and (B), (n)(2), and (r), and THSC, §341.0315(c), by failing to provide adequate plumbing regulations or a service agreement for each customer, provide documentation of customer service inspections, perform annual ground storage tank inspections, perform pressure tank inspections, provide an up-to-date distribution map, and provide a minimum working pressure of 35 psi in the distribution system; 30 TAC §290.42(i), by failing to provide American National Standards Institute/National Sanitation Foundation certification for hypochlorite solution; 30 TAC §290.41(c)(1)(F), by failing to provide a sanitary control easement; 30 TAC §288.20 and the Code, §13.132(a)(1), by failing to develop a drought contingency plan; 30 TAC §291.21(c)(7), §291.93(2)(A), and the Code, §13.136(a), by failing to ensure that the tariff included an approved drought contingency plan; 30 TAC §290.43(c), by failing to provide an American Water Works Association constructed ground storage tank; 30 TAC §290.44(d)(5), by failing to provide adequate flush valves; and 30 TAC §290.45(b)(1)(B)(i) and (iv), and THSC, §341.0315(c), by failing to

provide a well capacity of 0.6 gallons per minute (gpm) per connection and a pressure tank capacity of 20 gallons per connection; PENALTY: $2,350; ENFORCEMENT COORDINATOR: Wendy Cooper, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Lone Star Growers, L.P. dba Color Spot Nurseries, Inc.; DOCKET NUMBER: 2001-0731-IWD-E; IDENTIFIER: Water Quality Permit Number 02212-000; LOCATION: Huntsville, Walker County, Texas; TYPE OF FACILITY: nursery and greenhouse; RULE VIOLATED: 30 TAC §305.125(1) and Water Quality Permit Number 02212-000, by failing to comply with the permitted irrigation application rate of 3,500 gallons per day (gpd) and 5,000 gpd daily maximum, conduct soil monitoring and submit the annual soil monitoring report, monitor irrigation rates and maintain irrigation records, calculate the irrigation application rates and the nitrogen and organic loading rates, and submit the annual irrigation report; and 30 TAC §§220.21, 220.22, and 305.503, by failing to pay water usage fee and wastewater treatment inspections fees; PENALTY: $12,500; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: Orange County Water Control and Improvement District (WCID) Number 1; DOCKET NUMBER: 2000-0874-MWD-E; IDENTIFIER: Oak Lane Facility Water Quality Permit Number 10875-001 (National Pollutant Discharge Elimination System (NPDES) Permit Number TX0023795) and Oak Lane/Tiger Creek Facility TPDES Permit Number 10875-004; LOCATION: Vidor, Orange County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), (5), (11), and (19), Water Quality Permit Number 10875-004, NPDES Permit Number TX0023795, TPDES Permit Number 10875-004, and the Code, §26.121, by failing to properly operate and maintain the wastewater treatment systems, prevent an unauthorized discharge of wastewater from a leak in the Oak Lane/Tiger Creek facility clarifier wall, calibrate all automatic flow measuring devices, meet effluent limitations for chlorine residual at the Oak Lane facility, promptly correct errs in the March 2000 effluent report for the Oak Lane facility, meet effluent limitations at the Oak Lane facility; TPDES Permit Number 10875-004 and the Code, §26.121, by failing to meet effluent limitations at the Oak Lane/Tiger Creek facility; and NPDES Permit Number TX0023795, TPDES Permit Number10875-004, and the Code, §26.121, by failing to meet effluent limitations for solids and grease; PENALTY: $7,608; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(12) COMPANY: Nguyen-Pham Corporation and Najem Elahmad dba Pit Road Food Store; DOCKET NUMBER: 2001-0551-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 0061714; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: underground storage tank; RULE VIOLATED: 30 TAC §115.241 and THSC, §382.085(b), by failing to install a Stage II vapor recovery system; 30 TAC §334.51(b)(2)(B) and (C), and the Code, §26.3475(c)(2), by failing to install spill containment and overfill prevention equipment; 30 TAC §37.815 (formerly 30 TAC §334.93(a) and (b)), by failing to demonstrate financial assurance; 30 TAC §334.48(c), by failing to conduct inventory control for all USTs at a retail facility; 30 TAC §334.50(b)(1)(A) and (2)(A)(i), and the Code, §26.3475(a), by failing to monitor USTs for releases, monitor piping for releases monthly, and equip pressurized piping with automatic line leak detectors; 30 TAC §334.7(d)(3), by failing to amend, update, or change registration information; and 30 TAC §334.22(a), by failing to pay outstanding UST fees; PENALTY: $9,600; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: City of Point; DOCKET NUMBER: 2001-0499-PWS-E; IDENTIFIER: PWS Number 1900004; LOCATION: Point, Rains County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(2)(B), (C), (F), and (G), and THSC, §341.0315, by failing to meet the minimum water system capacity requirement for a treatment plant and transfer pump capacity of 0.6 gpm per connection, by failing to meet the minimum water system capacity requirement for service pump capacity by not providing each pump station or pressure plane with two or more pumps with a total capacity of two gpm, and meet the minimum water system requirement for pressure maintenance facilities; and 30 TAC §290.42(d)(11)(B)(iv) and THSC, §341.0315, by failing to meet the minimum water system capacity requirement for the design capacity of filtration facilities; PENALTY: $2,975; ENFORCEMENT COORDINATOR: Elnora Moses, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(14) COMPANY: Scott Egert dba Scott's Complete Car Care; DOCKET NUMBER: 2001-0894- PST-E; IDENTIFIER: PST Facility Identification Number 22070; LOCATION: Lubbock, Lubbock County, Texas; TYPE OF FACILITY: general automotive repair; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available a valid, current delivery certificate; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796- 7092; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(15) COMPANY: Sid Richardson Gasoline, Ltd.; DOCKET NUMBER: 2001-0033-AIR-E; IDENTIFIER: Air Account Numbers WC-0014-E, WM-0003-T, and PE-0009-M; LOCATION: Barstow, Kermit, and near Grandfalls; Ward, Winkler, and Pecos Counties, Texas; TYPE OF FACILITY: natural gas processing and compression; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit a Title V compliance certification for the Mi Vida and Walton Plant, and the Santa Rosa compressor station; PENALTY: $4,500; ENFORCEMENT COORDINATOR: Dan Landenberger, (915) 570-1359; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(16) COMPANY: Stallion Springs, Inc.; DOCKET NUMBER: 2001-0271-PWS-E; IDENTIFIER: PWS Number 0460179; LOCATION: Fischer, Comal County, Texas; TYPE OF FACILITY: public water system; RULE VIOLATED: 30 TAC §290.109(c)(2) and (3) (formerly 30 TAC §290.106(a)), by failing to collect and submit routine monthly water samples for bacteriological analysis and take the required number of repeat bacteriological samples; 30 TAC §290.109(b), (f), and (g), §290.122(b)(1), by exceeding the maximum contaminant level for total coliform bacteria and provide public notification of coliform monitoring violations; PENALTY: $1,563; ENFORCEMENT COORDINATOR: Brian Lehmkuhle, (512) 239-4482; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

TRD-200107725

Paul Sarahan

Director, Litigation Division

Texas Natural Resource Conservation Commission

Filed: December 11, 2001

Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 21, 2002**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Comments about the AOs should be sent to the attorney designated for the AO at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 21, 2002**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing**.

(1) COMPANY: Amoco Oil Company; DOCKET NUMBER: 1999-1278-AIR-E; TNRCC ID NUMBER: GB-0004-L; LOCATION: 2401 Fifth Avenue South, Texas City, Galveston County, Texas; TYPE OF FACILITY: petroleum refinery; RULES VIOLATED: 30 TAC §112.32, and Texas Health and Safety Code (THSC), §382.085(a) and (b), by exceeding the 30-minute hydrogen sulfide net ground level concentration standard; 30 TAC §112.3(b), and THSC, §382.085(a) and (b), by exceeding the sulfur dioxide 30-minute net ground level concentration; PENALTY: $20,000; STAFF ATTORNEY: David Speaker, Litigation Division, MC 175, (512) 239-2548; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Ave., Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: D & H Pump Service, Inc.; DOCKET NUMBER: 2001-0480-AIR-E; TNRCC ID NUMBER: EE-2122-O; LOCATION: 1221 Tower Trail, El Paso, El Paso County, Texas; TYPE OF FACILITY: underground storage tanks and gasoline dispensing pumps; RULES VIOLATED: 30 TAC §114.100(a), and THSC, §382.085(b), by dispensing gasoline for use as a motor fuel which failed to meet the maximum oxygen content of 2.7% by weight; PENALTY: $750; STAFF ATTORNEY: Shannon Strong, Litigation Division, MC 175, (512) 239-6201; REGIONAL OFFICE: El Paso Regional Office, 401 E. Franklin Ave., Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(3) COMPANY: IBP, Inc.; DOCKET NUMBER: 1999-0787-MWD-E; TNRCC ID NUMBER: 01958; LOCATION: adjacent to Farm-to-Market Road 323, approximately two miles southeast of the City of Palestine, Anderson County, Texas; TYPE OF FACILITY: cow slaughter and deboning plant and associated wastewater disposal facility; RULES VIOLATED: 30 TAC §305.42, and TWC, §26.121, TNRCC Permit Number 01958, by failing to prevent an unauthorized discharge; PENALTY: $3,750; STAFF ATTORNEY: Elisa Roberts, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(4) COMPANY: Wigginton Oil Company, Inc.; DOCKET NUMBER: 1999-1479-PST-E; TNRCC ID NUMBERS: 42522 and 42523; LOCATION: 1307 North Bridge and 1900 South Bridge, Brady, McCulloch County, Texas; TYPE OF FACILITY: convenience stores (North and/or South Facility) with underground storage tanks (USTs); RULES VIOLATED: 30 TAC §334.50(b)(1)(A), and TWC, §26.3475, by failing to monitor USTs for releases at a frequency of at least once a month at the North Facility; 30 TAC §334.93, by failing to demonstrate the necessary financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases at the North Facility; 30 TAC §334.50(b)(1)(A), and TWC, §26.3475, by failing to monitor USTs for releases at a frequency of at least once a month at the South Facility; 30 TAC §334.93, by failing to demonstrate the necessary financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases at the South Facility; PENALTY: $21,250; STAFF ATTORNEY: Troy Nelson, Litigation Division, MC R-5, (903) 535- 5100; REGIONAL OFFICE: San Angelo Regional Office, 622 S. Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

TRD-200107780
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: December 11, 2001

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Notice of Water Quality Applications.

The following notices were issued during the period of November 6, 2001 through December 6, 2001.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P O Box 13087, Austin Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

ALVARADO INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. 14101-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 35,000 gallons per day. The facility is located approximately 4,600 feet southwest of the intersection of Farm-to-Market Road 2738 and Farm-to-Market Road 917 in Johnson County, Texas.

CITY OF ANNONA has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14255-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 58,000 gallons per day. The facility is located approximately 1,500 feet east and 4,400 feet south of the intersection of United States Highway 82 and Farm-to-Market Road 44 in Red River County, Texas.

AQUASOURCE DEVELOPMENT COMPANY has applied for a renewal of Permit No. 13994-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 61,600 gallons per day via surface irrigation of 64.52 acres of Golf Course. The facility and disposal site are located within the Eagles Bluff Residential Development and Golf Course located on the east shore of Lake Palestine, 1.3 miles west of Farm-to-Market Road 346 and 1.2 miles south of Farm-to-Market Road 344 in Cherokee County, Texas.

AQUASOURCE DEVELOPMENT COMPANY has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14243-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 225,000 gallons per day. The facility is located three miles northeast of the intersection of State Highway 359 and State Highway 723 in Fort Bend County, Texas.

CITY OF AUSTIN has applied for a major amendment to TNRCC Permit No. 10543-011 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 60,000,000 gallons per day to an annual average flow not to exceed 75,000,000 gallons per day. The plant site is located approximately one mile east of the intersection of Farm-to-Market Road 969 and U.S. Highway 183, on the south side of Farm-to-Market Road 969 in Travis County, Texas.

BEN WHEELER WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. 13905-001, which authorizes the discharge of treated filter backwash water at a daily average flow not to exceed 9,000 gallons per day. The facility is located approximately 400 feet north of the intersection of County Road 4517 and Farm-to-Market Road 1995 and approximately 1.9 miles southwest of the intersection of Interstate Highway 20 and Farm-to-Market Road 314 in Van Zandt County, Texas.

BEN WHEELER WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. 13974-001, which authorizes the discharge of treated filter backwash water at a daily average flow not to exceed 5,500 gallons per day. This application was submitted to the TNRCC on June 18, 2001. The facility is located approximately 100 feet south of Farm-to-Market Road 279 (behind the First State Bank Building) which is adjacent and on the south side of Farm-to-Market Road 279 in the Community of Ben Wheeler in Van Zandt County, Texas.

BEN WHEELER WATER SUPPLY CORPORATION has applied for a renewal of TNRCC Permit No. 13974-002, which authorizes the discharge of treated water treatment filter backwash water at a daily average flow not to exceed 5,500 gallons per day. The plant site is located approximately 3.7 miles east-northeast of Ben Wheeler and 0.6 mile north of Farm-to-Market Road 858, in Van Zandt County, Texas.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY which operates the Silsbee Railyard, a railroad shop and refueling station, has applied for a renewal of TPDES Permit No. 00745, which authorizes the discharge of track pan washwater and stormwater runoff on an intermittent and flow variable basis via Outfall 001. The facility is located approximately 1/4 mile south of the intersection of 10th Street and Avenue F in the City of Silsbee, Hardin County, Texas.

CMH PARKS, INC has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TPDES Permit No. 13962-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 76,950 gallons per day. The facility is located approximately 2,500 feet northwest of the Community of Culleoka, immediately west of Farm-to-Market Road 982 and north of the Culleoka Baptist Church in Collin County, Texas.

CITY PUBLIC SERVICE OF SAN ANTONIO which operates the O.W. Sommers/J.T. Deely/J.K. Spruce Steam Electric Station, has applied for a renewal of TNRCC Permit No. 01514, which authorizes the discharge of once-through cooling water and previously monitored effluents from Sommers Units 1 & 2 and Deely Units 1 & 2 at a daily average flow not to exceed 1,440,000,000 gallons per day via Outfall 001; low volume waste and/or metal cleaning waste on a flow variable basis via Outfall 002; ash transport water and other low volume waste on an intermittent and flow variable basis via Outfall 003; coal pile runoff on an intermittent and flow variable basis via Outfall 004; storm water runoff from diked oil storage areas on an intermittent and flow variable basis via outfall 006; once-through cooling water and previously monitored effluents from Spruce Unit 1 at a daily average flow not to exceed 1,000,000,000 gallons per day via Outfall 007; low volume waste on an intermittent and flow variable basis via Outfall 008; discharge from a pond containing storm water runoff from material storage areas and flue gas desuphurizations (FGD) scrubber sludge on an intermittent and flow variable basis via Outfall 009; treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day via Outfall 010; storm water runoff on an intermittent and flow variable basis via Outfalls 301, 011, 012, 014, 015, 016, 017, and 018; discharge from a pond containing storm water runoff (sludge/fly ash disposal area and landfill area) on an intermittent and flow variable basis via Outfall 013; low volume waste on an intermittent and flow variable basis via Outfalls 101 and 201. The draft permit authorizes the discharge of once-through cooling water and previously monitored effluents (PME) from Sommers Units 1 & 2 and from Deely Units 1 & 2 at a daily average flow of 1,440,000,000 gallons per day via Outfall 001; low volume waste on a flow variable basis via Outfalls 101 and 102; ash transport water and other low volume waste on an intermittent and flow variable basis via Outfall 103; coal pile runoff on an intermittent and flow variable basis via Outfall 104; low volume waste and/or metal cleaning waste on an intermittent and flow variable basis via Outfalls 108, 112, and 002; discharge from a pond containing storm water from material storage areas and flue gas desuphurization (FGD) scrubber sludge on a flow variable basis via Outfall 109; treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day via Outfall 110; storm water from plant yard drains on an intermittent and flow variable basis via Outfall 111; storm water on an intermittent and flow variable basis via Outfalls 113, 115, 116, 117, 118, and 014; storm water from diked storage areas on an intermittent and flow variable basis via Outfall 006; once-through cooling water from Spruce Unit 1 at a daily average flow not to exceed 1,000,000,000 gallons per day via Outfall 007; storm water and wastewater from fire booster pumps on an intermittent and flow variable basis via Outfall 712; and from a pond containing storm water runoff (sludge/fly ash disposal area and landfill area) on an intermittent and flow variable basis via Outfall 713. The facility is located adjacent to Calaveras Lake at 9599 Gardner Road, and east-southeast of the City of San Antonio, Bexar County, Texas.

CITY OF DAISETTA has applied for a renewal of TNRCC Permit No. 10736-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located approximately 1000 feet east of Farm-to-Market Road 770, at a point approximately 1500 feet north of the City of Daisetta in Liberty County, Texas. The treated effluent is discharged to an unnamed ditch within a wetlands area; thence to an unnamed tributary of Batiste Creek; thence to Batiste Creek; thence to Willow Creek; thence to Pine Island Bayou in Segment No. 0607 of the Neches River Basin.

DIAMOND SHAMROCK REFINING COMPANY, L.P. has applied for a National Pollutant Discharge Elimination System (NPDES) wastewater permit. The applicant has an existing Texas Natural Resource Conservation Commission (TNRCC) Permit No. 03927. The draft permit authorizes the discharge of process wastewater, utility wastewater, domestic wastewater, and storm water at a daily maximum flow not to exceed 140,000 gallons per day via Outfall 001; storm water runoff on an intermittent and flow variable basis via Outfalls 002, 003, 004, 005 and 006; and storm water commingled with utility water from the ammonia plant on an intermittent and flow variable basis via Outfall 007. The applicant operates a petroleum refinery and ammonia plant.

The Texas Natural Resource Conservation Commission (TNRCC) has initiated a minor amendment of the permit issued to DOWELL SCHLUMBERGER, INC., a Division of Schlumberger Technology Corporation, which operates an oil and gas well service facility with vehicle washing, to establish an expiration date for the permit as required by TNRCC rules. The existing permit authorizes the disposal of industrial wash water from cleaning trucks at a daily average flow not to exceed 2,000 gallons per day via evaporation which will remain the same. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal area are located at the southwest corner of the intersection of Farm-to-Market Road 1470 and State Highway 281 South, south of the Town of Leming, Atascosa County, Texas.

EAST CEDAR CREEK FRESH WATER SUPPLY DISTRICT has applied for a renewal of Permit No. 13874-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day via surface irrigation of 137 acres of agriculture land. The facility and disposal site are located approximately 15,700 feet south of the intersection of State Highway 198 and State Highway 334 in Henderson County, Texas.

CITY OF FORT WORTH has applied for a renewal of TPDES Permit No. 10494-013, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 166,000,000 gallons per day. The current permit authorizes the surface disposal of sewage sludge on 156 acres and land application of Class A sewage sludge for beneficial use. The facility is located southeast of the confluence of the West Fork Trinity River with Village Creek in the City of Fort Worth in Tarrant County, Texas. The sludge treatment works and the sludge disposal site are located north of the wastewater treatment facility.

CITY OF GATESVILLE has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 10176-004, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 1,000,000 gallons per day. The facility is located approximately 0.5 mile south of the intersection of U.S. Highway 84 and U.S. Business 36 in Coryell County, Texas.

CITY OF GREENVILLE has applied for a renewal of TNRCC Permit No. 10485-002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,230,000 gallons per day. The facility is located approximately 1.3 miles east of the intersection of Interstate Highway 30 and U.S. Highway 69 in Hunt County, Texas.

CITY OF HUXLEY has applied for a major amendment to TPDES Permit No. 13932-001 to authorize an increase in the discharge of treated filter backwash water from a daily average flow not to exceed 15,000 gallons per day to a daily average flow not to exceed 30,000 gallons per day. The facility is located at an unnamed County Road between Farm-to-Market Road 2694 and Toledo Bend Reservoir in the City of Huxley in Shelby County, Texas.

CITY OF KEMP has applied for a renewal of TPDES Permit No. 10695-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located approximately 0.8 mile west-southwest of the intersection of State Route 274 and U.S. Route 175, approximately 1.5 miles southwest of the City of Kemp in Kaufman County, Texas.

LA HACIENDA PARTNERS has applied for a new permit, Proposed Permit No. 14298-001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 50,400 gallons per day via subsurface drainfields of 11.6 acres of drip irrigation land. The facility and disposal site are located approximately 2,500 feet south of the intersection of Hudson Bend Road and Doss Road in Travis County, Texas.

LOWER COLORADO RIVER AUTHORITY has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14303-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located approximately 1000 feet east of Pope Bend Road and approximately 3 miles northeast of the intersection of State Highway 71 and Pope Bend Road in Bastrop County, Texas.

MATHEWS BLUFF, LTD residential development service provider, has applied for a renewal of TPDES Permit No. 14107-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 240,000 gallons per day. The facility is located approximately 1,500 feet west and 300 feet south of the intersection of Farm-to-Market 1571 and County Road 3405 in Hunt County, Texas.

NORTH LAMAR INDEPENDENT SCHOOL DISTRICT has applied for a renewal of Permit No. 11932-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 7,600 gallons per day via evaporation on three acres of pond surface area. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located on the grounds of Powderly Elementary School, adjacent to and east of U.S. Highway 271 approximately 1000 feet north of the intersection of U.S. Highway 271 and Farm-to-Market Road 3298 in Lamar County, Texas.

SAN MIGUEL ELECTRIC COOPERATIVE has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a major amendment to TNRCC Permit No. 02043 to authorize the addition of discharge points for mine pit water and stormwater. The current permit authorizes the discharge of mine pit water and stormwater on a intermittent and flow variable basis via Outfalls 001, 002, 003, 004 and 005. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0083445 issued on March 11, 1988 and TNRCC Permit No. 02043. The applicant operates a lignite mine. The plant site is located on Farm-to-Market Road 3387, six miles east of Highway 16 and south of the City of Christine, Atascosa and McMullen Counties, Texas.

CITY OF STRATFORD has applied for a renewal of Permit No. 10293-002, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day via irrigation of 640 acres of farm land. No discharge of pollutants into water in the State is authorized by this permit. The wastewater treatment facilities and disposal site are located approximatley 0.5 mile southeast of U.S. Highway 54 and 1.7 miles northeast of the intersection of U.S.Highway 54 and U.S. Highway 287 in the City of Stratford in Sherman County, Texas.

TEXAS ELECTRIC COOPERATIVES, INC which operates a telephone pole preparation and preservation plant, has applied for a renewal of TPDES Permit No. 01766, which authorizes the discharge of storm water and previously monitored effluents (non-contact cooling water, boiler blowdown, and storm water) on an intermittent and flow variable basis via Outfall 001. The facility is located on Bevil Loop Road approximately 0.6 miles south of U.S. Highway 190 and southeast of the City of Jasper, Jasper County, Texas.

TEXAS PARKS AND WILDLIFE DEPARTMENT has applied for a renewal of TPDES Permit No. 11718-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 35,000 gallons per day. The facility is located 500 feet east of Park Road 48 and approximately 3,500 feet due south of the intersection of U. S. Highway 190 and Park Road 48 in Jasper County, Texas.

TRAVIS COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 17 has applied for a major amendment to Permit No. 13294-001, to authorize an interim phase not to exceed a daily average flow of 400,000 gallons per day, to increase the irrigation application rate from 2.13 acre-feet per year per acre irrigated to 3.09 acre-feet per year per acre irrigated and to change the acreage irrigated from 145 acres of perennial pasture to 190 acres of golf course at final build out. The current permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 525,000 gallons per day via evaporation and surface irrigation on public access acreage consisting of 278 acres of perennial pasture land in the final phase. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facilities and disposal area are located at North Quinlan Park Road approximately 2 miles south of the intersection of Ranch Road 620 and Quinlan Park Road in Travis County, Texas.

WEST TEXAS UTILITIES COMPANY which operates a steam electric generating station known as the Lake Pauline Power Station, has applied for a renewal of TNRCC Permit No. 00962, which authorizes the discharge of once-through cooling water at a daily average flow not to exceed 133,000,000 gallons per day via Outfall 001, and fuel tank area storm water on an intermittent and flow variable basis via Outfall 002. The draft permit authorizes the discharge of once-through cooling water, sand filter backwash, and service water floor drain wastewater at a daily average flow not to exceed 133,000,000 gallons per day via Outfall 001. Outfall 002 has been removed from the draft permit. The facility is located on the north shore of Lake Pauline, approximately four and one half miles southeast of the City of Quanah, Hardeman County, Texas.

Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 10 DAYS OF THE ISSUED DATE OF THIS NOTICE.

The Texas Natural Resource Conservation Commission (TNRCC) has initiated a minor amendment of the permit issued to DOWELL SCHLUMBERGER, INC., a Division of Schlumberger Technology Corporation, which operates an oil and gas well service facility with vehicle washing, to establish an expiration date for the permit as required by TNRCC rules. The existing permit authorizes the disposal of industrial wash water from cleaning trucks at a daily average flow not to exceed 2,000 gallons per day via evaporation which will remain the same. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal area are located at the southwest corner of the intersection of Farm-to-Market Road 1470 and State Highway 281 South, south of the Town of Leming, Atascosa County, Texas

TRD-200107774
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: December 11, 2001

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Notice of Water Rights Application

Notices mailed during the period November 29, 2001 through December 10, 2001.

PROPOSED PERMIT NO. TP-8217; Stephens Martin Paving, Inc., 5000 East Highway 80, Abilene, Texas 79601, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a temporary water use permit, for a period of 8 months, to divert and use 30 acre-feet of water at a maximum diversion rate of .67 cfs (300 gpm) from Colorado River, Colorado River Basin, McCulloch County, Texas, for Industrial Use (road construction.) Water will be diverted from the vicinity of Highway 377 and the Colorado River, located 24 miles in a north/northeast direction from the town of Brady, Texas and .5 miles in a south direction from the town of Winchell. Notice of the application was mailed to the eighty-five (85) water right holders located downstream of the applicant's diversion point. The temporary permit, if issued, will be junior in priority to all senior and superior water rights in the Colorado River Basin. The application was received on October 26, 2001 and accepted for filing on November 09, 2001. The Executive Director of the TNRCC has reviewed the application and has declared it to be administratively complete on November 09, 2001. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, by December 21, 2001. The TNRCC may grant a contested case hearing on this application if a written hearing request is filed by December 21, 2001.

PROPOSED PERMIT NO. TP-8214; Sun Pipe Line Company, P.O. Box 758, Nederland, Texas 77627, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a temporary water use permit, for a period of one year, to divert and use 79 acre-feet of water at a maximum diversion rate of 13.37 cfs (6000 gpm) from the Neches River, tributary of Sabine Lake, Neches River Basin, for industrial (hydrostatic testing) purposes. Water will be diverted from a point on the Neches River approximately 5 miles southeast of Beaumont and 2 miles northeast of Nederland, also being 30.007 degree N Latitude, 93.979 degrees W Longitude, in Jefferson County, Texas. Should this permit be granted, 100% of the water diverted from the Neches River will be returned to the Neches River. Pursuant to TAC §295.154, notice of the application was mailed to the five (5) water right holders located downstream of the applicant's diversion point to the Intracoastal Waterway. The temporary permit, if issued, will be junior in priority to all senior and superior water rights in the Neches River Basin. The application was received on May 23, 2001. The Executive Director of the TNRCC has reviewed the application and has declared it to be administratively complete on November 19, 2001. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, by December 21, 2001. The TNRCC may grant a contested case hearing on this application if a written hearing request is filed by December 21, 2001.

PROPOSED PERMIT NO. 8216; Stephens Martin Paving, Inc., 5000 East Highway 80, Abilene, Texas 79601, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a temporary water use permit, for a period of 15 months, to divert and use 30 acre-feet of water at a maximum diversion rate of .67 cfs (300 gpm) from Clear Fork Creek, tributary of Brazos River, Brazos River Basin, Jones County, Texas, for Industrial Use (road construction). Water will be diverted from a point located near the intersection of Clear Fork Creek and Highway 277, located 11 miles in a north direction from Abiline, Texas (Taylor County), and 1 mile in a south direction from the city of Hawley, Texas. Notice of the application has been mailed to the twenty-eight (28) water right holders located downstream of the applicant's diversion point. The temporary permit, if issued, will be junior in priority to all senior and superior water rights in the Brazos River Basin. The application was received on October 26, 2001 and accepted for filing on November 09, 2001. The Executive Director of the TNRCC has reviewed the application and has declared it to be administratively complete on November 09, 2001. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, by December

21, 2001. The TNRCC may grant a contested case hearing on this application if a written hearing request is filed by December 21, 2001.

PROPOSED PERMIT NO. TP-8218; The Brazos River Authority, 4600 Cobbs Drive, P.O. Box 7555, Waco, Texas 76717-7555 has applied for a Temporary Water Use Permit to authorize the diversion (overdraft) and use of up to 4,200 acre-feet of water out of Lake Georgetown, on the San Gabriel River, tributary of the Little River, tributary of the Brazos River, Brazos River Basin, Williamson County, Texas, for the remainder of the calendar year 2001 for municipal use. The requested 4,200 acre-feet of water is in excess of BRA's diversion amount of 13,610 acre-feet per annum authorized by Certificate of Adjudication No. 12-5162. The additional water from Lake Georgetown is required to meet the water demands of the Cities of Georgetown and Round Rock until a pipeline project currently under construction is completed in late 2001 or early 2002. The pipeline will convey water from Stillhouse Hollow Lake on the Lampasas River, tributary of Little River, tributary of the Brazos River, Brazos River Basin in Bell County to Lake Georgetown in Williamson County, and eliminate the necessity of over-drafting Lake Georgetown in the future. 71 water rights owners with diversion points downstream of Lake Georgetown were provided a copy of this notice to make them aware of BRA's request. A copy of this notice has also been provided to the TNRCC Regional Office Austin, Texas. The application was received by the TNRCC on April 24, 2001. The Executive Director of the TNRCC has reviewed the application and declared it to be administratively complete on November 19, 2001. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, by Thursday, December 27, 2001. The TNRCC may grant a contested case hearing on this application if a written hearing request is filed by Thursday, December 27, 2001.

APPLICATION NO. 5752; William Gavranovic, Jr. 5702 May Road, Wharton, Texas, 77488, applicant, seeks a permit pursuant to Texas Water Code §11.121 and Texas Natural Resource Conservation Commission Rules 30 TAC §§295.1, et seq. to divert 2,460 acre-feet of water per year from two existing points, one on the Brazos River and one on the Old River, and one new point on the Old River, tributary of the Brazos River Brazos River Basin for direct irrigation or to an off-channel reservoir for subsequent irrigation of 820 acres in Burleson County. Published notice of the application is being given pursuant to 30 TAC §295.152, allowing for a thirty (30) day comment period. Notice has been mailed to all water right owners of record in the Brazos River Basin pursuant to 30 TAC §295.153. The applicant seeks authorization to divert 2,460 acre-feet of water per year from two existing points, one on the Brazos River and one on the Old River, and one new point on the Old River, tributary of the Brazos River, Brazos River Basin for direct irrigation, or to an off-channel reservoir for subsequent irrigation of 820 acres out of a 892.477 acre tract of land in the Alfred Kennon Survey, Abstract 32 and a 30.821 tract of land in the John Chenowith Survey, Abstract 84, Burleson County. Ownership of the aforesaid tract is evidenced by a Special Warranty Deed dated October 16, 2000, filed in Volume 533 Page 178 of the official Deed Records of Burleson County. Diversion Point No. 1 is located on the right or west bank of the Brazos River at Latitude 30.464°N, Longitude 96.333 degrees W, also bearing S11 degrees W from the northeast corner of the Alfred Kennon Survey, Abstract 32, in Burleson County. Diversion Point No. 2 is located at Latitude 30.405 degrees N, Longitude 96.345 degrees W, also bearing N55 degrees E from the northwest corner of the same survey. Diversion Points 1 and 2 are the same diversion points authorized by existing Water Use Permit No. 5603, also owned by the applicant. Diversion Point No. 3, to be established, will be located on the right or west bank of Old River at Latitude 30.266 degrees N, Longitude 96.207 degrees W, also bearing S 6.643 degrees E, 970.75 feet from the northeast corner of the aforesaid survey. Water authorized by this permit request will be diverted from Diversion Point No. 1 at a maximum rate of 11.14 cfs (5000 gpm), from Point No. 2 at a maximum rate of 4.01 cfs (1,800 gpm), and from Diversion Point No. 3 at a maximum rate of 4.01 cfs (1,800 gpm). Applicant also seeks authorization to divert the requested water to an off-channel reservoir for subsequent irrigation of the aforesaid acreage. The off-channel reservoir will impound not to exceed 367.26 acre-feet of water with a surface area of approximately 61.2 acres. The approximate center of the reservoir will be located at Latitude 30.439 degrees N, Longitude 96.348 degrees W in the Alfred Kennon Survey, Abstract 32, in Burleson County, Texas. William Gavranovic, Jr. submitted Water Use Permit Application No. 5752 on March 21, 2001. Additional information was received on May 17 and October 18, 2001, and the application was declared administratively complete on October 18, 2001. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice. The TNRCC may grant a contested case hearing on this application if a written hearing request is filed within 30 days from the date of newspaper publication of this notice. Notice Issued December 10, 2001.

APPLICATION NO. 5751; Gary Moy, P.O. Box 98, Falls City, Texas, 78113 has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a Water Use Permit pursuant to §11.121, Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC §295.1, et seq. to divert and use 100 acre-feet of water per year from the San Antonio River, San Antonio River Basin, Karnes County, Texas, for irrigation use. Public notice of the application has been given pursuant to 30 TAC §295.152, and notice has been mailed pursuant to 30 TAC §295.153 (a) and (b) to the water right holders of record in the San Antonio River Basin. Applicant seeks authorization to divert and use 100 acre-feet of water per annum at a maximum diversion rate of .22 cfs (100 gpm) from the San Antonio River, San Antonio River Basin, Karnes County, Texas, for irrigation of 50 acres of land out of a total of 65 acres in the Erasmo Seguin Survey, Abstract 10, Karnes County, Texas, Vol. 534 Page 157 & Vol. 540 Page 580. The location of the diversion point is 10 miles in a northwest direction from Karnes City, or 1 mile in a westerly direction from Falls City, Texas, bearing N 45 degrees E 9500 feet from the northwest corner of the E. Seguin Unit A Original Survey, Abstract 10, Karnes County, Texas, being at Latitude 29.95 degrees N, Longitude 98.042 degrees W. The application was received on October 26, 2001 and accepted for filing on November 12, 2001. The Executive Director of the TNRCC has reviewed the application and has declared it to be administratively complete on November 12, 2001. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice. The TNRCC may grant a contested case hearing on this application if a written hearing request is filed within 30 days of the date of newspaper publication of the notice. Notice Issued December 10, 2001.

Information Section

A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in an application.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name

and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the 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 permit 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-200107773
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: December 11, 2001

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Texas Department of Protective and Regulatory Services

Request for Proposal - Services to At-Risk Youth (STAR) Program - Archer, Clay, and Wichita Counties

The Texas Department of Protective and Regulatory Services (PRS), Division of Prevention and Early Intervention, is soliciting proposals to provide preventive and short-term services to at-risk youth in Archer, Clay, and Wichita counties. PRS anticipates funding only one contract as a result of this solicitation. The Request for Proposal (RFP) will be released on or about December 20, 2001. The RFP will be posted on the State Internet Site at www.marketplace.state.tx.us on the date of its release.

Brief Description of Services: The goal of the Services to At-Risk Youth or *STAR* program is to reduce and prevent the problems of runaway, truancy, abandonment, family conflict, and delinquent behavior through timely and appropriate services to eligible youth and their families. The foundation of the *STAR* program is residential, non-residential, and short- term crisis intervention services that are family-oriented, strengths-based, solution-focused, and client-driven. Community-based programs with a family systems approach, which are affirmation focused, can offer youth and families the tools and knowledge needed to problem solve, master new skills, and relate more effectively. The *STAR* program envisions a community effort to provide the assistance and support high-risk youth and their families need to become redirected toward more positive pathways of functioning. Services must be as accessible to self- and family- referred youth as to youth referred by agencies or other sources. The program's highest priority is to support youth remaining in their homes, and to quickly reunite out-of-home youth with their families.

PRS's intent, through its *STAR* program, is to procure residential, non-residential, and short-term crisis intervention services that best meet the needs of the targeted population, or eligible youth and families who do not meet the requirements of other youth-serving agencies. The contracts will be funded and managed by PRS.

Eligible Applicants: Eligible offerors include private nonprofit and for-profit corporations, cities, counties, partnerships, and individuals. Historically Underutilized Businesses (HUBs), Minority Business and Women's Enterprises, and Small Businesses are encouraged to submit proposals.

Limitations: The anticipated total prorated funding for the remaining Fiscal Year (FY) 2002 (February 15, 2002, through August 31, 2002) is $162,500 for a **primary** county, $27,000 for a **satellite** county, and $13,500 for an **outlying** county. If renewed in FY 2003 (September 1, 2002, through August 31, 2003) the maximum funding will be $300,000 for a **primary** county, $50,000 for a **satellite** county and $25,000 for an **outlying** county. The funding allocated for the contract resulting from this RFP is dependent on Legislative appropriation. Funding is not guaranteed at the maximum level, or at any level. PRS reserves the right to reject any and all offers received in response to this RFP, and to cancel this RFP if it is deemed in the best interest of PRS. PRS also reserves the right to re-procure this service.

If no acceptable responses are received, or no contract is entered into as a result of this procurement, PRS intends to procure by non-competitive means in accordance with the law but without further notice to potential vendors.

Deadline for Proposals, Term of Contract, and Amount of Award: Proposals will be due January 24, 2002, at 4:00 p.m. The effective dates of contracts awarded under this RFP will be February 15, 2002, through August 31, 2002. If contracts are renewed, funding will be reviewed annually with prescribed maximum funding levels.

Contact Person: Potential offerors may obtain a copy of the RFP on or about December 20, 2001. It is preferred that requests for the RFP be submitted in writing (by mail or fax) to: Jacqueline Gomez, Mail Code E-541; c/o Vicki Logan; Texas Department of Protective and Regulatory Services; P.O. Box 149030; Austin, Texas 78714-9030; Fax: 512-438-2031.

TRD-200107792
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Filed: December 12, 2001

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Public Utility Commission of Texas

Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on December 5, 2001, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of TXU ET Services Company for Retail Electric Provider (REP) certification, Docket Number 25114 before the Public Utility Commission of Texas.

Applicant's requested service area by geography includes the entire State of Texas.

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 no later than December 28, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200107607
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 7, 2001

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On December 3, 2001, Smoke Signal Communications ® filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60052. Applicant intends to reflect a change in ownership/control to 1-800-RECONEX, Inc.

The Application: Application of Smoke Signal Communications ® for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 25102.

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 December 31, 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) 936-7136. All correspondence should refer to Docket Number 25102.

TRD-200107597
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 5, 2001

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On December 5, 2001, Capital Telecommunications, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60020. Applicant intends to change its type of provider to include resale telecommunications services.

The Application: Application of Capital Telecommunications, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 25115.

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 December 31, 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) 936-7136. All correspondence should refer to Docket Number 25115.

TRD-200107606
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 7, 2001

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Public Notice of Intent to File Pursuant to P.U.C. Substantive Rules §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214

Docket Title and Number. Valor Telecommunications of Texas, LP Application for Approval of LRIC Study for Valor Value Plan and Valor Value Plan Plus Pursuant to P.U.C. Substantive Rule §26.214 on or before December 17, 2001.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 25113. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the 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.

TRD-200107727
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 11, 2001

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Public Notice of Interconnection Agreement

On August 29, 2001, KMC Telecom Holdings, Inc. doing business as KMC Telecom V, Inc. and Sugar Land Telephone Company, 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 24566. 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 24566. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by January 7, 2002, 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 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 24566.

TRD-200107594
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 5, 2001

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Public Notice of Interconnection Agreement

On December 5, 2001, Kerrville Telephone Company and Sprint Spectrum, LP, 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 25116. 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 25116. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by January 7, 2002, 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 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 25116.

TRD-200107609
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 7, 2001

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Request for Proposals for Assistance in the Performance of Independent Measurements and Tests to Evaluate the Effectiveness of the PUC Customer Education Campaign Related to Electric Restructuring

The Public Utility Commission of Texas (PUC or commission) is issuing a Request for Proposals (RFP) for assistance in the performance of independent measurements and tests to evaluate the effectiveness of the PUC Customer Education Campaign related to electric restructuring.

Project Description. The selected contractor will provide the commission with information, obtained from both qualitative and quantitative research that will allow the commission to evaluate and monitor the education campaign to both ensure that the target markets are being reached and that the educational messages are being delivered effectively and timely; and to determine whether the education campaign is providing the information that consumers need to make informed decisions regarding electric choice.

Selection Criteria. Proposals will be evaluated based on the ability of the proposer to provide the best value for the services rendered and the proposer's ability to provide the requested services. In addition to the proposer's ability to carry out all of the requirements contained in the RFP, demonstrated competence and qualifications of the proposer and the reasonableness of the proposed fee will be considered. When other considerations are equal, preference will be given to a proposer whose primary place of business is in Texas or who will manage the project wholly from its offices in Texas. Among proposals that are otherwise comparable, the commission shall also give preference to proposals submitted by historically underutilized businesses (HUBs), as defined in the Texas Government Code, Chapter 2161, §2161.001.

Requesting a Copy of the RFP. A complete copy of the RFP for services may be obtained by writing Mike Renfro, Customer Protection Division, Public Utility Commission of Texas, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, or mike.renfro@puc.state.tx.us, or calling (512) 936-7145. The RFP will be issued December 21, 2001. You may also download the RFP from the commission website at www.puc.state.tx.us, under "Hot Topics", and from the electronic business daily website sponsored by the Texas Building and Procurement Commission at www.marketplace.state.tx.us.

For Further Information. You may request clarifying information in writing only. For clarifying information about the RFP, contact Mike Renfro, Customer Protection Division, Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, fax (512) 936-7003, or mike.renfro@puc.state.tx.us.

Deadline for Receipt of Responses. Responses must be filed under seal with a cover letter for filing in Project Number 23578 and received no later than 3:00 p.m. on Monday, January 14, 2002, in Central Records, Room G-113, Public Utility Commission of Texas, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Proposals may be received in Central Records between 9:00 a.m. and 5:00 p.m., Monday through Friday, except on state holidays. Regardless of the method of submission of the response, the commission will rely solely on Central Records' time/date stamp in establishing the time and date of receipt.

TRD-200107741
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 11, 2001

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Office of Rural Community Affairs

Revised Rural Health Facility Capital Improvement Fund Notice

The Office of Rural Community Affairs is issuing a Request for Proposals ("RFP") for The third round of the Rural Health Facility Capital Improvement Fund. The purpose of this RFP is to provide the applicant with funding for capital improvement projects under the endowment fund created by HB 7, Section 487.301.

USE OF FUNDS: Funds are awarded for a specifically defined purpose and may not be used for any other project. Matching funds may be used to make capital improvements to existing facilities, construct new health facilities and to purchase capital equipment, including information systems hardware and software. Emergency Grants may only be used to address Life Safety Code Violations.

AMOUNT OF AWARD: Matching funds are available for projects of up to $150,000. Matching funds will total approximately $1,400,000, depending on the amount received from the Comptroller's Office. Emergency funds will total approximately $500,000. Funds for the first two quarters of the fiscal year will be awarded in January and the remaining two quarters will be awarded in July.

ELIGIBLE APPLICANTS: Eligible applicants include rural public and non-profit hospitals located in counties of less than 150,000 persons. A 15% match requirement is now in effect for Matching Funds. No match is required for an Emergency Grant. However, the board must certify that there are no other funding sources available.

EVALUATION AND SELECTION: Applications are initially screened for eligibility and completeness. Applications that do not meet the requirements in this RFP, may not be considered for review and the applicant will be notified in writing. After the initial screening, all remaining applications will be reviewed by the Program Administrator and then by the Executive Director. The Rural Health Facility Capital Improvement Program Working Group will also have an opportunity to make recommendations to the Executive Director. The Executive Director will then make a final determination.

DEADLINE: Completed applications are due by 01/31/02 or 07/31/02. Announcement of the selected applicants will be made by 02/07/02 and 08/07/02 respectively.

CONTRACT PERIOD: The budget period for the applications funded under this RFP will begin 03/01/02 or 09/01/02 and continue for 6 months.

CONTACT PERSON: To obtain the application, please contact: Capital Improvement Program Administrator, Office of Rural Community Affairs, P.O. Drawer 1708, Austin, Texas, 78767-1708, (512) 479-8891

TRD-200107759
Mike Easley
Director
Office of Rural Community Affairs
Filed: December 11, 2001

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San Antonio-Bexar County Metropolitan Planning Organization

Request for Proposals

The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms to conduct the Traffic Signal Re-timing Study (FY 2002).

A copy of the Request for Proposals (RFP) may be requested by calling Jeanne Geiger, Interim Administrator, at (210) 227-8651 or by downloading the RFP and attachments from the MPO's website at www.sametroplan.org. Anyone wishing to submit a proposal must do so by 12:00 p.m. (CST), Friday, February 8, 2002 at the MPO office:

Jeanne Geiger, Interim Administrator

San Antonio-Bexar County Metropolitan Planning Organization

1021 San Pedro, Suite 2200

San Antonio, Texas 78212

The contract award will be made by the MPO's Transportation Steering Committee based on the recommendation of the project's consultant selection committee. The Traffic Signal Re-timing Study Consultant Selection Committee will review the proposals based on the evaluation criteria listed in the RFP.

Funding for this study, in the amount of $162,000, is contingent upon the availability of Federal transportation planning funds.

TRD-200107799
Jeanne Geiger
Interim Administrator
San Antonio-Bexar County Metropolitan Planning Organization
Filed: December 12, 2001

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Request for Proposals

The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms to perform the MPO's compliance and financial audits for fiscal years 2001-2002, 2002-2003, and 2003-2004.

A copy of the Request for Proposals (RFP) may be requested by calling Jeanne Geiger, Interim Administrator, at (210) 227-8651 or by downloading the RFP and attachments from the MPO's website at www.sametroplan.org. Anyone wishing to submit a proposal must do so by 12:00 p.m. (CST), Friday, February 8, 2002 at the MPO office:

Jeanne Geiger, Interim Administrator

San Antonio-Bexar County Metropolitan Planning Organization

1021 San Pedro, Suite 2200

San Antonio, Texas 78212

The contract award will be made by the MPO's Transportation Steering Committee based on the recommendation of the project's consultant selection committee. The Audit Subcommittee of the Transportation Steering Committee will review the proposals based on the evaluation criteria listed in the RFP.

Funding for this study, in the amount of $36,000, is contingent upon the availability of Federal transportation planning funds.

TRD-200107800
Jeanne Geiger
Interim Administrator
San Antonio-Bexar County Metropolitan Planning Organization
Filed: December 12, 2001

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Stephen F. Austin State University

Notice of Consultant Contract Award

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of consultant contract award. The consultant will undertake a feasibility study for the College of Fine Arts. The Request for Proposals was filed in the September 28, 2001 issue of the *Texas Register*, Volume 26 Number 39 TexReg Pages 7355-7662.

The contract was awarded to Marts & Lundy, Inc., for an amount not to exceed $19,200.00, excluding travel and per diem.

The beginning date of the contract is November 28, 2001 and the ending date is six weeks from that date.

Documents, films, recording, or reports of intangible results will be presented by the outside consultant at the conclusion of the study.

For further information, please call (936)468-4305.

TRD-200107757
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: December 11, 2001

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Texas A&M University, Board of Regents

Public Notice

Pursuant to Section 552.123, Texas Government Code, the following candidate is the finalist for the position of Director of the Texas Veterinary Medical Diagnostic Laboratory and upon the expiration of twenty-one days, final action is to be taken by the Board of Regents of The Texas A&M University System:

(1) Dr. Lelve G. Gayle

TRD-200107633
Vickie Burt Spillers
Executive Secretary to the Board
Texas A&M University, Board of Regents
Filed: December 10, 2001

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Texas Department of Transportation

Record of Decision--Tyler Loop 49 West

Based on the Tyler Loop 49 West Final Environmental Impact Statement (FEIS), Combined Alternative N-C/S-A has been selected as the preferred alternative for the construction of Loop 49 West.

As described in Section 2.4.2 of the FEIS, this alternative is a 15.86 mile new location roadway that follows a generally southerly course, immediately west of the central urbanized area of Smith County (Tyler). This alternative would consist of a combination of four lane parkway and freeway sections. The freeway sections will include one-way frontage roads which will have two travel lanes in each direction. The parkway sections, which will not include frontage roads, will provide a greenbelt of natural vegetation between the right-of-way lines and the main lane ditches.

ALTERNATIVES CONSIDERED

Population projections from the Tyler Metropolitan Planning Organization indicate that the population of the Tyler urbanized area will increase by almost 40,000 people by the year 2015. The western section of Loop 323 currently operates at a Level of Service E during peak hours. Radial arterials and collectors from the south experience a Level of Service from D to E during peak hours. These conditions are expected to deteriorate without actions to address the problem.

No-build Alternative - This alternative would leave the current transportation network to handle future demand. The No-build Alternative could not alleviate the traffic increases on the already strained capacity of the existing transportation network, especially Loop 323 and other arterials and county roads. Thus, the No-build Alternative is not considered a viable alternative.

Northern Segment Alternatives

Alternative N-A--This alternative begins at IH 20, 0.14 miles east of the IH 20/FM 849 interchange and extends south, crossing SH 110 approximately 0.45 miles east of the SH 110/FM 849 intersection. Alternative N-A then extends south and southeast crossing County Road (CR) 46, CR 1150, CR 1151, and FM 724 at CR 1148. At FM 724, Alternative N-A turns to the south and southwest until it crosses SH 64, approximately 0.17 miles east of FM 2661. The length of Alternative N-A from IH 20 to south SH 64 is approximately 7.86 miles. The total estimated cost of Alternative N-A is $44.58 million.

Alternative N-B-- This alternative deviates from Alternative N-A approximately 0.60 miles south of SH 110 and proceeds in a more southerly direction crossing CR 46 approximately 0.90 mile west of Alternative N-A. Proceeding south, Alternative N-B then crosses FM 724 approximately 1.56 miles west of Alternative N-A. At this point Alternative N-B turns to the southeast and rejoins Alternative N-A for 0.25 miles to a point just south of its crossing of SH 64. The length of Alternative N-B from IH 20 to south of SH 64 is approximately 7.86 miles, with an estimated cost of $47.59 million.

Alternative N-C--This alternative begins at IH 20 approximately 0.80 miles east of Alternative N-A and 0.3 miles west of CR 411. Alternative N-C extends south from IH 20 crossing SH 110 1.45 miles south of IH 20 and proceeds south 2.27 miles to join Alternative N-A at CR 46. From there it follows the route described for Alternative N-A to a point just south SH 64, the length of Alternative N-C from IH 20 to south

of SH 64 is approximately 7.59 miles, with a total estimated cost of $41.14 million.

Southern Segment Alternatives

Alternative S-A--From SH 64 this alternative proceeds southeast, crossing CR 1145 and SH 31 approximately 4.40 miles west of Loop 323. Alternative S-A, proceeding south and southeast, then crosses CR 1134, the Union Pacific Railroad, CR 1130, CR 1227, and CR 1113. At CR 1113, the corridor takes a more easterly direction crossing CR 196 to end at SH 155 approximately 5.25 miles south of Loop 323. The length of Alternative S-A from south of SH 64 to SH 155 is approximately 8.18 miles, with an estimated cost of $53.96 million.

Alternative S-B--From its northernmost point this alternative proceeds in a southerly direction crossing CR 1145, SH 31, CR 1132, the Union Pacific Railroad, CR 1227, and CR 1113 where it begins a more easterly direction, crossing CR 196 and rejoining Alternative S-A near its southern terminus at SH 155. The total length of Alternative S-B from south of SH 64 to SH 155 is approximately 8.39 miles. The total estimated cost for Alternative S-B is $46.23 million.

Alternative S-D--From its northernmost point this alternative veers south from SH 64 along with Alternative S-B, then veers southwestward from Alternative S-B, south of SH 31, and proceeds southwest, crossing CR 1134 and the Union Pacific Railroad. It then turns south/southwest to cross CR 1130, CR 1113, and CR 196 prior to joining Alternative S-A 0.58 mile northwest of SH 155. The total length of Alternative S-D is approximately 8.75 miles, with a total estimated cost of $50.96 million.

Alternative S-E--This alternative is a connection between Alternative S-A and Alternative S-B, departing Alternative S-A 0.42 miles south of SH 31 and proceeding south to cross CR 1134 and the Union Pacific Railroad between Alternative S-A and Alternative S-B. Alternative S-E continues south to cross CR 1227 and CR 1130 and join Alternative S-B 0.35 miles north of CR 1113, proceeding to the project's southern terminus at SH 155. The total length of Alternative S-E is approximately 8.43 miles. The estimated total cost for this alternative is $62.50 million.

Comparison of Combined Alternatives

Based on the Alternatives analysis for Loop 49 West, Combined Alternative N-C/S-A was designated as the Preferred Alternative. It was the shortest route of all of the combined routes studied. The length of the other combined routes ranges from 15.98 miles for Combined Alternative N-C/S-B to 16.61 miles for Combined Alternative N-B/S-D. All of the combined alternatives were similar with regard to relocations and land use impacts. Combined Alternatives N-B/S-A and N-B/S-D would result in the least relocations, with 39 total. Combined Alternatives N-C/S-A and N-C/S-D would generate 40 total relocations. The total land use affected by each of the combined routes ranges from 1,171 acres affected by Combined Alternative N-C/S-B to the 1,274 acres affected by Combined Alternative N-B/S-D. Combined Alternative N-C/S-A would affect the second smallest area of any of the combined routes, or 1,202 acres. The number of residences that would experience noise increases above the relative criterion ranges from 11 for Combined Alternative N-C/S-D to 24 for Combined Alternatives N-B/S-A and N-B/S-B. Combined Alternative N-C/S-A would result in relative noise impacts to 20 residences.

Depending on the alternative, each combined route would have between 19 (Combined Alternative N-B/S-A) and 26 (Combined Alternative N-C/S-D) stream crossings. Combined Alternative N-C/S-A would have 20 stream crossings and would have slightly higher anticipated wetland impacts (40 acres) than the other alternatives. Combined Alternative N-B/S-D would have the least wetland impacts (21.42 acres). Impact to the woodlands range from 675 acres for Combined Alternative N-C/S-A to 751 acres for Combined Alternative N-B/S-D. Combined Alternative N-C/S-A would also have the shortest total floodplain crossing (4,783 feet), which is 1,139 feet shorter than the next shortest alternative (Combined Alternative N-C/S-B). All six combined routes would yield similar impacts to cultural resources; however Combined Alternatives N-B/S-A, N-B/S-B, and N-B/S-D cross one recorded archeological site, while Combined Alternatives N-C/S-A, N-C/S-B, and N-C/S-D do not cross any recorded sites. Nevertheless, all six combined routes have a high probability for affecting prehistoric sites.

The combined routes were also evaluated based on engineering criteria, including construction cost. These costs range from approximately $87.4 million for Combined Alternative N-C/S-B to $101.5 million for Combined Alternative N-B/S-A. Combined Alternative N-C/S-A has a construction cost estimated at $95.1 million. The proximity to existing developed areas was also used to evaluate the different alternatives. In general, the closer the alternative was to existing developed areas, the more traffic it was predicted to handle and the less sprawl it would induce. Combined Alternative N-C/S-A is the closest of the six combined routes to the City of Tyler and accompanying urbanized areas.

The similarity in impacts to the human and natural environments between the combined routes makes issues such as construction cost and proximity to existing developed areas more important in evaluating the relative merit of each combined route. A complete analysis of potential environmental impacts, cost and engineering issues identified Combined Alternative N-C/S-A as the preferred alternative for Loop 49 West. The choice of Combined Alternative N-C/S-A would be consistent with the recommendations of the Steering Committee regarding the placement of the roadway in the closest possible proximity to existing developed areas.

When all resource categories were considered, Combined Alternative N-C/S-A was determined to be the environmentally preferred alternative. While this route would appear to impact more wetland acres than the others (based on National Wetland Inventory maps), it would have the lowest impacts on woodland acres, floodplains and known archeological sites while best following the aforementioned resource agency recommendations regarding proximity to development.

MEASURES TO MINIMIZE HARM

All practicable measures to minimize harm have been incorporated into the FEIS. These measures are discussed below.

Alternative N-C/S-A would result in the relocation of approximately 34 homes and one public building. One commercial structure will require relocation as a result of Alternative N-C/S-A. Relocation assistance will be provided by TxDOT in accordance with the provisions of the Civil Rights Act of 1968, the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, and the Housing and Urban Development Act of 1974.

Visual impacts resulting from the project will be minor. These impacts will be mitigated within the right-of-way by using existing natural vegetative cover as a buffer and by planting native species for aesthetic enhancement. Parkway sections in residential areas will limit secondary commercial development to interchanges, thus lessening noise and visual impacts.

The construction of Loop 49 West will conform to TxDOT and Federal Highway Administration (FHWA) specifications and guidelines. Prior to beginning construction, a Storm Water Pollution Prevention Plan (SW3P) will be developed according to Environmental Protection Agency and Texas Natural Resource Conservation Commission rules

and guidelines, respectively. The plan will include procedures for installing, maintaining and removing the temporary storm water controls to be used during construction.

Approximately 20 residences would experience relative noise impacts as a result of the preferred alternative's construction. However, noise abatement measures were not found to be reasonable or effective and are not proposed.

Following right-of-way acquisition, a field wetland delineation will be completed for the preferred alternative. The results of this delineation will be used to determine permit requirements. It is anticipated that an individual permit from the U.S. Army Corps of Engineers will be required prior to construction. Impacts to wetland areas detailed in this permit will be mitigated as provided by the Memorandum of Agreement (MOA) between the Environmental Protection Agency and the U.S. Army Corps of Engineers. The MOA outlines the objectives for the determination of mitigation under the Clean Water Act Section 404(b)(1) Guidelines and provides guidance to Corps and Environmental Protection Agency personnel for implementing the Guidelines.

The hydraulic design practices for this project will be in accordance with current TxDOT and Federal Highway Administration design policy and standards. The roadway facility will be designed to accommodate a 100-year flood, inundation of the roadway being acceptable.

Cultural resource sites may be impacted by the preferred alternative. All cultural resource surveys and their coordination with the Texas Historical Commission (THC) will be completed prior to construction. Should discovery of archeological sites occur, proper survey and preservation activities will be coordinated with FHWA, TxDOT, THC, and the Advisory Council on Historic Preservation. The mitigation of cultural resource sites will be pursued in compliance with Section 106 of the National Historic Preservation Act and the Texas Antiquities Code.

MONITORING OR ENFORCEMENT PROGRAM

TxDOT and FHWA will include environmental mitigation commitments and conditions in the construction plans, where applicable. These commitments and conditions are discussed in "Section 5.2 Recommendations for Mitigation" of the FEIS. A summary of relevant commitments in the FEIS is included, as follows:

An individual permit for wetland impacts is anticipated in order to comply with Section 404 of the Clean Water Act. The Tyler District will apply for a permit prior to construction pursuant to its Memorandum of Agreement (MOA) with resource protection agencies regarding the Anderson Tract Mitigation Project for Highway Impacts to Wetlands Requiring Department of the Army Permits.

TxDOT will initiate consultation with the State Historic Preservation Officer (SHPO) regarding the scope of additional archeological investigations in accordance with the terms of the Programmatic Agreement and Memorandum of Understanding.

Erosion and sedimentation controls will be coordinated with the Environmental Protection Agency and the Texas Natural Resources Conservation Commission. These include temporary holding ponds, silt fences, diversion dikes, rock berms, sediment containment ponds, and application of straw mulch, mulch netting, and synthetic matting. TxDOT construction phase specifications will provide contractors and supervising engineers with detailed guidance for the implementation of protective measures. These specifications include Items 162 (Sodding for Erosion Control), 164 (Seeding for Erosion Control), 169 (Soil Retention Blankets), 190 (Roadside Planting), and 506 (Temporary Erosion, Sediment, and Water Pollution Control).

COMMENTS ON FINAL ENVIRONMENTAL IMPACT STATEMENT

No substantive comments on the FEIS have been received at this time.

TRD-200107619
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: December 7, 2001

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Texas Veterans Land Board

Request for Qualifications for Architectural/Engineering Services Texas State Veteran's Cemetery Program

The Texas Veterans' Land Board is interested in procuring Architectural Services for the design and construction of up to seven state veterans' cemeteries. These services will provide for site investigation, environmental documentation, concept design submittal, and preparation of plans and specifications for the construction of the cemeteries, project administration, and other incidental and related work. The master plan will incorporate building designs based on furnished plans from the United States Department of Veterans Affairs and will include, but not be limited to, some or all of the following: administration building(s), maintenance building(s), committal service shelters, assembly area, columbarium, mausoleum, main entrance area, roadways, bridges, burial areas, environmental mitigation, landscaping, fences, signage, site furnishings, irrigation and utilities.

The architect should have a licensed/registered landscape architect as members of the firm, or team, with experience in the master planning and design of cemeteries, large institutional campuses, recreational facilities, parks, or similar land development projects.

Interested firms are requested to respond with statements of qualifications indicating: understanding of the project, evidence of ability to perform, profile of personnel to be involved, experience in designing like facilities, references, and fiscal stability. Applicants must possess the experience to accomplish the work and be licensed in the State of Texas. Preference will be given to firms with working offices in the State of Texas. The master plan, schematic, and design development will include all appropriate engineering and architectural disciplines and a firm estimate of construction cost will be required. Applicants will be rated based on the relevant experience of both the firm(s) and assigned individuals, the applicant's capacity to do the work, record of past performance on USDVA and other federal work, master planning on projects of similar scale and scope, geographic consideration and participation of Historically Underutilized Businesses (HUBs). The state's HUB goal for subcontractors is 26% of the total construction cost. Award of a contract is dependent upon the availability of funds. Firms interested in providing the services specified in this document must have a minimum of $1 million of professional liability insurance at the time a contract is signed, and must maintain that insurance for the duration of the project.

An information packet and further information may be obtained by contacting Larry R. Soward by phone (512) 936-1927, by fax (512) 463-5248, or via email at larry.soward@glo.state.tx.us. The deadline for submission is January 18, 2002, by 3 p.m. Central Standard Time. Emailed or faxed copies will not be accepted.

Please submit five copies of your firm's qualifications to: By Mail: Texas Veterans' Land Board; Attn: Larry R. Soward; P.O. Box 12873; Austin, Texas 78711. Or , in person: Texas Veteran's Land Board; Stephen F. Austin Building, Room B-30; 1700 N. Congress; Austin, Texas 78701.

TRD-200107804
Larry R. Soward
Chief Clerk, General Land Office
Texas Veterans Land Board
Filed: December 12, 2001

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Request for Qualifications for Architectural/Engineering Services Texas State Veteran's Home Program

The Texas Veterans' Land Board (TVLB) is interested in procuring Architectural/Engineering Services (A/E) for the review, modification and adaptation of existing plans, specifications and designs for two new Texas State Veterans' Homes (TSVH) that will provide long-term skilled nursing care facilities for Texas veterans, and to assist the TVLB in the oversight of construction of the new homes. Oversight will include, but not be limited to, assisting the TVLB in the selection of a general construction contractor, assisting in the solicitation of bids from construction contractors and subcontractors, reviewing cost estimates and bids, and assisting the TVLB with the final preparation and presentation of the construction grant proposal to the United States Department of Veterans Affairs (USDVA) for the construction portion of the project. Further, the A/E may be requested to assist the TVLB in evaluating options of reconfiguring existing buildings or facilities that might be available to the TVLB for conversion to state veterans' homes.

The site locations for the two new homes have not been determined to date. The TVLB owns the as-built plans and other architectural and construction related drawings and documents from the four existing veterans homes that have just been completed. The two new homes will generally be designed and constructed from these prototypes; however, site specific or other TVLB requested modifications may be required. The redesigned facilities will be based on site evaluations and funding considerations.

The architectural/engineering firm must be licensed in Texas and have demonstrated experience in the master planning and design of long-term skilled nursing facilities. Interested firms are requested to respond with statements of qualifications indicating: understanding of the project, evidence of ability to perform, profile of personnel to be involved, experience in designing like facilities, references, and fiscal stability. Preference will be given to firms with working offices in the State of Texas. Applicants will be rated based on the relevant experience of both the firm(s) and assigned individuals, the applicant's capacity to do the work, record of past performance on USDVA and other federal work, master planning on projects of similar scale and scope, geographic consideration and participation of Historically Underutilized Businesses (HUBs). The State's HUB goal for subcontractors is 26% of the total construction cost. Award of a contract is dependent upon the availability of funds. A/E firms interested in providing the services specified in this document must have a minimum of $1 million of professional liability insurance at the time a contract is signed, and must maintain that insurance for the duration of the project.

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TRD-200107803
Larry R. Soward
Chief Clerk, General land Office
Texas Veterans land Board
Filed: December 12, 2001

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Texas Workers' Compensation Commission

Correction of Error

The Texas Workers' Compensation Commission (TWCC) adopted amendments to 28 TAC §134.600, concerning Preauthorization, Concurrent Review, and Voluntary Certification of Health Care. The adoption was published in the November 30, 2001, issue of the *Texas Register* (26 TexReg 9874).

The adoption, as submitted by the Commission, contained errors as listed below:

1. Page 9908, right column--Subsection (f)(1)(C) contains a period and semicolon at the end of the phrase. The period should be deleted. The corrected text should read as follows:

"(C) the fact that the employee has reached maximum medical improvement;"

2. Page 9908 right column--Subsection (f)(3)(B) contains a semicolon and a comma at the end of the word "review". The semicolon should be deleted. The corrected text should read as follows:

"(B) Within three working days of receipt or a request for concurrent review, except for health care listed in subsection (i)(1) of this section, which is due within one working day of the receipt of the request."

3. Page 9909, left column--The first sentence of subsection (g) contains an error. The word "request " is followed by an "a". The "a" should be deleted. The corrected sentence should read as follows:

"(g) If the response is a denial of preauthorization the requestor or employee may request reconsideration of the denied health care."

4. Page 9909, right column--In subsection (h)(6) a semicolon should be inserted at the end of the phrase. The corrected text should read as follows:

"(6) all chemonucleolysis;"

5. Page 9910, certification paragraph--The certification erroneously states "the proposal has been reviewed by legal counsel." The corrected paragraph should read as follows:

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

TRD-200107916

♦ ♦ ♦

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).

Texas Register
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The *Texas Register* offers the following services. Please check the appropriate box (or boxes).

Texas Natural Resource Conservation Commission, Title 30

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❑ **Chapter 334** $40 ❑ update service $25/year *(Underground/Aboveground Storage Tanks)*
❑ **Chapter 335** $30 ❑ update service $25/year *(Industrial Solid Waste/Municipal Hazardous Waste)*

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