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How to Use the Texas Register

Information Available: The 11 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Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.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.

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.

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 21 (1996) is cited as follows: 21 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 "21 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 21 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.

Texas Administrative Code

The *Texas Administrative Code* (*TAC*) is the official 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*. West Publishing Company, the official publisher of the *TAC*, publishes on an annual basis.

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 ***Official TAC*** also is available on WESTLAW, West's computerized legal research service, in the TX-ADC database.

To purchase printed volumes of the *TAC* or to inquire about WESTLAW access to the *TAC* call West: **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 26, April 9, July 12, and October 8, 1996). In its second issue each month the *Texas Register* contains a cumulative *Table of TAC Titles Affected* for the preceding month. 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.dd

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The *Table of TAC Titles Affected* is cumulative for each volume of the *Texas Register* (calendar year).

Update by FAX: An up-to-date *Table of TAC Titles Affected* is available by FAX upon request. Please specify the state agency and the TAC number(s) you wish to update. This service is free to *Texas Register* subscribers. Please have your subscription number ready when you make your request. For non-subscribers there will be a fee of $2.00 per page (VISA, MasterCard). (512) 463-5561.

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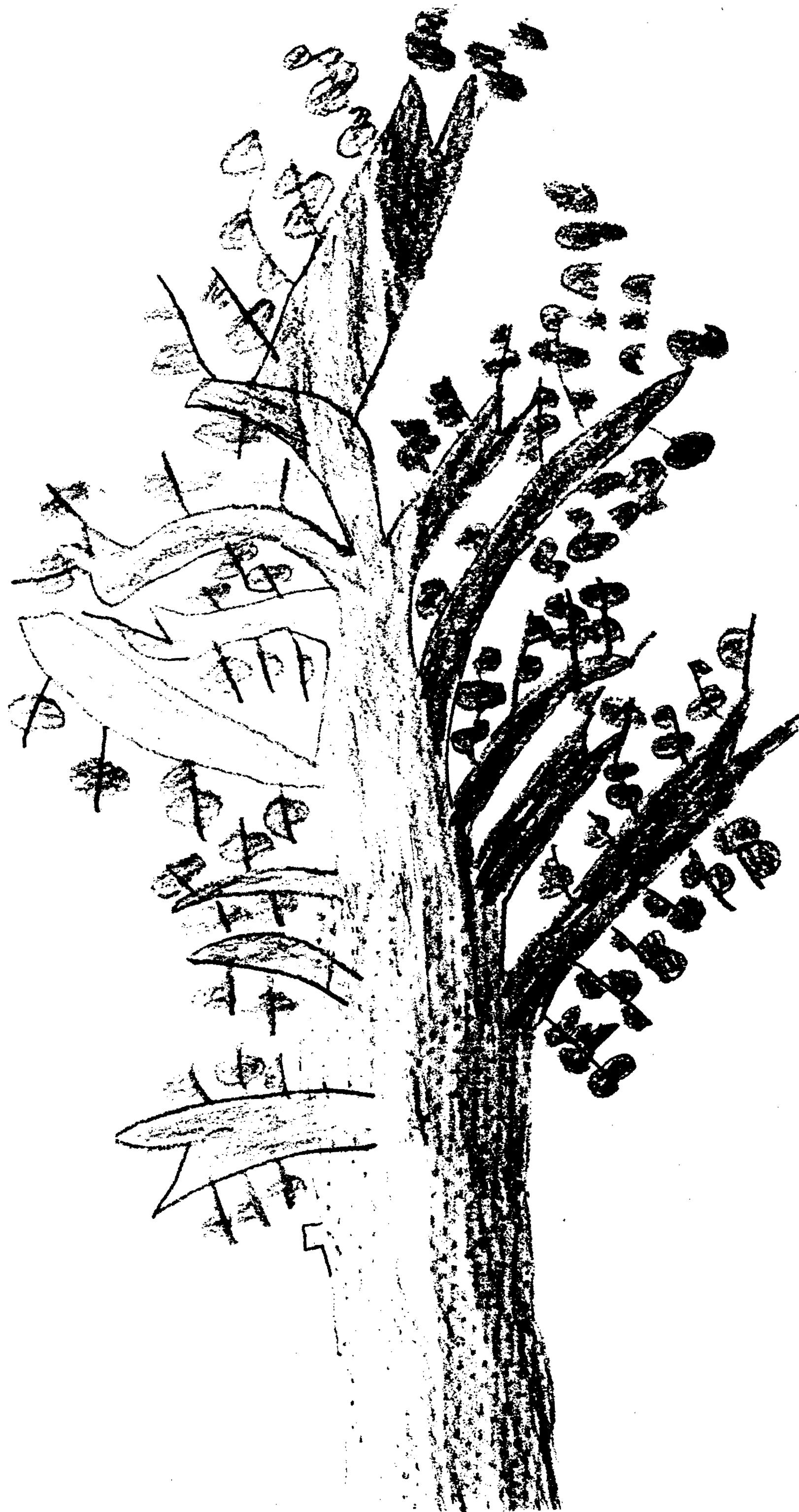

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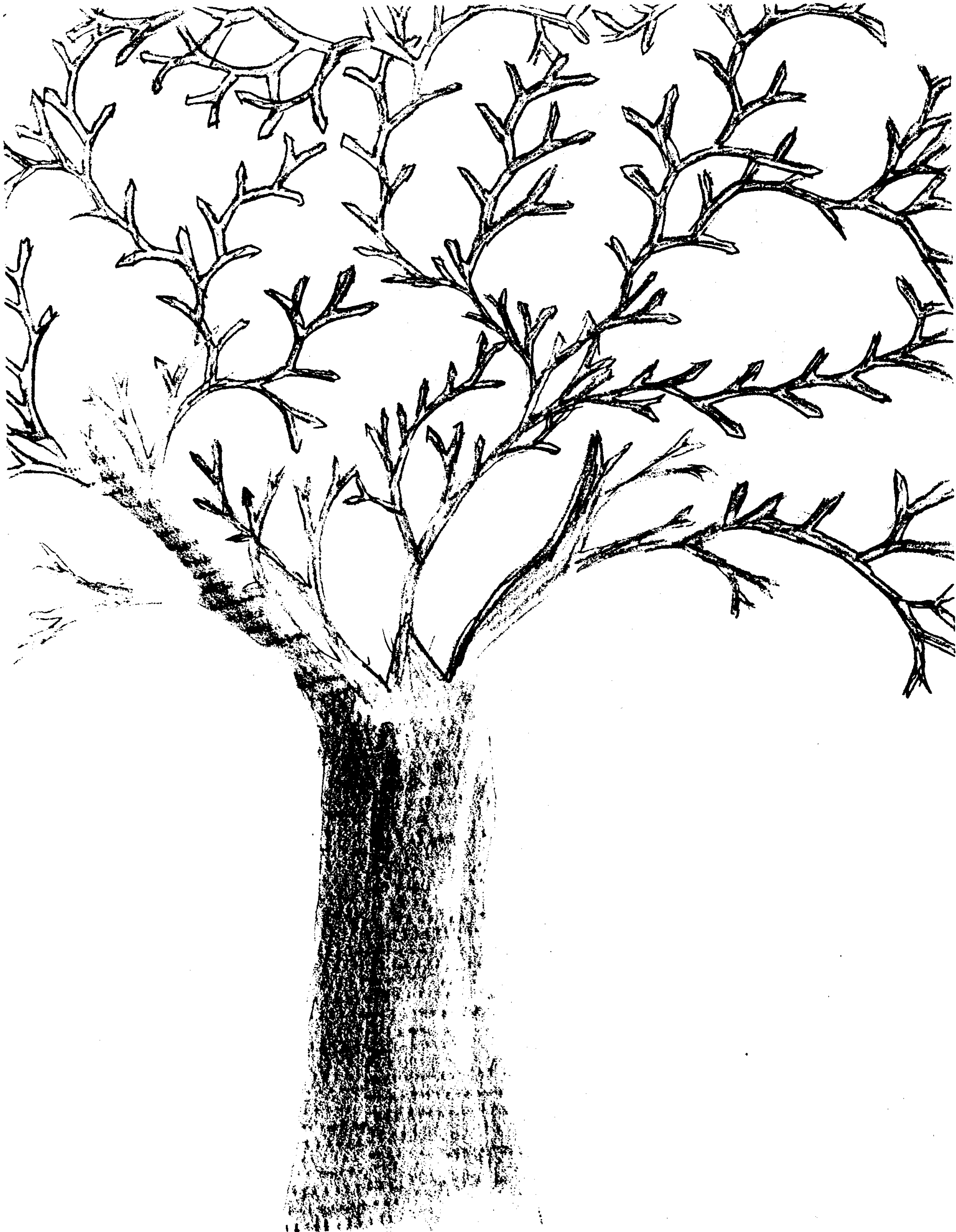

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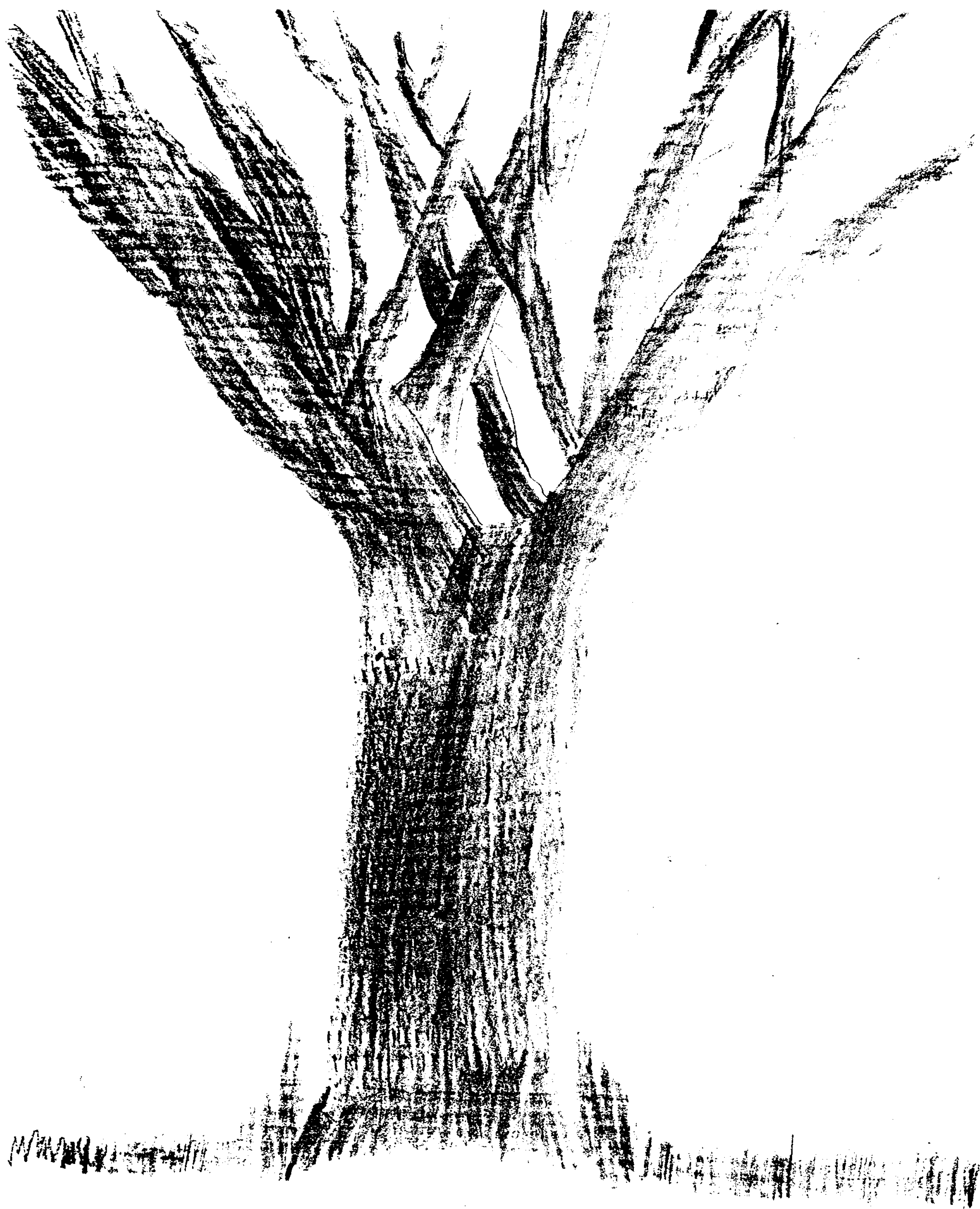

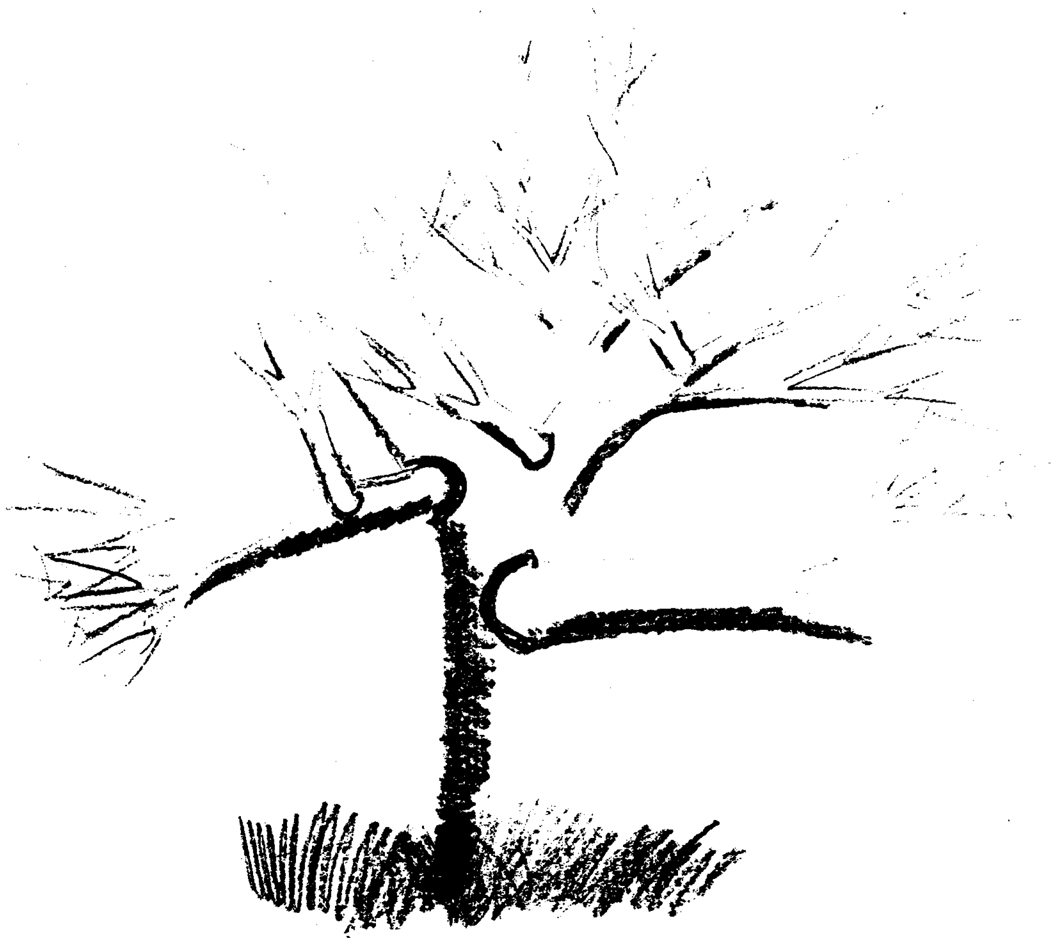

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TEXAS ETHICS COMMISSION

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

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

Ethics Advisory Opinion

EAO-301 (AOR-335) Whether a corporation may make contributions to a candidate for county chair of a political party.

Summary of Opinion Title 15 of the Election Code does not prohibit a corporation from making contributions to a candidate for county chair of a political party.

EAO-302 (AOR-337) Whether the primary election and the general election are considered separate elections for purposes of the expenditure and reimbursement limits in the Judicial Campaign Fairness Act.

Summary of Opinion For purposes of the limits on expenditures and reimbursement of personal funds in the Judicial Campaign Fairness Act, the primary election and the general election are considered separate elections.

EAO-303 (AOR-338) Whether a retired judge who hears cases by assignment may use the title "Judge" in political advertising or campaign communications.

Summary of Opinion The use of the title "Judge" by a retired judge who sits by assignment does not, by itself, represent that the former judge holds an office he does not hold.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

Issued in Austin, Texas, February 9, 1996.

TRD-9602107 Tom Harrison
Executive Director
Texas Ethics Commission

Filed: February 14, 1996

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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 use of **bold text.** [Brackets] indicate deletion of existing material within a section.

TITLE 7. BANKING AND SECURITIES

Part I. State Finance Commission

Chapter 3. Banking Section

Subchapter A. Securities Activities and Subsidiaries

• 7 TAC §§3.1, 3.3, 3.4

The Finance Commission of Texas (the commission) proposes to amend §§3. 1, 3.3, and 3.4, concerning securities activities and subsidiaries, to conform references from the repealed Texas Banking Code to the recently enacted Texas Banking Act. Texas Civil Statutes, Articles 342-101 through 342-1011 (The Texas Banking Code, Chapters I-X) were repealed by the 74th Legislature and replaced by Texas Civil Statutes, Articles 342-1.001 et seq (Texas Banking Act, §1.001 et seq.) (the Act).

As proposed, §3.1(b) provides that a state-chartered bank may not acquire equity securities for which it has acted as agent or broker under this section, except as provided under the Act. The existing section refers to the Texas Banking Code.

Proposed amendments to §3.3 are designed to conform a reference to the Texas Banking Code to the Act, to modify investment limitations to conform to the Act, and to renumber within the section for clarity.

Finally, the proposed amendment to §3.4(c) is designed to change a reference to the Texas Banking Code to the comparable provision in the Act.

Everette D. Jobe, General Counsel, Texas Department of Banking, 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. Jobe also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections is clarity and accuracy in referring to the proper statute. No net economic cost will result to persons required to comply with the sections. No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by the sections.

Comments on the proposal may be submitted in writing to Everette Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294 (512) 475-1290.

Amendment of these sections is proposed pursuant to the department's rule-making authority under the Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act. As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

No statutes or sections are affected by the proposed amendments.

§3.1. Private Placement of Securities.

(a) (No change.)

(b) Except as otherwise permitted by **Texas Civil Statutes, Articles 342-1.001 et seq** [the Texas Banking Code], a state chartered bank may not acquire for its own account any equity securities for which it has acted as agent or broker pursuant to this **section** [regulation].

§3.3. Securities Activities of Subsidiaries of State Banks.

(a) Securities activities permitted. Pursuant to Texas Civil Statutes, §342-5.103(c), and subject [Subject] to the provisions of 12 Code of Federal Regulations **(CFR), §337.4** [Part 337], a state bank may establish or acquire a subsidiary that engages in securities activities; provided, however, that said subsidiary shall comply with all rules and regulations of the Securities and Exchange Commission applicable to registered brokers-dealers. The term "securities activities" means issuing, underwriting, selling, or distributing, or acting as agent or advisor in the issuing, underwriting, selling, or distributing of stocks, bonds, debentures, notes, or other securities.

(b)[(1)] Investment ceiling. **Pursuant to Texas Civil Statutes, Article 342-5.103(b), a** [A] state bank may invest not more than 10% of its capital and certified surplus [nor more than 5.0% of its total assets] in a subsidiary [corporations] engaged in securities activities **that the bank is prohibited from conducting directly**.

(c)[(2)] Capitalization. Any subsidiary corporation engaged in securities activities pursuant to this regulation must comply with any applicable state and federal capital requirements including, but not limited to, those imposed by the Securities and Exchange Commission or the National Association of Securities Dealers.

(d)[(3)] Limitations.

(1)[(A)] Unless otherwise permitted by **Texas Civil Statutes, Articles 342-1.001 et seq** [the Texas Banking Code], a subsidiary of a state bank must dispose of any equity securities acquired for its own account within 90 days after the day of purchase.

(2)[(B)] A state bank may not purchase, in its discretion as fiduciary or managing agent, any security underwritten, distributed, or issued by the bank's securities subsidiary or any security issued by an investment company advised by the subsidiary.

(e)[(4)] Notice. A state bank must file with the [Texas] banking commissioner copies of all notices required to be filed with the Federal Deposit Insurance Corporation under the provisions of 12 **CFR, §337.4** [Code of Federal Regulations Part 337] or any successor regulation.

§3.4. Foreign Banking.

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

(c) The investment limitation of Texas Civil Statutes, Article **342-5.103(b)** [342-513(a)(1)] does not apply to an investment made pursuant to this section. The banking commissioner may approve any activity or investment authorized by this section subject to such restrictions as the banking commissioner deems advisable and consistent with safe and sound banking practices, and may require any investment pursuant to subsection (2) or (3) of this section to constitute a majority interest in the voting securities of the bank or corporation acquired.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601907 Everette D. Jobe
General Counsel, Finance Commission of Texas
State Finance Commission

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 475-1300

♦ ♦ ♦

Subchapter B. General

• 7 TAC §3.21

The Finance Commission of Texas (the commission) proposes new §3.21, concerning reports of financial condition and results of operations, more commonly referred to as "call reports," by state banks subject to regulation by the Banking Commissioner of Texas (commissioner). Acts 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451, effective September 1, 1995, modernized and reorganized the now repealed Texas Banking Code, Texas Civil Statutes, Articles 342-101 et seq (Code), into the Texas Banking Act, Texas Civil Statutes, Articles 342-1.001 et seq (Act).

The Act, §2.009, substantially altered the prior law, Code, Article 342-209. Former Article 342-209 generally required that a state bank make and publish its call report on a quarterly basis in a newspaper of general circulation, and further required that a copy of the call report be posted in the lobby of the state bank at a point accessible to the public. Violation subjected the state bank to a $500 penalty. The Act, §2.009, now directs state banks to submit call reports as required by the commissioner but deletes the statutory publication requirement. However, the commission may by regulation specify other requirements for filing and publishing of call reports.

Section 3.21, as proposed, draws a distinction between state banks subject to Federal Deposit Insurance Corporation (FDIC) regulation and those which are not. Subsection (b) of the proposed section provides that a state bank subject to FDIC regulation need not file a call report with the commissioner in that the filing of the call report with the FDIC is deemed a filing with the commissioner. Subsection (c) provides that all other state banks (i.e., those not subject to FDIC regulation) file quarterly call reports with the commissioner by the proposed due dates in substantially the same form and manner and containing the same information as is required of FDIC-regulated state banks.

Subsection (d), as proposed, requires a state bank to file special call reports as may be requested by the commissioner to permit discharge of the commissioner's duties to monitor the safety and soundness of the bank. The provision may be invoked, for example, to more frequently monitor the affairs of a problem bank or require a detailed report on a particular line of business of concern to the commissioner.

The section as proposed also requires in subsection (e) that all call reports and special call reports contain certain declarations and attestations, and in subsection (f) that call reports (but not special call reports) be posted in the lobby of the state bank at a location accessible to the public. Subsection (g) provides that the public portion of call reports filed or deemed filed with the commissioner are public information. Special call reports and the non-public portions of all other call reports are confidential. Finally, proposed §3.21(h) sets out the penalties for late filings, failures to file, and false or misleading filings.

Sammie K. Glasco, Assistant General Counsel, Texas Department of Banking, has determined that for the first five-year period the section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Glasco also has determined that, for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section is the clarification of statutory requirements to aid the industry in compliance. No net economic cost will result to persons required to comply with the proposed section. No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by this section.

Comments on the proposed section may be submitted in writing to Sammie K. Glasco, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

The new section is proposed under the Act, §1.012, which authorizes the commission to adopt rules to implement and clarify the Act, to preserve the safety and soundness of state banks, and to grant the same rights and privilege to state banks that are or may be granted to national banks domiciled in Texas. The new section is also proposed under the Act, §2.009(b) , which authorizes the commission to adopt rules specifying the form of a call report, including specified confidential and public information; to require public information in call reports of state banks to be published at the times and in the publications and locations the commission determines; and to require call reports to be filed with the commissioner. As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

The Act, §§2.009 and 2.102-2.108, is affected by the proposed section.

§3.21. Bank Call Reports.

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

(1) Act–Texas Civil Statutes, Articles 342-1.001 et seq (Texas Banking Act, §1.001 et seq).

(2) Commissioner–The Banking Commissioner of Texas.

(3) Call report–A report of condition and income in FFIEC form as required by 12 United States Code (USC), §1817, or a report of financial condition and results of operations of a state bank as mandated by the commissioner pursuant to the Act, §2.009.

(4) Department–The Texas Department of Banking.

(5) FDIA–The Federal Deposit Insurance Act (12 USC, §1811 et seq).

(6) FDIC–The Federal Deposit Insurance Corporation.

(7) FFIEC–The Federal Financial Institutions Examination Council.

(8) State bank–A bank as defined by the Act, §1. 002(a)(51).

(b) Reporting requirements of FDIA regulated state banks. Each state bank which is subject to regulation under FDIA will be considered to have filed a copy of its call report with the commissioner if the state bank has filed its call report with the FDIC pursuant to FDIA and FFIEC guidelines and requirements.

(c) Reporting requirements for non-FDIA regulated entities. Each state bank not subject to subsection (b) of this section shall file four call reports annually with the commissioner. Such call reports must be filed with the commissioner no later than April 30, July 31, and October 31 of each year and by January 31 of the subsequent

year, and shall be for the periods ending on March 31, June 30, September 30, and December 31, respectively, of the annual reporting year. The call reports required under this subsection must be in substantially the same form and contain substantially the same information as call reports filed by FDIA-regulated state banks in accordance with FDIA and FFIEC requirements pursuant to subsection (b) of this section. The call report forms, the instructions for completing the reports and the accompanying materials will be furnished to all state banks subject to this subsection, or may be obtained upon request from the Bank and Trust Division, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294. The commissioner may make such modifications and additions to call report form and contents under this subsection as considered necessary in the discretionary discharge of the commissioner's duties, notwithstanding FDIA and FFIEC guidelines and requirements.

(d) Special call reports. In addition to the requirements of subsections (b) and (c) of this section, the commissioner may require a state bank to file and submit a special call report, in such form and manner and containing such information as may be requested, on dates fixed, whenever in the commissioner's discretion the special call report is necessary in the performance of the commissioner's supervisory duties related to the safety and soundness of the state bank. Special call reports must contain only such information as is specifically requested by the commissioner.

(e) Call report declarations and attestations. Each call report or special call report required to be filed under subsections (c) and (d) of this section must contain a declaration by the president, a vice president, the cashier, or by another officer designated by the board of directors of the state bank to make such declaration, that the report is true and correct to the best of such individual's knowledge and belief. The correctness of the call report or special call report must also be attested by the signatures of at least three of the directors of the state bank other than the officer making the declaration. The declaration of the directors must state that the call report or special call report has been examined by them and is true and correct to the best of their knowledge and belief.

(f) Lobby notice and publication. The latest call report filed with the commissioner pursuant to subsections (b) and (c) of this subsection must be posted in the lobby of the state bank at a point accessible to the public. A state bank is not required to publish its call report in a newspaper or other media unless specifically directed to do so by the commissioner. A state bank required to publish its call report by the commissioner shall publish the report in a newspaper or other medium of general circulation as directed by the commissioner.

(g) Confidentiality. Pursuant to the Act, §2.101, call reports filed under subsections (b) or (c) of this section are public information to the extent that such reports are considered public records under the FDIA, implementing federal regulations, and FFIEC guidelines, and may be published or otherwise disclosed to the public. Special call reports filed pursuant to subsection (d) of this section and non-public portions of call reports filed pursuant to subsections (b) or (c) of this section are confidential, subject only to such disclosure as may be permitted by the Act, §§2.102-2.108, or by §3.111 of this title (relating to Confidential Information).

(h) Penalties for failure to file or for filing a report with false or misleading information. A state bank which fails to make, file, or submit a call report or a special call report or fails to timely file a call report or special call report as required by this section is subject to a penalty not exceeding $500 a day to be collected by the attorney general on behalf of the commissioner. Any state bank which makes, files, submits or publishes a false or misleading call report or special call report is subject to an enforcement action pursuant to the Act, Chapter 6.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601908 Everette D. Jobe
General Counsel, Finance Commission of Texas
State Finance Commission

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 475-1300

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• 7 TAC §3.22

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the State Finance Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Finance Commission of Texas (the commission) proposes the repeal of §3.22, concerning restrictions on loan fees on certain categories of loans. A new §12.62 in this title is proposed in this issue of the *Texas Register* to address permissible loan fees.

The repeal is necessary because of changes in law made regarding loan fees as a result of the recent enactment of Texas Civil Statutes, Articles 342-1. 001 et seq (Texas Banking Act, §§1.001 et seq) (the Act), particularly by the Act, §5.202. Required amendments are sufficiently extensive to warrant repeal and replacement of §3.22 by a new section.

Everette D. Jobe, General Counsel, Texas Department of Banking, 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 or administering the repeal.

Mr. Jobe also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal is clarification of statutory requirements through elimination of obsolete provisions. No net economic cost will result to persons required to comply with the repeal. No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by this repeal.

Comments on the proposed repeal may be submitted in writing to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

The repeal of this section is proposed pursuant to rulemaking authority under the Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act. As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

The statute affected by the proposed repeal is Texas Banking Act, §5.202.

§3.22. Restrictions on Loan Fees on Certain Categories of Loans.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601909 Everette D. Jobe
General Counsel, Finance Commission of Texas
State Finance Commission

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 475-1300

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• 7 TAC §3.35

The Finance Commission of Texas (the commission) proposes an amendment to §3.35, concerning safe deposit box facilities, to change references from the repealed Texas Banking Code to the recently enacted Texas Banking Act. Texas Civil Statutes, Articles 342-101 through 342-1011 (The Texas Banking Code, Chapters I-X) were repealed by the 74th Legislature and replaced by Texas Civil Statutes, Articles 342-1.001 et seq (Texas Banking Act, §1.001 et seq) (the Act).

Proposed amendments to §3.35(a) and (f) are designed to change references to the Texas Banking Code to comparable provisions in the Act for clarity.

Everette D. Jobe, General Counsel, Texas Department of Banking, has determined that, for the first five-year period the section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Jobe 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 is clarity and accuracy in referring to the proper statute. No net economic cost will result to persons required to comply with the section. No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by this section.

Comments on the proposal may be submitted in writing to Everette Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294 (512) 475-1290.

The amendment is proposed pursuant to the department's rule-making authority under the Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act. As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

No statutes or sections are affected by the proposed amendment.

§3.35. Safe Deposit Box Facilities.

(a) **Purpose** [General]. Texas Civil Statutes, Article **342-8.107** [342-906] (the Act) requires financial institutions to imprint keys issued to safe deposit boxes after September 1, 1992, with the financial institution's routing number. In addition, it requires a report to the Department of Public Safety if the routing number is altered or defaced so that the correct routing number is illegible. The purpose of this **section** [regulation] is to clarify the requirements of this article.

(b)-(e) (No change).

(f) Effective Date; Applicability to Existing Keys. A financial institution must imprint all safe deposit box keys **issued** on or after September 1, 1992. Institutions may begin imprinting keys prior to that date. The imprinting requirement shall apply to all keys currently outstanding as well as to all keys issued after September 1, 1992. However, keys for boxes rented prior to September 1, 1992 need not be imprinted with the routing number unless and until a customer presents a safe deposit box key at a financial institution for access to a box. Nothing in this **section** [regulation] or the Act shall be construed to require a financial institution to provide notice to its safe deposit box customers or to otherwise require such customers to present their keys for imprinting. However, on the first date after September 1, 1992 that a customer presents a key which has not been imprinted, the financial institution shall imprint the key with the routing number as required by **the Act** [Article 342-906].

(g) (No change).

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601910 Everette D. Jobe
General Counsel, Finance Commission of Texas
State Finance Commission

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 475-1300

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Chapter 4. Currency Exchange

Subchapter A. General

• 7 TAC §4.6

The Finance Commission of Texas (the commission) proposes to amend §4.6, concerning license exemptions available to armored car services or other courier services engaged in the business of transporting currency or other items for deposit or payment. Section 4.6 is proposed to be amended by adding a new subsection (d) that clarifies the exemption provided by Texas Civil Statutes, Article 350, §3(f).

Under Texas Civil Statutes, Article 350, §2, a person may not engage in the business of currency exchange, transportation, or transmission in this state without a license issued by the banking commissioner. Texas Civil Statutes, Article 350, §3(f), grants an exemption from the licensing requirement of §2 to a person engaged in the business of currency transportation who holds a permit issued under Texas Civil Statutes, Article 911b, §6-dd. Although Texas Civil Statutes, Article 350, §3(f), made specific reference only to Texas Civil Statutes, Article 911b, and did not reference Texas Civil Statutes, Article 4413(29bb), it is clear that the Texas Legislature's intent was to exempt licensed armored car services or other courier services engaged in the business of transporting currency or other items for deposit or payment. An armored car company or courier company could not engage in business without possessing licenses under both statutes; therefore, Article 4413(29bb) is incorporated by implication in Article 350, §3(f).

Texas Civil Statutes, Article 911b, §6-dd, authorized the Texas Railroad Commission to regulate commercial motor vehicles in Texas, including armored motor vehicles, and provided for the issuance of a permit when an applicant demonstrated financial and operating fitness and showed that the public interest would be served. Texas Civil Statutes, Article 911b, was repealed in connection with the enactment of Texas Civil Statutes, Article 6675c, effective September 1, 1995, see Acts 1995, 74th Legislature, Chapter 705, §3 and §31(a)(4).

Texas Civil Statutes, Article 6675c, assign oversight responsibility and regulation of commercial vehicles in Texas to the Texas Department of Transportation. A motor carrier may not operate a commercial motor vehicle on a road or highway in Texas unless the carrier registers with the Texas Department of Transportation. A registration application must disclose the name of the owner and the principal business address of the motor carrier; the name and address of the legal agent for service of process of the carrier in Texas; a description of each vehicle, including the motor vehicle identification number, make, and unit number; a statement as to whether the carrier proposes to transport household goods or hazardous materials; and, a declaration that the applicant has knowledge of all laws and rules relating to motor carrier safety. Proof of insurance or financial responsibility must also be furnished to the Texas Department of Transportation. Article 6675c does not regulate the professional licensing standards of armored car and courier services.

Texas Civil Statutes, Article 4413(29bb), §13(a), require that all armored car companies and courier companies, among others, obtain a license from the Texas Board of Private Investigators and Private Security Agencies. An applicant for a license must be at least 18 years of age; not have been convicted of a misdemeanor involving moral turpitude during the 7-year period preceding the date of the application unless a full pardon has been granted; not have been declared incompetent by reason of mental defect or disease by any court; not be suffering from habitual drunkenness or from narcotics addiction or dependence; and not have been discharged from the armed services of the United States under other than honorable conditions. An applicant must also have at least two consecutive years of prior experience.

Texas Civil Statutes, Article 6675c, supersede Article 911b for the

purpose of regulating the motor safety of commercial motor vehicles in Texas but, unlike repealed Article 911b, it does not establish and regulate the professional standards of armored car and courier companies. Texas Civil Statutes, Article 4413(29bb), specifically regulates armored car and courier companies, and includes professional licensing standards. Texas Civil Statutes, Article 4413(29bb), enacted in 1969 and incorporated by implication in repealed Article 911b, is also incorporated by implication in the successor statute, Texas Civil Statutes, Article 6675c.

The purpose of proposed subsection (d) is to implement the Texas Legislature's intent to exempt licensed armored car services or other courier services from the licensing requirements of this article by clarifying that, subsequent to the repeal of Article 911b, an armored car service or other courier service, to be exempt under Texas Civil Statutes, Article 350, §3(f), must be registered and licensed under Texas Civil Statutes, Article 4413(29bb) , and Article 6675c.

Everette D. Jobe, General Counsel, Texas Department of Banking, has determined that for the first five-year period the section is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the section.

Mr. Jobe 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 this section is the clarification of highly complex statutory standards to aid the industry in compliance. No net economic cost will result to persons required to comply with the proposed section. No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by this section.

Comments on the proposed amendment may be submitted in writing to Jerry Sanchez, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

Amendment of this section is proposed under Article 350, §7, which authorizes the commission to adopt implementing rules.

Texas Civil Statutes, Article 350, §3(f), are affected by this proposed amendment.

§4.6. Exemptions.

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

(d) Armored Car and Courier Services. An armored car service or other courier service, engaged in the business of transporting currency or other items for deposit or payment, must be registered and licensed under both Texas Civil Statutes, Article 4413(29bb), and Texas Civil Statutes, Article 6675c, to be exempt from the licensing requirement of the Act applicable to currency transportation. This exemption does not authorize an armored car service or other courier service to engage in the business of currency exchange or transmission without a license issued under the Act.

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

Issued in Austin, Texas, on December 15, 1995.

TRD-9601911 Everette D. Jobe
General Counsel, Finance Commission of Texas
State Finance Commission

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 475-1300

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Part II. Texas Department of Banking

Chapter 10. Trust Companies

• 7 TAC §§10.4, 10.10, 10.11

The Finance Commission of Texas (the commission) proposes amendments to §§10.4, 10.10, and 10.11, concerning advertising, requirements applicable to applying for and maintaining status as an exempt trust company, and revocation of exempt trust company status, respectively.

Proposed amendments to §10.4 forbid, with exceptions, the use of certain terms in a business name or advertisement without written approval of the banking commissioner, provide additional notice that violation of this section is subject to enforcement action under the Act, §6.201, and make other changes for clarification. The proposed section represents an adaptation of Texas Civil Statutes, 342-8.004, to the trust company industry, applicable to trust companies pursuant to Texas Civil Statutes, Article 342-1102.

Proposed amendments to §10.10 and §10.11 amend citations in these sections to conform references from repealed provisions of The Texas Banking Code to the recently enacted Texas Banking Act. Texas Civil Statutes, Articles 342-101-342-1011 (The Texas Banking Code, Chapters I-X) were repealed by the 74th Legislature and replaced by Texas Civil Statutes, Articles 342-1. 001 et seq (Texas Banking Act, §1.001 et seq) (the Act). An amendment is also proposed to the definition of "direct family member" in §10.10(a) to refer to the fourth degree of consanguinity. Current §10.10(a) limits the term to the second degree of consanguinity.

Sharon Gillespie, Assistant General Counsel, Texas Department of Banking, 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.

Ms. Gillespie also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections is better regulation of misleading advertising, greater clarity and accuracy in referring to statutory authorities, and liberalization of the basis for exemption from regulation. No net economic cost will result to persons required to comply with the sections. No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by the sections.

Comments on the proposal may be submitted in writing to Sharon Gillespie, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294 (512) 475-1300.

Amendment of these sections is proposed pursuant to the department's rule-making authority under the Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act, and (with respect to proposed §10.4) under Texas Civil Statutes, Article 342-1106(b), which permits the Department to promulgate "general rules and regulations as may be necessary to accomplish the purposes" of Texas Civil Statutes Articles 342-1101 et seq.

Texas Civil Statutes, Article 342-1103, §6, is affected by the proposed amendments.

§10.4. Advertising.

(a) Except as provided in subsection (c) of this section, a person may not use in a business name or advertising the words "trust," "trust company," or any similar term or phrase, any words pronounced "trust" or "trust company," any foreign words which mean "trust" or "trust company," or any other term that tends to imply the business is holding out to the public as engaged in the business of a fiduciary for hire unless the banking commissioner has approved the use in writing after finding that the use will not be misleading. This subsection does not prohibit an individual from engaging in the business of a fiduciary for compensation or from using the words "trust" or "trustee" for the purpose of identifying assets held or actions taken in an existing fiduciary capacity.

(b)[(a)] No advertisement published by or on behalf of a trust company incorporated under Texas Civil Statutes, Articles 342-1101 et seq, shall include the following:

(1) a guaranteed rate of return or interest rate on funds deposited in trust;

(2) any statements that tend to deceive or mislead the public;

(3) the term "bank," "bank and trust," any words pronounced "bank" or "bank and trust," or any foreign words which mean "bank" or "bank and trust," unless the trust company is affiliated with a state or national bank or bank holding company or **excepted under subsection (c) of this section**; or

(4) any other term that may deceive the public into belief that the [person or] company is engaged in the banking business.

(c) Subsections (a) and (b)(3) of this section do not apply to:

(1) a depository or trust institution authorized under the laws of this state to conduct a trust business in this state;

(2) another entity organized under the laws of this state, another state, the United States, or a foreign sovereign state to the extent that:

(A) the entity is authorized under its charter or the laws of this state or the United States to use a term, word, character, ideogram, phonogram, or phrase prohibited by subsection (a) or (b)(3) of this section; and

(B) the entity is authorized by the laws of this state or the United States to conduct the activities in which the entity is engaged in this state.

(d)[(b)] Advertisements **published by or on behalf of a trust company** shall be retained in the company's records for examination by department personnel.

(e) A person who violates this section is subject to an enforcement action initiated by the banking commissioner under Texas Civil Statutes, Articles 342-6.201 et seq (Texas Banking Act, §6.201 et seq).

§10.10. Requirements to Apply for and Maintain Status as Exempt Trust Company.

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

(1) Act-Texas Civil Statutes, **Articles 342-1.001 et seq (Texas Banking Act, §1.001, et seq** [Article 342-1101 et seq].

(2) (No change.)

(3) Code-Texas Civil Statutes, Articles 342-1101 et seq.

(4)[(3)] Commissioner-The Banking Commissioner of Texas.

(5) [(4)] Control-To own or possess the power to vote 25% or more of the voting securities of the exempt trust company or to have the ability to control in any manner the election of a majority of the board of directors of the exempt trust company.

(6)[(5)] Department-The Texas Department of Banking.

(7) [(6)] Direct family member-Any person who is related within the **fourth** [second] degree of affinity or consanguinity to a person who controls an exempt trust company.

(8)[(7)] Examination-The process of verifying the annual certification of exempt status under the Code, either by a field examination or an internal Department review of exempt trust company records and reports in lieu of a field examination.

(9)[(8)] Exempt Trust Company-A trust company which has been granted an exemption by the Commissioner, is current in filing annual certifications of exempt status with the Department, and is not currently transacting business with the general public.

(10)[(9)] Transact business with general public-Any sales, solicitations, arrangements, agreements, or dealings to provide trust or other business services, whether or not for a fee, commission, or any other type of remuneration, with any individual that is not a direct family member, or a sole proprietorship, partnership, joint venture, association, trust, estate, business trust, or corporation that is not 100% owned by one or more direct family members.

(b) Application for trust company exemption.

(1) A trust company requesting an exemption **under the Code, Article 342-1103, §6,** [from the provisions of the Act] shall file an application with the Commissioner containing the following:

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

(2) (No change.)

(c) Requirements to maintain exemption status under the **Code** [Act].

(1) To maintain status as an exempt trust company under the **Code** [Act], the trust company shall comply with the following:

(A)-(B) No change.)

(C) An exempt trust company shall comply with the [change of domicile] provisions of §15.62 of this title (relating to Exempt Trust Companies) [Texas Civil Statutes, Article 342-311 (formerly Article 342-314 until redesignated and amended by Acts 1993, 73rd Legislature, Chapter 765, §3, effective August 30, 1993)]. Requests for change of **home office** [domicile] shall comply with the address and telephone requirements of subsection (b)(1)(E) of this section.

(D) (No change.)

(2) (No change.)

(d) (No change.)

§10.11. Revocation of Exempt Trust Company Status.

(a) (No change.)

(b) Authority to revoke. The commissioner shall have authority to revoke the exempt status of a trust company in the following circumstances:

(1) (No change.)

(2) the exempt trust company makes a false statement under oath on any document required to be filed by the **Code** [Act] or by any rule promulgated by the department; or

(3) (No change.)

(4) the exempt trust company fails to comply with **§15.62 of this title (relating to Exempt Trust Companies),** [the Banking Code, Article 342-311 (Change of Domicile)] or with the address and telephone requirements of §10.10(b)(1)(E) of this title; or

(5)-(6) (No change.)

(7) the exempt trust company violates any provision of the **Code or** Act applicable to exempt trust companies; or

(8) (No change.)

(c) Notification of revocation of exemption. If the commissioner finds that an exempt trust company has violated any of the

requirements of the Code [Act] or subsection (b) of this section, the commissioner may revoke the trust company's exemption by notifying the company by certified mail, hand delivery, or express mail service that the trust company's exempt status has been revoked. The revocation of exempt trust company status shall be effective upon mailing of the notification by the commissioner or at the time the commissioner delivers the notification to the carrier for hand or express delivery. Once the notification is effective, the trust company shall be subject to all of the requirements and provisions of the **Code and** Act applicable to non-exempt trust companies.

(d) Compliance period. A trust company shall have five calendar days after the notice is effective to comply with all of the provisions of the **Code and** Act applicable to non-exempt trust companies, including such capitalization requirements as shall be determined by the commissioner to be necessary to assure the safety and soundness of the trust company. If, however, the commissioner determines, at the time of revocation, that the trust company has been engaging in or attempting to engage in acts intended or designed to deceive or defraud the general public, the commissioner may waive, in the commissioner's sole discretion, the five calendar day compliance period. In case of such fraudulent or deceptive activities, the commissioner may immediately initiate action under the **Code** [Act], or as provided in subsection (e) of this section.

(e) Remedies for failure to comply. If the trust company does not comply with all of the provisions of the **Code and** Act, including such capitalization requirements as have been determined by the commissioner as necessary to assure the safety and soundness of the trust company, within the five-calendar-day period, the commissioner may institute one or more of the following actions as soon as practicable:

(1) place the trust company into supervision or in conservatorship in accordance with the **Code** [Act]; or

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

(5) take any other action or remedy prescribed by the [Banking] Code, the Act, or any applicable rule or regulation.

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

Issued in Austin, Texas, on December 15, 1995.

TRD-9601912 Everette D. Jobe
General Counsel
Texas Department of Banking

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 475-1300

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Chapter 11. Miscellaneous

The Finance Commission of Texas (the commission) proposes the repeal of §§11.1-11.5, 11.21-11.26, 11.41-11.48, and 11.82, concerning miscellaneous banking regulatory matters. Remaining in Chapter 11 will be §§11.27, 11.81, and 11.83, which contain currently useful guidance although it is likely these rules will be amended and relocated in the near future. Sections proposed for repeal are published separately in groups organized by undesignated head as required by the *Texas Register*, preceded by this common preamble.

The repeal is necessary because of changes in law made regarding bank regulation as a result of the recent enactment of Texas Civil Statutes, Articles 342-1.001 et seq (Texas Banking Act, §§1.001 et seq) (the Act), but primarily because the sections proposed for repeal have not been reviewed in several years and by recent examination have been determined to be outdated and obsolete as discussed further in this preamble.

Sections 11.1-11.5 govern real estate loans. The statutory underpinning for these sections has been amended on several occasions in such a way as to render these sections obsolete. Real estate loans are now heavily regulated by federal law such as 12 Code of Federal Regulations (CFR), §§34.1 et seq, 12 CFR, §§225.61 et seq, and by 12 CFR, §§365.1 et seq, among others.

Sections 11.21-11.26 are general sections setting out definitions and procedures that are now set forth elsewhere, establishing penalties for inadequate reserves, an area regulated by the Board of Governors of the Federal Reserve System, and certain other matters, all of which are now obsolete.

Opinion requests to the banking commissioner are governed by §§11.41-11. 48 and these sections are not followed in practice. These sections are therefore superfluous.

Finally, §11.82 governs certain investments by banks that are clearly permissible under the Act. This section is therefore also superfluous.

Everette D. Jobe, General Counsel, Texas Department of Banking, 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 or administering the repeal.

Mr. Jobe also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeal is clarification of statutory requirements through elimination of obsolete provisions. No net economic cost will result to persons required to comply with the repeals. No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by these repeals.

Comments on the proposed repeals may be submitted in writing to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

Real Estate Loans

• 7 TAC §§11.1-11.5

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

The repeal of these sections is proposed pursuant to rulemaking authority under the Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act. As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

No statutes are affected by the proposed repeal.

§11.1. Real Estate Loans.

§11.2. Wrap-Around Mortgage.

§11.3. Loans under Texas Banking Code Chapter V, Article 4.4.

§11.4. Loans under Texas Banking Code Chapter V, Article 4.7.

§11.5. Loans which Are Not Real Estate Loans.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601913 Everette D. Jobe
General Counsel
Texas Department of Banking

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 475-1300

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General

• 7 TAC §§11.21-11.26

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

The repeals are proposed pursuant to rulemaking authority under the Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act. As required by the Act, §1. 012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

No statutes are affected by the proposed repeals.

§11.21. Definitions.

§11.22. Computing Time.

§11.23. Penalty for Inadequate Reserves.

§11.24. Leases and Liability.

§11.25. Qualifications of Examiners.

§11.26. Recommended Fidelity Insurance Coverage.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601914 Everette D. Jobe
General Counsel
Texas Department of Banking

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 475-1300

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Formal Opinions

• 7 TAC §§11.41-11.48

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

The repeals are proposed pursuant to rulemaking authority under the Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act. As required by the Act, §1. 012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

No statutes are affected by the proposed repeals.

§11.41. Submission of Requests.

§11.42. Content of Requests.

§11.43. Requirements for Consideration.

§11.44. Consultation by Commissioner.

§11.45. Copies.

§11.46. Effect.

§11.47. Scope.

§11.48. Refusal of Request.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601915 Everette D. Jobe
General Counsel
Texas Department of Banking

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 475-1300

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Same Powers as National Banks

• 7 TAC §11.82

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed pursuant to rulemaking authority under the Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act. As required by the Act, §1. 012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

No statutes are affected by the proposed repeal.

§11.82. Investments.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601916 Everette D. Jobe
General Counsel
Texas Department of Banking

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 475-1300

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Chapter 12. Lending Limits

Subchapter B. Loans

• 7 TAC §12.31

The Finance Commission of Texas (the commission) proposes §12.31, concerning loans made by a state bank on the collateral security of securities issued by an affiliate, to be codified in new Subchapter B entitled Loans. The proposed rule is in response to requests for clarification as to whether a state bank may loan on the collateral security of its bank holding company's securities. The proposed rule clarifies that because a national bank may generally loan on the

collateral security of an affiliate's securities, a state bank may also do so, subject to restrictions.

The proposed section provides that, notwithstanding Texas Civil Statutes, Article 342-5.102(d), a state bank may make loans on the collateral security of securities issued by an affiliate, other than a loan to that affiliate or any other affiliate of the bank, if the transaction is subject to and in compliance with the provisions of the Federal Reserve Act, §23A and §23B (12 United States Code (USC), §371c and §371c-1). These provisions are applicable to nonmember insured banks by virtue of the Federal Deposit Insurance Act, §18(j)(1) (12 USC, §1828(j)(1)). The proposed rule also provides that a loan must be subtracted from the capital of a lending bank if the loan proceeds are used directly, or indirectly, for the purpose of recapitalizing the lending bank, unless the loan is fully secured by irrevocable letters of credit or other liquid assets.

Under Texas Civil Statutes, Article 342-5.102(d), equity securities issued by a bank holding company that are not publicly traded on a national securities exchange or automated quotation system are considered to be shares of each of the bank's holding company's subsidiary state banks, and loans may therefore not be made by a state bank with these bank holding company securities as collateral. However, federal law permits national banks to make these loans under certain circumstances and state banks, as a matter of competitive parity, should be able to make the same loans.

Transactions with affiliates are governed by federal law as well as state law, see 12 USC, §§371c, 371c-1, and 1828(j)(1). Under 12 USC, §371c, a bank is permitted to accept securities issued by an affiliate as collateral security for a loan by the bank to any person or company, although the transaction is subject to regulation as a "covered transaction." However, securities issued by an affiliate of a bank are not acceptable collateral for a loan or extension of credit to, or guarantee, acceptance, or letter of credit issued on behalf of, that affiliate or another affiliate of the bank. Each covered transaction must be added to other covered transactions with the affiliate, if any, for purposes of a 10% of capital stock and surplus limitation (as calculated under federal law) on covered transactions with any single affiliate, and for purposes of a 20% of capital stock and surplus limitation (as calculated under federal law) on the amount of aggregate covered transactions between a bank and all affiliates. All covered transactions between an affiliate and a bank must be engaged in only on terms and under circumstances, including credit standards, that are substantially the same as those for comparable transactions with a nonaffiliate.

Although under this proposal a state bank may make loans on the collateral security of securities issued by an affiliate, the loan proceeds should not be utilized for the purpose of recapitalizing the lending bank. For example, if a third-party obligor utilizes, directly or indirectly, the loan proceeds from a state bank loan (whether or not secured by affiliate securities) to purchase a new capital issue of a bank's holding company that then uses the proceeds to capitalize the lending bank, the loan will generally be recorded as a reduction of shareholder's equity, unless the loan is fully secured by irrevocable letters of credit or other liquid assets. This requirement has been formalized by a consensus of the Financial Accounting Standards Board Emerging Issues Task Force in Issue Number 85-1.

Everette D. Jobe, General Counsel, Texas Department of Banking, has determined that for the first five-year period the section is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the section.

Mr. Jobe 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 this section is the clarification of highly complex statutory standards to aid the industry in compliance. No net economic cost will result to persons required to comply with the proposed section. No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by this section.

Comments on the proposed section may be submitted in writing to Jerry Sanchez, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

The new section is proposed under Texas Civil Statutes, Article 342-5.102(d) , which authorize the commission to adopt implementing rules. The section is also proposed under Texas Civil Statutes, Article 342-1.1012(a)(3) and Article 342-3.010(e), which authorize the commission to adopt rules necessary or reasonable to grant the same rights and privileges to state banks that are or may be granted to national banks domiciled in this state. As required by Texas Civil Statutes, Article 342-1.1012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state banking system, and allow for economic development within this state. Further, as required by Texas Civil Statutes, Article 342-3.010(e), the commission has concluded that national banks domiciled in this state possess the rights or privileges to perform activities the rule would permit state banks to perform and the rule contains adequate safeguards and controls, consistent with safety and soundness, to address the concern of the legislature evidenced by the state law the rule would impact.

Texas Banking Act, §5.102(d) is affected by this proposed new section.

§12.31. Loans Secured By Affiliate-Issued Securities.

(a) Notwithstanding Texas Civil Statutes, Article 342-5.102(d), a state bank may make loans on the collateral security of securities issued by an affiliate, other than a loan to that affiliate or another affiliate of the bank, if the transaction is subject to and in compliance with the provisions of the Federal Reserve Act, §23A and §23B (12 United States Code (USC), §371c and §371c-1). These provisions are applicable to nonmember insured banks by virtue of the Federal Deposit Insurance Act, §18(j)(1) (12 USC, §1828(j)(1)).

(b) A loan must be subtracted from the capital of a lending bank if the loan proceeds are used directly, or indirectly, for the purpose of recapitalizing the lending bank, unless the loan is fully secured by irrevocable letters of credit or other liquid assets.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601917 Everette D. Jobe
General Counsel
Texas Department of Banking

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 475-1300

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• 7 TAC §12.32

The Finance Commission of Texas (the commission) proposes §12.32, concerning loan fees that may be charged by banks under Texas Civil Statutes, Article 342-5.202 (Texas Banking Act, §5.202). Existing §3.22 concerning loan fees is proposed for repeal in this issue of the *Texas Register.*

Texas Banking Act, §5.202, provides statutory authority for banks to charge loan fees and expenses. Under previous law, while such charges were not prohibited for certain loans, they were not specifically authorized, leading to questions regarding the authority of banks to charge certain fees. New Texas Banking Act, §5.202, parallels authority which has been available to state savings and loan associations, savings banks, and credit unions for many years. The purpose of this section is to provide clarification and a framework for such charges.

Texas Banking Act, §5.202, does not apply to transactions subject to Texas Civil Statutes, Title 79, Subtitle Two, Chapters 2-8 (Articles 5069-2.01 through 5069-8.06), or Subtitle Three, Chapter 15 (Articles 5069-15.01 through 5069-15.11). The proposed section therefore provides that it does not apply to a consumer loan payable in two or more installments with a rate set under any of those articles or set under Texas Civil Statutes, Article 5069-1.04.

However, Texas Banking Act, §5.202, does apply to first lien residential real estate loans, loans which are not for personal, family, or household use (i.e., commercial loans, including all commercial real estate loans),

and "single pay" consumer loans (no periodic installments with payment in full due on the maturity date) other than those subject to Texas Civil Statutes, Article 5069-3.01 et seq. The proposed section states that a bank may require a borrower to pay all reasonable expenses and fees incurred in connection with the making, closing, disbursing, extending, readjusting, or renewing of a loan to which Texas Banking Act, §5.202, applies, including fees paid to third parties as well as charges and fees paid to the bank itself for the services of bank employees.

Section §5.202(a) further states that it "does not authorize the bank to charge its borrower for payment of fees and expenses to an officer, director, manager, or managing participant of the bank for services rendered in the person's capacity as an officer, director, manager, or managing participant." The proposed section clarifies that, pursuant to the quoted provision, charges to a borrower may not include a pass-through of a fee paid by the bank (in addition to regular salary or director's fee) to an officer or director for services rendered within the course and scope of his or her employment. For example, a borrower may not be directly charged for a fee paid to an officer of the bank for an informal appraisal of collateral or loan analysis, or as additional, incentive compensation for loan production, since such services are clearly within the duties and responsibilities of the officer. Such costs (assuming they can be legally incurred under other applicable law) may, however, be included in overhead and allocated as part of a standardized fee that captures the fully allocated cost of consummating a loan. Conversely, a fee paid by the bank to, for example, the law firm of a non-employee director for document preparation is properly characterizable as a third party fee and may be charged to the borrower since such services are not within the duties and responsibilities of a member of the board of directors.

Authorized loan fees must be reasonably related to the costs incurred by the bank. The proposal clarifies that a bank may establish fixed fees for underwriting activities for various categories of loans by taking into consideration its average costs in various activities such as taking an application, obtaining necessary reports and documentation, review of credit reports, analysis of the loan proposal and the prospective borrower's ability to repay, preparation of documents, loan review, and closing activities, plus a reasonable overhead factor. In lieu of conducting its own analysis, a bank may rely on the functional cost analysis prepared by the Board of Governors of the Federal Reserve System, which the proposed section states is considered per se reasonable.

Everette D. Jobe, General Counsel, Texas Department of Banking, has determined that for the first five-year period the section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Jobe also has determined that, for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section is the clarification of statutory standards to aid the industry in compliance with law. No net economic cost will result to persons required to comply with the proposed section. No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by this section.

Comments on the proposed section may be submitted in writing to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

The new section is proposed under the Texas Banking Act, §1.012(a)(1), which authorizes the commission to adopt rules to implement and clarify the Texas Banking Act. As required by the Texas Banking Act, §1.012(b), in proposing this section, the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

Texas Civil Statutes, Articles 5069-1.01 through 5069-1.11, and 342-5.202, are affected by the proposed new section.

§12.32. Loan Fees and Charges.

(a) Applicability.

(1) Texas Banking Act, §5.202, and this section apply to:

(A) first lien residential real estate loans;

(B) loans other than for personal, family, or household use (i.e., commercial loans including all commercial real estate loans); and

(C) loans for personal, family, or household use that are repayable in a single installment and subject to Texas Civil Statutes, Article 5069-1.01 (i. e., single pay consumer loans other than loans under Texas Civil Statutes, Title 79, Subtitle Two, Chapter 3 (Articles 5069-3.01 et seq)).

(2) Texas Banking Act, §5.202, and this section do not apply to a consumer loan payable in two or more installments with a rate set under Texas Civil Statutes, Title 79, Subtitle Two, Chapters 2-8 (Articles 5069-2.01 through 5069-8.06), Subtitle Three, Chapter 15 (Articles 5069-15.01 through 5069-15.11), or Article 5069-1.04.

(b) Reasonable fees authorized. A bank may require a borrower to pay all reasonable expenses and fees incurred in connection with the making, closing, disbursing, extending, readjusting, or renewing of a loan subject to this section, including fees paid to third parties as well as charges and fees paid to the bank itself for the services of the bank employees. However, such charges may not include fees paid by the bank (in addition to regular salary or director's fee) to an officer or director for services rendered within the course and scope of his or her employment with the bank. Subject to limitations of other law, possible fees and charges which may be charged and collected under this section include fees for underwriting, appraisal, document preparation, title insurance or abstract and opinion, insurance (including casualty coverage for collateral and credit products), credit reports, escrows, and filing fees.

(c) Calculation of reasonable fee.

(1) Authorized loan fees must be reasonably related to the costs incurred by the bank. In establishing loan fees, a bank may establish fixed fees for underwriting activities for various categories of loans. In establishing such fixed fees, the bank may take into consideration its average costs in various activities such as taking an application, obtaining necessary reports and documentation, review of credit reports, analysis of the loan proposal and the prospective borrower's ability to repay, preparation of documents, loan review, and closing activities, plus a reasonable overhead factor. In lieu of conducting its own analysis, where relevant a bank may rely on the functional cost analysis prepared by the Board of Governors of the Federal Reserve System, which is considered per se reasonable.

(2) This section does not require a bank to charge its borrower the full, true cost of accepting and consummating a lending transaction. For example, a bank may choose to assess a lower than actual cost loan fee on smaller consumer single pay loans in the interest of making loans more affordable to low to moderate income borrowers, or may deliberately underestimate its actual costs to provide a margin of security regarding compliance with law.

(3) Banks should be advised that an otherwise permissible loan fee may be characterized in litigation as compensation for the use, forebearance, or detention of money (interest) to the extent the amount of the fee is not reasonably related to the service performed.

(d) Collection of fee. Loan fees may be collected separately or added to the amount of the promissory note and financed as part of the loan.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601918 Everette D. Jobe
General Counsel
Texas Department of Banking

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 475-1300

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TITLE 16. ECONOMIC REGULATION

Part III. Texas Alcoholic Beverage Commission

Chapter 33. Licensing

License and Permit Surcharge

• 16 TAC §33.24

The Texas Alcoholic Beverage Commission proposes an amendment to §33.24, concerning conduct surety bonds. The amendment, contained in paragraph (j) of the rule establishes a procedure by which permittees and licensees can obtain a hearing prior to revocation of their conduct surety bond. The amendment further addresses the question of how the misconduct of an employee or agent of the licensee or permittee, which has not been charged against the licensee or permittee because of the operation of §106.14 of the Alcoholic Beverage Code, can be used to revoke the conduct surety bond.

Jeannene Fox, Director of Licensing and Compliance, has determined that the for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Lou Bright, General Counsel, has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of the amendment will be extra incentives to permittees and licensees to comply with the Alcoholic Beverage Code. By allowing the surety bond revocation process to be a function of a public hearing, the public will benefit by increased awareness of the operation of the Alcoholic Beverage Commission and of the standards of practice followed by certain licensees and permittees. Small businesses subject to this rule will not face increased costs because the terms of the proposed amendment are not mandatory.

The amendment is proposed under the Alcoholic Beverage Code, §5.31, which provides the Texas Alcoholic Beverage Commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code.

Cross reference: Alcoholic Beverage Code, §11.11(c) and §61.13(c).

§33.24. Conduct Surety Bond.

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

(j) Forfeiture of the Bond

(1) When a license or permit is cancelled, or a final adjudication that the licensee or permittee has committed three violations of the Alcoholic Beverage Code since September 1, 1995, the commission shall notify the licensee or permittee, in writing, of its intent to seek forfeiture of the bond.

(2) The licensee or permittee is, upon request, entitled to a hearing on the question of whether the criteria for forfeiture of the bond, as established by §11.11 and §61. 13 of the Alcoholic Beverage Code and this rule have been satisfied. The hearing shall be conducted in accordance with the Administrative Procedures Act.

(3) Evidence that an agent or servant of the licensee or permittee has been adjudicated guilty of, or granted deferred adjudication for, an offense under the Alcoholic Beverage Code, because of conduct occurring during the performance of his/her duties for the licensee or permittee, shall constitute evidence of an adjudication that the licensee or permittee has violated a provision of the Alcoholic Beverage Code, regardless of the operation of §106.14 of the code.

(4) Upon entry of final order in the above described hearing, or upon waiver of said hearing by the licensee or permittee, the commission shall notify the surety company, bank, savings institution or credit union to remit to the state the amount of surety required within ten days after notification.

(5) The commission may institute action in its own name, for the benefit of the state, on the surety supporting the bond, and against the bank, savings institution or credit union, as set forth in the Alcoholic Beverage Code, §11.70, to recover the surety.

[(j) License/Permit Cancelled or Suspended.

[(1) If a license or permit is cancelled by the commission or three or more suspensions have been imposed after September 1, 1995, and no appeal is pending, the commission shall notify the surety company, bank, savings institution or credit union to remit to the state the amount of surety required within ten days after notification.

[(2) The commission may institute action in its own name, for the benefit of the state, on the surety supporting the bond, and against the bank, savings institution or credit union, as set forth in the Alcoholic Beverage Code, §11.70, to recover the security.]

(k) (No change.)

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

Issued in Austin, Texas, on February 12, 1996.

TRD-9601978 Lou Bright
General Counsel
Texas Alcoholic Beverage Commission

Proposed date of adoption: March 22, 1996

For further information, please call: (512) 206-3204

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TITLE 22. EXAMINING BOARDS

Part XVII. Board of Plumbing Examiners

Chapter 361. Administration

General Provisions

• 22 TAC §361.1

The State Board of Plumbing Examiners, proposes an amendment to §361.1. This section defines terms commonly used in the profession or in the board's rules. This amendment is being proposed to add definitions for the phrases Pocket Card, Plumbing Company and Responsible Master Plumber.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing the rule.

Mr. Pereyra 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 a clearer understanding of the phrases Plumbing Card, Plumbing Company and Responsible Master Plumber. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment to §361.1 is proposed under and affects Texas Civil Statutes, Article 6243-101, §2 and §5(a) (Vernon 1995).

§361.1. Definitions The following words and terms, when used in this part, have the following meanings, unless the context clearly indicates otherwise:

Pocket Card–A card issued by the Board which certifies that the holder has a plumbing license.

Plumbing Company–A business which engages in plumbing work. There is no criteria other than the performance of plumbing work that will designate a business a plumbing company.

Responsible Master Plumber–A responsible master plumber is the master that 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 by allowing his license to be used in this manner assumes responsibility for all plumbing work performed.

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601738 Ernest Pereyra
Chief Fiscal Officer
Board of Plumbing Examiners

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 458-2145

General Provisions

• 22 TAC §361.6

The State Board of Plumbing Examiners, proposes an amendment to §361.6. This section specifies the fees of the Texas State Board of Plumbing Examiners. The amendment increases the Master Examination Fee from $75 to $150 and creates a late penalty for inspector licenses.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect the Board will collect annually an additional $20,000 in examination fees (revenue).

Mr. Pereyra 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 better trained plumbers. The additional fees will improve the quality of the examination process used for Master Plumbers. There will be no effect on small businesses. The anticipated economic cost to persons who are required to comply with the rule will be a $75 increase in the Master License Penalty Fee.

Comments may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment to §361.6 is proposed under and affects Texas Civil Statutes, Article 6243-101, §5(a) and §13 (Vernon 1995).

§361.6. Fees.

(a) The board has established the following fees:

(1) (No change.)

(2) Examinations

(A) Master examination **$150.00** [$75]

(B)-(G) (No change.)

(3) (No change.)

(4) Other fees

(A) Late renewal

(i)-(vi) (No change.)

***(vii)* Plumbing Inspector:**

(I) less than 90 days-one-half examination fee $25.00

(II) more than 90 days-examination fee $50.00

(B)-(D) (No change.)

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

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601739 Ernest Pereyra
Chief Fiscal Officer
Board of Plumbing Examiners

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 458-2145

General Provisions

• 22 TAC §361.7

The State Board of Plumbing Examiners, proposes an amendment to §361.7. This section specifies that the Board maintains a roster of licenses. The amendment allows the Board to serve as a repository of information on medical gas installation companies that will be available to the public.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing the rule.

Mr. Pereyra 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 from the amendment will be a better way to access information on medical gas installation companies who choose to comply with the rule. There will be no effect on small businesses. There is no anticipated economic cost to persons who decide to provide information related to their medical gas installation company to the Board.

Comments may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment to §361.7 is proposed under and affects Texas Civil Statutes, Article 6243-101, §5(a) (Vernon 1995).

§361.7. Roster of Licensees.

(a) In addition to the requirements of §12(a) of the act regarding distribution of a roster of licensees, the board may distribute **the roster** [it] to plumbing inspectors and other persons and agencies either on request or as it finds appropriate.

(b) The board shall act as the repository of Medical Gas Certification Company Information Sheets. Any company who is engaged in medical gas certification may provide a maximum of two pages stating their company's qualifications. This information will be available to the general public as outlined under §361.9 of this title (relating to Charges for Copies of Public Records). The board by such action does not make any implicit or explicit endorsement of any Medical Gas Certification Company.

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601740 Ernest Pereyra
Chief Fiscal Officer
Board of Plumbing Examiners

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 458-2145

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Chapter 363. Examinations

• 22 TAC §363.5

The State Board of Plumbing Examiners, proposes an amendment to §363.5. This section specifies that the board shall conduct for each licensee an examination. The amendment specifies that the board shall include written and practical applications as deemed appropriate to the examination.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing the rule.

Mr. Pereyra 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 a better quality of plumbers since they will have demonstrated both written and practical skills. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule.

Comments may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment to §363.5 is proposed under and affects Texas Civil Statutes, Article 6243-101, §5(a) and §8 (Vernon 1995).

§363.5. Description of Examination. The board shall conduct for each license and endorsement category a uniform examination that **shall** [may] include written and practical applications as deemed appropriate by the board. The board shall furnish applicants with information titled "General Examination Data" explaining the scope of the examination. The board may also sell applicants guides to study for the examination.

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601741 Ernest Pereyra
Chief Fiscal Officer
Board of Plumbing Examiners

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 458-2145

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• 22 TAC §363.6

The State Board of Plumbing Examiners, proposes an amendment to §363.6. This section specifies that the board may conduct special condition examinations for individuals with disabilities. The amendment eliminates the redundancy in the rule and removes the foreign language requirement.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing the rule.

Mr. Pereyra also has determined that for each year of the first five years the rule is in effect there will be no change in public benefit from the amended version of the rule with regard to disabilities. The benefit related to the change in foreign language requirement is it will allow plumbers to understand the warning labels and instructions for plumbing equipment installation which are written in English. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule.

Comments may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment to §363.6 is proposed under and affects Texas Civil Statutes, Article 6243-101, §5(a) and §8 (Vernon 1995).

§363.6. Special Examination Conditions. The board, on request, may conduct examinations [orally, in a foreign language,] for the hearing impaired, or for those with other disabilities, depending upon the special circumstances of the applicant.

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601742 Ernest Pereyra
Chief Fiscal Officer
Board of Plumbing Examiners

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 458-2145

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• 22 TAC §363.11

The State Board of Plumbing Examiners, proposes an amendment to §363.11. This section specifies the criteria for endorsement training programs. The amendment makes it clear that instructors must be active licensed plumbers with the appropriate endorsement in order to teach endorsement training.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing the rule.

Mr. Pereyra 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 better trained plumbers performing plumbing work who will more effectively facilitate the health and safety of the citizenry. We also believe that the public will better served if plumbers are used to teach plumbers to perform plumbing work, and individuals who currently have the endorsement teach those who seek it. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule.

Comments may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment to §363.11 is proposed under and affects Texas Civil Statutes, Article 6243-101, §5(a), §8C, §11A and §12B (Vernon 1995).

§363.11. Endorsement Training Programs.

(a) Medical gas piping installation training programs

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

(4) Instructors in medical gas piping installation will be required to successfully complete a board approved program **and be an active licensee of the Board with a Medical Gas Piping Installation Endorsement.** Instructors will be required to pass the board examination as well as successfully complete a board approved program of 160 hours which meets the following generic criteria. The board will allow credit for approved courses.

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

(5)-(6) (No change.)

(b) Water supply protection training programs

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

(3) Instructors in water supply protection will be required to pass the board examination in water supply protection and **be an active licensee of the Board with a Water Supply Protection Specialist Endorsement. Instructors will be required to successfully** complete a board approved program of 160 hours which meets the following generic criteria. The board will allow credit for approved courses.

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

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

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601743 Ernest Pereyra
Chief Fiscal Officer
Board of Plumbing Examiners

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 458-2145

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Chapter 365. Licensing

• 22 TAC §365.1

The State Board of Plumbing Examiners, proposes an amendment to §365.1. This section specifies the license categories. The amendment merely removes an unnecessary reference to another section of the rules.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing the rule.

Mr. Pereyra also has determined that for each year of the first five years the rule is in effect there will be clearer understanding of the rule. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule.

Comments may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment to §365.1 is proposed under and affects Texas Civil Statutes, Article 6243-101, §5(a), §2, §8(C), and §11(A) (Vernon 1995).

§365.1. License Categories; Description; Scope of Work Permitted. The board shall establish three separate license categories and two endorsement categories, described as follows:

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

(4) Plumbing Inspector–a license that entitles the individual to do plumbing inspections as an employee of a political subdivision, or if approved by the board [under § 363.1(c)(3) of this part (relating to Qualifications)], as an agent of a political subdivision.

(5) (No change.)

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601744 Ernest Pereyra
Chief Fiscal Officer
Board of Plumbing Examiners

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 458-2145

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• 22 TAC §365.2

The State Board of Plumbing Examiners proposes an amendment to §365.2. This section specifies the criteria to become a registered plumber apprentice. The amendment makes it clear that an individual must be working at the plumbing trade in order to become a registered plumber apprentice.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing the rule.

Mr. Pereyra 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 clearer guidelines for registered plumber apprentices. It is implicit that one who is studying to be a plumber be engaged in the practical applications of the trade. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule.

Comments may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment to §365.2 is proposed under and affects Texas Civil Statutes, Article 6243-101, §5(a) and §11 (Vernon 1995).

*§365.2. **Apprentice Registration*** To qualify as a registered plumber apprentice, one must be at least 16 years of age, **be regularly employed in the plumbing trade,** and be registered with the board.

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601745 Ernest Pereyra
Chief Fiscal Officer
Board of Plumbing Examiners

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 458-2145

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• 22 TAC §365.3

The State Board of Plumbing Examiners, proposes an amendment to §365.3. This section defines the licensing qualifications for plumbers licensed by the Board and details certain requisites for acquisition of a license. This amendment is being proposed to make it clear that repairs are included in the plumbing rules and to specify the licenses and endorsements covered by the license qualifications section.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing the rule.

Mr. Pereyra, Chief Fiscal Officer, 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 a clearer understanding that repairs are covered by the license qualification section and all of the requirements are necessary. Plumbing as defined by statute, includes repair as well as installation; therefore, hours included in the repair trade should also be included as eligible experience to meet the qualification prerequisites. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule.

Comments may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment to §365.3 is proposed under and affects Texas Civil Statutes, Article 6243-101, §2.1(B), §5(a) and §8 (Vernon 1995).

§365.3. License Qualifications.

(a) An applicant may qualify for **a Master, Journeyman or**

Inspector license. [in one of the three categories of licenses or] **All three licenses can include a Medical Gas Piping Installation Endorsement and/or a Water Supply Protection Specialist Endorsement.** [for an endorsement in one of the two categories] In order to qualify for any of these licenses or endorsements an applicant must [by] successfully **complete** [completing] the required examination and remit[ting] the appropriate fee. Furthermore, in the case of plumbing inspectors, the political subdivision shall furnish proof of the applicant's employment or intention to employ if requirements are **successfully completed**[completed successfully].

(b) To be eligible to take the Journeyman examination, the applicant must:

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

(2) hold a high school diploma or General Equivalency Diploma (GED); and

(3) meet all the minimum trade experience requirements set forth in subparagraphs (A)-(G) of this paragraph.

(A) Installation **or repair** of piping for waste and vent drainage systems, 2,000 hours: During this period, a person should obtain the proper knowledge and skill to install, **or repair,** different types of materials used in these systems, e.g., cast iron, plastics, copper.

(B) Installation **or repair** of piping for domestic hot and cold water systems, 2,000 hours: During this period, a person should obtain the proper knowledge and skill to install, **or repair,** different types of materials used in these systems, e.g., cast iron, plastics, copper, steel; the function, difference, and proper installation of various valves, e.g., gate, globe, mixing, etc.

(C) Installation **or repair** of fixtures and equipment common to plumbing systems, 2,000 hours: During this period, a person should obtain the proper knowledge and skill to install, **or repair,** different types of products used, e.g., water heaters, natural and L.P. gas fired equipment; proper installation of plumbing fixtures, faucets, water softeners and similar equipment; proper method for sizing and installation of gas appliance vents.

(D) **Installation or repair** of Piping Hangers and Pipe Support systems, 500 hours: During this period, a person should obtain the proper knowledge and skill to install or repair different types of hangers for piping support.

(E) Installation **or repair** of Special Plumbing systems, 1000 hours: During this period, a person should obtain the proper knowledge and skill regarding medical gas systems, decorative fountains, lawn irrigation systems, solar panels.

(F)-(G) (No change.)

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601746 Ernest Pereyra
Chief Fiscal Officer
Board of Plumbing Examiners

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 458-2145

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• 22 TAC §365.5

The State Board of Plumbing Examiners, proposes an amendment to §365.5. This section defines the procedures a licensed plumber must follow to renew his license. This amendment is being proposed to clarify the procedures a plumber must follow to renew his license.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing the rule.

Mr. Pereyra also has determined that for each year of the first five years the rule is in effect the public anticipated as a result of enforcing the rule benefit will be a clearer understanding of the procedures a licensee must follow to renew his license. There will be no effect on small businesses. There is no anticipated change in the economic cost to persons who are required to comply with the rule.

Comments may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment to §365.5 is proposed under and affects Texas Civil Statutes, Article 6243-101, §5(a), §12 and §12A (Vernon 1995).

§365.5. Renewals.

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

(e) [Beginning September 1, 1994,] A[a]ny journeyman plumber, master plumber, or plumbing inspector wishing to renew a license must submit to the administrator board-approved documentation of successful completion within the previous license year of six hours of board approved continuing education. [Any journeyman plumber or master plumber no longer required to have a current license because of retirement or of employment in an occupation which does not require the journeyman or master license may be exempted from complying with the continuing education requirements by submitting documentation each year in support of this fact and the license will be marked inactive. Should the individual return to the plumbing trade, he/she will be required to abide by the continuing education requirement before the license may be renewed.] **No inactive license may be issued or renewed after September 1, 1996.**

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601747 Ernest Pereyra
Chief Fiscal Officer
Board of Plumbing Examiners

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 458-2145

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• 22 TAC §365.6

The State Board of Plumbing Examiners, proposes an amendment to §365.6. This section defines the procedures a plumber must follow to renew an expired license. This amendment is being proposed to clarify that individuals with licenses which have been expired for more than two years must take the current examination to get a new license, remit the appropriate fee and fulfill the continuing education requirement prior to the renewal of any expired license.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing the rule.

Mr. Pereyra 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 a better understanding of procedures regarding renewal of a license, expiration of a license and application for a license previously held. Further, it will result in more consistency in

complying with the education requirements. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment to §365.6 is proposed under and affects Texas Civil Statues, Article 6243-101, §5(a), §12 and §12A (Vernon 1995).

§365.6. Expirations.

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

(d) No individual may renew a license or endorsement that has been expired for two or more years; however, in such cases an individual can apply for a new license or endorsement **by taking the current examination and paying the current fees** [following the procedures to obtain an original license or endorsement].

(e) [A plumbing inspector whose license has been expired for one or more years must take a plumbing inspector refresher course conducted by the board before becoming eligible to renew the license. The board may charge a refresher course fee equal to the fee established for the plumbing inspector examination.] **Continuing education requirements must be satisfied prior to the renewal of any expired license.**

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601748 Ernest Pereyra
Chief Fiscal Officer
Board of Plumbing Examiners

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 458-2145

Chapter 367. Enforcement

• 22 TAC §367.3

The State Board of Plumbing Examiners, proposes an amendment to §367.3. This section specifies requirements for plumbing companies. The amendment requires plumbing companies to have a current licensed master plumber that has a current medical gas endorsement in order for a company to install medical gas piping.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing the rule.

Mr. Pereyra also has determined that for each year of the first five years the rule is in effect the public benefit from the amendment will be a more qualified Master Plumber responsible for supervision of plumbers installing medical gas piping. The license law requires that plumbers are properly supervised so this change will facilitate this requirement. The effect on small businesses will be the cost of the endorsements for their plumbers. The anticipated economic cost to persons who are required to comply with the rule will be the cost of the endorsement for plumbers.

Comments may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment to §367.3 is proposed under and affects Texas Civil Statutes, Article 6243-101, §5(a) and §8C (Vernon 1995).

§367.3. Requirements for Plumbing Companies.

(a) A company offering to do plumbing work must first secure the services of at least one person holding a current master plumber's license. The master plumber shall not allow any person, firm, company, or corporation to use his or her master plumber's 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 or has a substantial financial interest in the firm, company, or corporation that will use the master plumber's license. The master plumber's license shall be used only by such a person, company, firm, or corporation. The 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's license. All work performed under the master plumber's license shall be within the sight of and under the direct control and on-the job supervision of a licensed plumber that is an [bona fide employee of the] owner, person, or bona fide employee, [owner of or has a substantial financial interest in the] firm, company, or corporation using the master plumber's license.

(b) A company 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 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 that piping. That master plumber with the medical gas 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 insuring 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 endorsement issued by the Board. The relationship between the master plumber and the company using his master license with the medical gas endorsement must be as defined in subsection (a) of this section.

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601749 Ernest Pereyra
Chief Fiscal Officer
Board of Plumbing Examiners

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 458-2145

• 22 TAC §367.4

The State Board of Plumbing Examiners proposes an amendment to §367.4. This section specifies when and where a plumber must display his license. This amendment is being proposed to specify that Responsible Master Licensees must display their permanent license in their place of business and that all licensees shall carry their pocket card license.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing the rule.

Mr. Pereyra 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 an easier way to determine if a plumber is licensed and a Master Plumber is responsible for the work at issue. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment to §367.4 is proposed under and affects Texas Civil Statutes, Article 6243-101, §5(a) and §8(b) (Vernon 1995).

§367.4. Display of License. **Responsible Master** licensees shall display the **frameable certificate** license in their place of business and **all licensees** shall carry the **pocket card** license with them while engaged in work. Each **responsible** [licensed] master plumber shall display permanently the master plumber license number and company name on both sides of all service vehicles used in conjunction with plumbing contracting by the **responsible** master plumber. The letters and numbers shall be not less than two inches high and shall be in a color sufficiently different from the body of the vehicle so that the letters and numbers shall be plainly legible at a distance of not less than 100 feet.

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601750 Ernest Pereyra
Chief Fiscal Officer
Board of Plumbing Examiners

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 458-2145

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TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 29. Purchased Health Services

Subchapter P. Hearing Aid Services

• 25 TAC §§29.1501-29.1504

On behalf of the State Medicaid Director, the Texas Department of Health (department) submits proposed amendments to §§29.1501-29.1504, concerning the requirements for hearing aid services, in its Purchased Health Services rules. Generally, these amendments will delete obsolete information. Specifically, these amendments will include that hearing aid services providers must follow the standards of their licensing authorities, as well as rules and regulations of the Texas Medicaid program. These proposed amendments are also in response to a petition for rulemaking submitted to the department by Ray Jones, a hearing aid services provider.

Joe Moritz, acting health care financing budget director, has determined that for the first five-year period the sections as proposed will be in effect there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections.

Mr. Moritz also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections as proposed will be a more accurate administrative rule base. There is no anticipated economic cost to small or large businesses or individuals who are required to comply with the proposed sections. There is no anticipated effect on local employment.

Comments on the proposal may be sent to Brenda Salisbery, Health Care Financing, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 338-6521. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendments are proposed under the Human Resources Code, §32.021 and Texas Civil Statutes, Article 4413 (502), §16, which provides the Health and Human Services Commission with the authority to adopt rules to administer the state's medical assistance program and is submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the purchased health services program and as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

The amended sections affect Chapter 32 of the Human Resources Code.

§29.1501. Benefits and Limitations.

(a) Benefits. Hearing aid services available through the Texas Medical Assistance (Medicaid) Program are provided in accordance with federal regulations found at 42 CFR [430.0,] Subchapter C, Medical Assistance Programs;[,] state-legislated appropriations;[,] and the provisions and procedures found elsewhere in this chapter as cited at **§29.1502** [§29.1502(b)] of this title (relating to Requirements for Hearing Aid Services). The following hearing aid services are available through the Texas Medicaid Program:

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

(b) Limitations and exclusions. Hearing aid providers and examining physicians must comply with the following conditions and limitations established by the department or its designee:

(1) Hearing aid services are available only to non-EPSDT eligible Medicaid **clients** [recipients].

(2) **Clients** [Recipients] are limited to one hearing aid every six years (72 months) from the dispensing month of the present instrument.

(3) An individual using a hearing aid before becoming eligible for Medicaid benefits may have a hearing aid evaluation conducted by an approved hearing aid services provider after he becomes eligible for Medicaid. Medicaid payment for a new hearing aid, however, is denied if the provider concludes, based upon the evaluation findings, that the **client's** [recipient's] present hearing aid adequately compensates for his degree of hearing loss.

(4) Providers may not submit a hearing aid evaluation claim to the department or its designee unless the Medicaid **client** [recipient] meets the eligibility criteria in **§29.1502(b)** [§29.1502(b)(1)(B)] of this title (relating to Requirements for Hearing Aid Services).

(5) The department or its designee does not pay for **the replacement of batteries or cords.**[:]

[(A) evaluations or hearing aids for EPSDT recipients;

[(B) replacement of batteries or cords;

[(C) a hearing aid if the recipient or a third party has made a deposit or any payments toward its purchase.]

(6) Binaural fittings are not available except for legally blind, hearing-impaired **clients** [recipients] who can document that they have no other available resources.

(7) (No change.)

(8) **Clients** [Recipients] may receive home visit hearing aid evaluations and hearing aid fittings only on the written recommendation of a physician.

(9) (No change.)

(10) Medicaid reimbursement for hearing aids is limited to eligible clients whose air conduction puretone average in the better ear is 45dB or greater.

§29.1502. Requirements for Hearing Aid Services.

(a) Hearing aid **services** [evaluations]. Providers of hearing aid **services** [evaluations] must comply with all applicable federal and state laws and regulations, recognized professional standards, and the provisions cited in Subchapter A, **of this chapter (relating** to Medicaid Procedures for Providers), and Subchapter L, **of this chapter (relating** to General Administration)[, of this chapter], in addition to the [following] conditions, specifications, limitations established by the Texas Department of Health (department) or its

designee, and applicable requirements of their licensing authorities.

(b)[(1)] **Hearing aid evaluations.** Hearing aid evaluations must be recommended by a physician based upon his examination of the client. The client must have a medical necessity for a hearing aid and have no medical contraindications to his ability to use and/or wear a hearing aid.

(1)[(A)] A physician who recommends a hearing aid evaluation must be licensed to practice medicine in the state where and when the evaluation is conducted.

(2)[(B)] The physician must indicate on the Physician Examination Report form if the client needs a hearing aid evaluation based on his examination of the client. Medicaid reimbursement for a hearing aid evaluation is based on the physician's recommendation that the hearing aid evaluation is medically necessary. [Medicaid reimbursement for hearing aids is limited to eligible clients whose air conduction puretone average in the better ear is 45dB or greater (PTA for 500, 1000, 2000 HZ).]

(3) **Hearing aid services providers must administer hearing aid evaluations using appropriate procedures as specified within their scope of practice and recognized professional standards.**

[(C) Each client receiving a hearing aid through the Texas Medicaid Program must receive a hearing aid evaluation using the procedures specified under the provisions of paragraph (2)(A)-(G) and paragraph (3)(A)-(C) of this subsection and subsection (b) of this section.]

(4)[(D)] Providers may conduct home visit hearing aid evaluations only if the client's physician has documented that the client's medical condition prohibits his traveling to the provider's place of business.

[(E)] Only those providers having the necessary mobile testing equipment and sound level meter may conduct home visit hearing aid evaluations.]

(5)[(2)] Providers must include in the hearing aid evaluation an audiometric assessment and **the results of the hearing aid evaluation** [a sound field test].

[(A) Masking for air-conduction, bone-conduction, speech discrimination testing, and speech audiometry must be conducted in accordance with the 45dB hearing loss evidenced by the client.

[(B) Providers must ensure that the testing environment does not have an ambient noise level exceeding 50dBA or 60dBC.

[(C) Audiometers must be equipped with air and bone conduction circuitry, masking and sound field capabilities, with calibrated speech circuit and VU meter.

[(D) Semi-annual audiometer calibration and sound level readings are required for equipment used for home visit hearing aid evaluations.

[(E) If conventional sound field speech discrimination testing cannot be done, providers may use aided versus unaided lipreading scores on appropriate standardized tests.]

(6)[(3)] Providers of hearing aid evaluations must have a report in the client's record. Providers must include in the report audiometric test data, hearing aid evaluation test data, and a recommendation for the hearing aid most appropriate for the ear being amplified. **If any of the criteria cited in this section cannot be met, providers must specify in the evaluation report the factors influencing or preventing assessments, and justify the recommendation for a hearing aid.**

[(A) If appropriate, providers must include test data cited in paragraph (2)(F) and (G) of this subsection in the hearing aid evaluation report.

[(B) If any of the criteria cited in this section cannot be met, providers must specify in the evaluation report the factors influencing or preventing assessments, and justify the recommendation for a hearing aid.

[(C) Recommendations including poor ear fittings resulting in problems with speech discrimination ability must be accompanied by supporting rationale.]

(c)[(b)] Hearing aids. Providers must offer each client eligible for a hearing aid a new instrument that meets his hearing need and that is within the allowable fee paid by the Texas Medicaid Program.

(1) Hearing aids above the maximum allowable fee. The department shall pay the maximum allowable fee paid by the Texas Medicaid Program toward hearing aids for clients who meet the requirements cited at §29.1504(b)(2) of this title (relating to Reimbursement for Hearing Aid Services).

(2) Warranty. Providers must ensure that each hearing aid purchased through the Texas Medicaid Program is a new and current model which meets the performance specification of the manufacturer and the hearing needs of the client. Providers must also ensure that each hearing aid is covered by a full 12-month manufacturer's warranty, effective from the dispensing date.

(3) Required package. Providers must dispense each hearing aid purchased through the Texas Medicaid Program with [a receiver or oscillator, if needed;] all necessary tubing, cords, and connectors; instructions for care and use; and a one-month supply of batteries.

(4) Thirty-day trial period. Providers must allow each eligible client 30 days to determine his satisfaction with a hearing aid purchased through the Texas Medicaid Program. The trial period consists of 30 consecutive days from the dispensing date. Providers must inform clients of the trial period and of the beginning and ending dates.

(A) During the trial period, providers may dispense additional hearing aids, as medically necessary, until the client is satisfied with the results of the aid or the provider determines that the client cannot benefit from the dispensing of an additional hearing aid. A new trial period begins with the dispensing date of each hearing aid.

(B) Providers may charge a rental fee for hearing aids returned during the trial period.

(i) If a rental fee is charged, providers must assess the rental fee according to the rules and regulations established by the Texas Board of Examiners in the Fitting and Dispensing of Hearing Aids and the State Board of Examiners for Speech-Language Pathology and Audiology.

(ii) If there is no signed agreement between the client and the provider specifying a greater amount, the maximum rental for eligible Medicaid clients is $2 per day. This fee is not a

covered benefit of the Texas Medicaid Program. Clients are responsible for paying any rental fee assessed them for instruments returned during the 30-day period. Providers must keep in the client's file the client's signed certification acknowledging his responsibility to pay hearing aid rental fees.

(iii) Providers must comply with all procedures and directions provided by the department or its designee regarding forms and certifications required during the 30-day trial period. Providers must allow 30 days to elapse from the hearing aid dispensing date before completing a "30-day trial period certification statement," which is kept in the client's file.

(5) Post-fitting checks. The fitter and dispenser must perform a post-fitting check of the hearing aid within five weeks of the initial fitting. The post-fitting check is part of the dispensing procedure.

(6) First revisit. The first revisit includes a hearing aid check and/or counseling and is conducted as needed within six months of the post-fitting check.

(7) Second revisit. The second revisit is conducted as needed. The purpose of the second revisit is to assess hearing acuity [and includes an aided sound field test according to the hearing aid evaluation guidelines established by the department or its designee].

§29.1503. Requirements for Provider Participation.

(a) Provider enrollment. Each physician, audiologist, or fitter and dispenser of hearing aids claiming reimbursement for hearing aid services provided as a Title XIX benefit to an eligible Medicaid **client** [recipient] must be enrolled in the Texas Medicaid Program [and must be enrolled as a Medicaid provider in the state where and when he provides services].

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

(b) Provider licensure and certification. To be eligible for participation as a provider of hearing aid services under the Texas Medicaid Program, physicians, audiologists, and fitters and dispensers must meet applicable federal and state licensing and/or certification laws and rules for the services they provide. The following requirements are applicable to Medicaid providers of hearing aid services practicing in the State of Texas:

(1) (No change.)

(2) Audiologists must be currently licensed by the State **Board** [Commission] of Examiners for Speech-Language Pathology and Audiology and be certified by the American Speech-Language-Hearing Association (ASHA) or meet ASHA equivalency requirements. Audiologists providing fitting and dispensing services must be **registered with the State Board of Examiners for Speech-Language Pathology and Audiology** [licensed by the Texas Board of Examiners in the Fitting and Dispensing of Hearing Aids].

(3) Fitters and dispensers must be currently licensed by the **State Committee** [Texas Board] of Examiners in the Fitting and Dispensing of Hearing **Instruments** [Aids].

§29.1504. Reimbursement for Hearing Aid Services.

(a) The Texas Department of Health or its designee **shall** make direct vendor payments to providers of hearing aid services participating in the Texas Medical Assistance (Medicaid) Program. Participating providers are reimbursed within the limits defined by the maximum allowable fee schedule for hearing aid services established by the Texas Board of Health.

(b) Reimbursement for a hearing aid **shall be** [is] based on the lowest of the invoice cost of the hearing aid, the acquisition cost of the hearing aid, or the department's maximum allowable fee.

(1) (No change.)

(2) The department may authorize reimbursement for a hearing aid that exceeds the maximum allowable fee under the following conditions:

(A) the **client** [recipient] must certify in writing his preference for a specific hearing aid, and

(B) the **client** [recipient] must acknowledge in the certification his responsibility to pay the difference between the acquisition cost of the preferred instrument and the department's maximum allowable fee.

(3) The department or its designee **shall establish** [establishes] a fee schedule to set the upper limits of reimbursement for authorized hearing aid services. The fee schedule includes costs for hearing aids, earmolds, evaluation, fitting and dispensing, and follow-up visits.

(A) (No change.)

(B) Reimbursement for a physician's examination to determine the need for a hearing aid is not subject to the fee schedule. The department considers the examination a physician service and reimburses physicians according to **the methodology** [a determination of reasonable charge as] described in §29.1104 of this title (relating to **Texas Medicaid Reimbursement Methodology (TMRM)** [Reasonable Charges]).

(4) (No change.)

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601770 Susan K. Steeg
General Counsel
Texas Department of Health

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 458-7236

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 1. Purpose of Rules, General Provisions

• 30 TAC §§1.1-1.11

The Texas Natural Resource Conservation Commission (commission) proposes new §§1.1-1.11, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to

these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-20-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapter 70-79-enforcement; Chapter 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

Proposed new Chapter 39 contains requirements for notices of public hearings moved or duplicated from Chapter 305. Sections 1-100 of this new chapter are reserved for other public notice requirements.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50 Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50 Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305 Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. Newspaper notice regarding possible action by the executive director is moved to §305.100, and continues to apply only to water and waste permit applications. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §50.13(b).

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. To speed the resolution of disputed issues, §55.27 makes clear it is unnecessary to file a motion for reconsideration of the denial of a hearing request prior to seeking judicial review. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payments of "costs" required for withdrawal of an application without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter have been recodified in Chapters 39 and 50.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to include requirements for pump installers as well as water well drillers from Chapter 339. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the Council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these Council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held March 19, 1996, at 9:00 a.m. in Room 254S of TNRCC Building E, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to

the TNRCC Office of Policy and Regulatory Development in Austin through March 27, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed sections implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.01.

§1.1. Purpose of Rules 2, 382.017, 401.011, 401.051, and 401.412. The purpose of the commission's rules is to implement the powers and duties of the commission under the Texas Water Code, the Texas Health and Safety Code, and other laws, to establish the general policies of the commission, and to set forth the procedure to be followed in agency proceedings. The rules should be interpreted to simplify procedure, avoid delay, save expense, and facilitate the administration and enforcement of state and other laws by the agency.

§1.2. Construction of Rules. Unless otherwise expressly provided for in these rules, the past, present, and future tense shall each include the other; the masculine, feminine, and neutral gender shall each include the other; and the singular and plural number shall each include the other.

§1.3. Business Office and Mailing Address of the Agency.

(a) Agency offices. The agency's offices are located at Park 35, 12100 North Interstate 35, Austin. The commission's mailing address is P.O. Box 13087, Austin, Texas 78711-3087.

(b) Chief clerk's address. The chief clerk's mailing address is: Office of Chief Clerk, Texas Natural Resource Conservation Commission, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087. The chief clerk's office is located in Austin, Park 35, Building F, 12015 North Interstate 35. §1.4. Seal of the Commission. The seal of the commission will bear the words "Texas Natural Resource Conservation Commission" encircling the oak and olive branches common to other official state seals.

§1.5. Records of the Agency.

(a) Subject to the limitations provided in the acts administered by the commission and the Texas Public Information Act and copyright law, information collected, assembled, or maintained by the agency is public record open to inspection and copying during regular business hours.

(b) If classified data of the federal government or confidential information in the records of the agency is the subject of an open records request under the Texas Public Information Act, the executive director may submit a request to the Texas attorney general under Texas Government Code, §552.301, seeking a determination that the information is within an exception to the requirement to provide the information to the public.

(c) Subject to the limitations of this section, the agency will provide copies of its records upon request. The agency may furnish copies at the rates published in its operating procedures, or will contract for the copies to be made at the expense of the person requesting them. The agency will charge the fees specified in Texas Government Code, §603.004 for the reproduction services listed in that section. The agency may waive a charge if the cost to the agency to collect the charge will exceed the amount of the charge. Copies may be certified by the executive director or the chief clerk.

(d) Confidentiality of information.

(1) A person submitting information to the agency may request that the information be designated as classified data of the federal government, or as confidential. Each claim of classified data or confidentiality must be made upon submission, and each page must be stamped "confidential," or the material will be considered available for public review. Confidential information is information relating to trade secrets, secret processes, or economics of operation, or information that if made public would give any advantage to competitors or bidders, and includes confidential information under 5 United States Code, §552(b)(4), 18 United States Code, §1905, and special rules cited in 40 Code of Federal Regulations, §§2.301-2.309; provided, however, that the composition of any defined waste subject to the jurisdiction of the commission may not be regarded as confidential information.

(2) If the commission or executive director agrees with the designation, the agency will not provide the information for public inspection. The agency may return classified or confidential information to the person providing it if the person so requests and the information has served the purpose for which it was submitted.

(3) If a claim of classified data or confidentiality is not approved, the person submitting the information will be notified. If the person elects to withdraw the information, it will be withheld from public review until withdrawn. If the person who submitted the information is an applicant, the executive director shall not consider the information upon preparing the draft permit, and the commission and executive director shall not consider the information upon determining to grant or deny the application.

(4) The name and address of an applicant or permittee will not be considered confidential.

(5) For injection well applications, information which deals with the existence, absence, or levels of contaminants in drinking water will not be considered confidential.

(6) This section shall not be construed so as to make confidential any effluent data, including effluent data in permits, draft permits, and permit applications.

(7) For Texas pollutant discharge elimination system applications, information required relating to the contents of the application for permit will not be considered confidential. This includes information submitted on the forms themselves and any attachments used to supply information required by the forms.

(8) This section does not create privileges from discovery of documents in contested case hearings under Chapter 80 of this title (relating to Contested Case Hearings).

§1.6. Inscriptions on Commission Vehicles. Vehicles under the care and custody of the commission and used primarily in the detection and investigation of criminal violations of state and federal environmental laws are exempt from bearing the inscription required by Transportation Code, §721.002. The purpose of this exemption is

to is to increase the effectiveness of commission investigators in detecting and investigating criminal violations of state and federal environmental laws, thereby allowing investigative personnel to accomplish their tasks undetected and to provide a greater degree of safety for these investigators, the state property being used in the investigation, and a greater degree of case integrity.

§1.7. Computation of Time. In computing any period of time prescribed or allowed by regulations of the commission, by order of the commission, or by any applicable statute, the period shall begin on the day after the act, event, or default in question and it shall conclude on the last day of that designated period, unless it is a Saturday, Sunday, or legal holiday on which the office of the chief clerk is closed, in which event the period runs until the end of the next day that is neither a Saturday, Sunday, nor a legal holiday on which the office of the chief clerk is closed.

§1.8. Initiation of proceeding. A person who wishes to initiate a proceeding at the agency should submit a written request to the executive director. The commission's rules set forth the requirements for the specific types of proceedings and the commission's or executive director's final action thereon.

§1.9. Docket System. The chief clerk shall assign a docket number to each matter scheduled for consideration during a commission meeting or contested case referred to SOAH.

§1.10. Document Filing Procedures.

(a) All documents to be considered in a commission meeting or by judges in contested cases shall be filed with the chief clerk. Hearing requests and responses shall also be filed with the chief clerk.

(b) If a docket number has been assigned, it should appear on the first page of all filed documents.

(c) Documents shall be filed by mail, facsimile, or hand delivery. If a person files a document by facsimile, he or she must file with the chief clerk the appropriate number of copies by mail or hand delivery within three days.

(d) The original or one copy of a document shall be filed, except for documents to be considered at a commission meeting. For documents to be considered at a commission meeting, 11 copies shall be filed.

(e) The time of filing is upon receipt by the chief clerk as evidenced by the date stamp affixed to the document by the chief clerk, or as evidenced by the date stamp affixed to the document or envelope by the commission mail room, whichever is earlier.

(f) The chief clerk shall accept all documents presented for filing. The chief clerk's acceptance is not a determination that the document meets filing deadlines or other requirements.

(g) If the requirements of this section are not followed, the commission, or a judge in a SOAH proceeding, may choose not to consider the documents. In the absence of a waiver under subsection (h) of this section, the commission may choose not to consider documents filed within two days of a commission meeting.

(h) The judge may waive one or more of the requirements of this section, or impose additional filing requirements in the SOAH proceedings. The commission or general counsel may waive one or more of the requirements of this section, or impose additional filing requirements for commission meetings.

(i) This section does not apply to offers of evidence during a hearing.

§1.11. Service on Judge, Parties, and Interested Persons.

(a) For responses to hearing requests filed under Chapter 55 of this title (relating to Request for Contested Case Hearing), copies of all documents filed with the chief clerk shall be served on the executive director, the public interest counsel, the applicant, and any persons filing hearing requests, no later than the day of filing.

(b) For contested case hearings referred to SOAH, copies of all documents filed with the chief clerk shall be served on the judge and all parties or their representatives no later than the day of filing.

(c) All documents filed and served under this section shall include a certificate of service, certifying compliance with this section, and signed by the person or attorney filing the document. Failure to timely furnish copies may be grounds for withholding consideration of the document.

(d) Service by mail is complete upon deposit in the mail, properly addressed, with postage prepaid. Service by courier-receipted delivery is complete upon the courier taking possession. Service by facsimile is complete when sent to the recipient's current facsimile number. Service by facsimile after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Service by facsimile must be followed by serving an extra copy by mail or hand delivery within one day. Judges may impose different service requirements for SOAH proceedings.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601941 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

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Chapter 3. Definitions

• 30 TAC §3.1, §3.2

The Texas Natural Resource Conservation Commission (commission) proposes new §3.1 and §3.2, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

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Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapter 70-79-enforcement; Chapter 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

Proposed new Chapter 39 contains requirements for notices of public hearings moved or duplicated from Chapter 305. Sections 1-100 of this new chapter are reserved for other public notice requirements.

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The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held March 19, 1996, at 9:00 a.m. in Room 254S of TNRCC Building E, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through March 27, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512)

239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new proposed sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§3.1. Applicability. The words and terms listed in this chapter, when used in commission rules, shall have the meanings described in this chapter unless the context clearly indicates otherwise. However, a definition in this chapter shall not apply to another chapter of the commission's rules if the word or term is defined in that chapter.

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

APA–The Texas Administrative Procedure Act, Texas Government Code, Chapter 2001.

Applicant–A person who submits an application to the commission.

Agency–The commission, executive director, and their staffs.

Application–A petition or written request to the commission for an order, permit, license, registration, standard exemption, or other approval.

Chairman–The chairman of the commission.

Chief clerk–The chief clerk of the commission or any authorized individual designated by the chief clerk to act in his or her place.

Commission–The Texas Natural Resource Conservation Commission. In these rules, the term "commission" means the commissioners acting in their official capacity.

Commissioner–A member of the commission.

Contested case–A proceeding subject to the contested case requirements of the APA.

Executive director–The executive director of the commission, or any authorized individual designated to act for the executive director.

General counsel–The general counsel of the commission, or any authorized individual designated by the general counsel to act in his or her place.

Judge–A SOAH administrative law judge.

Party–Each person named or admitted as a party in a contested case.

Permit–Written permission from the commission, including a license or other authorization, granted in accordance with law and commission rules to engage in a business or occupation, to perform an act (such as to build, install, modify, or operate a facility), or to engage in a transaction which, but for such permission, would be unlawful.

Person–An individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity.

Pleadings–Written allegations filed by parties concerning their respective claims, such as applications, protests, complaints, claims, petitions, executive director preliminary reports, answers, motions, and other similar documents, including those submitted by the executive director and the public interest counsel.

Protestant–Any person opposing, in whole or in part, an application.

Public interest counsel–The public interest counsel of the commission, or any authorized individual designated by the public interest counsel to act in his or her place.

SOAH–The State Office of Administrative Hearings.

TCAA–The Texas Clean Air Act, Texas Health and Safety Code, Chapter 382.

Open Meetings Act–Texas Open Meetings Act, Texas Government Code, Chapter 551.

Public Information Act–Texas Public Information Act, Texas Government Code, Chapter 552.

TRCA–The Texas Radiation Control Act, Texas Health and Safety Code, Chapter 401.

TSWDA–The Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601942 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

Chapter 5. Advisory Committees

• 30 TAC §§5.1-5.14

The Texas Natural Resource Conservation Commission (commission) proposes new §§5.1-5.14, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-20-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapter 70-79-enforcement; Chapter 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters

that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

Proposed new Chapter 39 contains requirements for notices of public hearings moved or duplicated from Chapter 305. Sections 1-100 of this new chapter are reserved for other public notice requirements.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50 Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50 Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305 Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. Newspaper notice regarding possible action by the executive director is moved to §305.100, and continues to apply only to water and waste permit applications. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §50.13(b).

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. To speed the resolution of disputed issues, §55.27 makes clear it is unnecessary to file a motion for reconsideration of the denial of a hearing request prior to seeking judicial review. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payments of "costs" required for withdrawal of an application without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter have been recodified in Chapters 39 and 50.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to include requirements for pump installers as well as water well drillers from Chapter 339. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the Council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these Council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held March 19, 1996, at 9:00 a.m. in Room 254S of TNRCC Building E, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through March 27, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and

to establish and approve all general policy of the commission.

The proposed sections implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§5.1. Purpose. This chapter governs procedures applicable to advisory committees created to advise the Texas Natural Resource Conservation Commission.

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

Advisory committee–A committee, council, commission, task force, or other entity that:

(A) is not a state agency;

(B) is created by or under state law; and

(C) has as its primary function advising the commission.

§5.3. Creation and Duration of Advisory Committees. Except as otherwise provided by law, advisory committees shall be created by commission resolution. An advisory committee shall be abolished on the fourth anniversary of the date of its creation unless the commission has established a different date by commission resolution or the commission affirmatively votes to continue the advisory committee or the advisory committee has a specific duration prescribed by statute.

§5.4. Purpose and Duties of Advisory Committees. The purpose of advisory committees shall be to give the commission the benefit of the members' collective business, environmental, and technical expertise and experience with respect to matters within the commission's jurisdiction. The advisory committees' sole duty is to advise the commission. Advisory committees have no executive or administrative powers or duties with respect to the operation of the commission, and all such powers and duties rest solely with the commission. The specific purposes and tasks of an advisory committee subject to this chapter shall be identified by commission resolution.

§5.5. Composition of Advisory Committees. The composition of advisory committees shall be in accordance with the requirements of Texas Civil Statutes, Article 6252-33.

§5.6. Membership Terms. Except as otherwise provided by law, advisory committee members may serve two- or four-year terms, as resolved by the commission. Should the commission resolve that the members of a committee serve four-year terms, these terms shall initially be staggered, with one half of the members (rounded down should one half of the number of members not be a whole number) serving two-year terms, and one half (rounded up should one half of the number of members not be a whole number) serving four-year terms, and the terms for each member decided by drawing lots in the first committee meeting following the establishment of the membership of the committee by the commission.

§5.7. Membership. Except as otherwise provided by law, all members of advisory committees are appointed by and serve at the pleasure of the commission. If a member resigns, dies, becomes incapacitated, is removed by the commission, or otherwise vacates his or her position prior to the end of his or her term, the commission shall appoint a replacement who shall serve the remainder of the unexpired term.

§5.8. Attendance. A record of attendance at each meeting of the advisory committee shall be made. Except as otherwise provided by law, if a member of an advisory committee misses three consecutive regularly scheduled meetings or more than half of all the regularly scheduled meetings in a one-year period, that member automatically vacates his or her position on the advisory committee and the commission shall make an appointment to fill the remainder of the unexpired term of the vacancy.

§5.9. Reimbursement. Members of advisory committees shall not be reimbursed for expenses unless the commission expressly authorizes reimbursement by resolution. The commission may, in its discretion, reimburse the expenses of members of any duly authorized subcommittee of an advisory committee.

§5.10. Presiding Officer. Except as otherwise provided by law, or by commission resolution, each committee shall elect from its members a presiding officer, chairperson, or co-chairpersons, who shall report the committee's advice and attendance in writing to the commission. The commission may, at its discretion, appoint presiding officers, chairpersons, or co-chairpersons, of advisory committees. Committees may elect other officers at their pleasure.

§5.11. Manner of Reporting. Advisory committees shall report in writing to the commission a minimum of once per year, unless otherwise established by the commission. The report provided by an advisory committee shall be sufficient to allow the commission to properly evaluate the committee's work, usefulness, and the costs related to the committee's existence.

§5.12. Subcommittees. Advisory committees may organize themselves into subcommittees. One member of each subcommittee shall serve as the chairperson of that subcommittee. Subcommittee chairs shall make written reports regarding their subcommittee's work to the presiding officer of the advisory committee. A subcommittee of an advisory committee may include members who are not members of the advisory committee with the consent of the commission, but must include at least one member of the advisory committee.

§5.13. Meetings. Advisory committees shall meet at the call of the presiding officer or the commission. All advisory committee and subcommittee meetings shall be open to the public.

§5.14. Records. Commission staff shall record and maintain the minutes of each advisory committee and subcommittee meeting. The staff shall maintain a record of actions taken and shall distribute copies of approved minutes and other committee documents to the commission and to advisory committee members.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601943 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

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Chapter 10. Commission Meetings

• 30 TAC §§10.1-10.10

The Texas Natural Resource Conservation Commission (commission) proposes new §§10.1-10.10, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-20-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapter 70-79-enforcement; Chapter 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

Proposed new Chapter 39 contains requirements for notices of public hearings moved or duplicated from Chapter 305. Sections 1-100 of this new chapter are reserved for other public notice requirements.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50 Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50 Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305 Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. Newspaper notice regarding possible action by the executive director is moved to §305.100, and continues to apply only to water and waste permit applications. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §50.13(b).

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. To speed the resolution of disputed issues, §55.27 makes clear it is unnecessary to file a motion for reconsideration of the denial of a hearing request prior to seeking judicial review. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payments of "costs" required for withdrawal of an application without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter have been recodified in Chapters 39 and 50.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to include requirements for pump installers as well as water well drillers from Chapter 339. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the Council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these Council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held March 19, 1996, at 9:00 a.m. in Room 254S of TNRCC Building E, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through March 27, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new proposed sections implement Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412.

§10.1. Commission Meetings.

(a) The commission shall meet as necessary for the conduct of business, at times specified by the commission, including special meetings, at times and places in the state necessary for the performance of the commission's duties. The commission is subject to the Open Meetings Act and Texas Water Code, §5. 058, including any existing or future excep- tions that may be provided by law.

(b) The chairman shall preside at all commission meetings. The chairman may designate another commissioner to preside in his or her absence.

§10.2. Conduct and Decorum in Commission Meetings.

(a) Persons who attend or participate in a meeting should act in a manner that is respectful of the conduct of public business, and conducive to orderly and polite discourse.

(b) All persons shall comply with the chairman's directions concerning the offer of public comment, and conduct and decorum. Before the meeting, any person who wishes to speak should complete a public participation form and deliver it to the chief clerk's representative at the meeting.

(c) Persons who have special requests concerning a presentation during a meeting shall make advance arrangements with the chief clerk. A special request includes:

(1) the presentation of audio or video recordings;

(2) or the need to move furniture, appliances, or easels;

(3) alternative language interpreters; or

(4) auxiliary aids or services, such as interpreters for persons who are deaf or hearing impaired, readers, large print, or braille. The chief clerk shall consult with the general counsel on such requests.

§10.3. Deadline to File Comments on Matter Set for Commission Meeting. The commission or the general counsel may set a deadline for filing of written comments on a matter set for a commission meeting. The general counsel, either by agreement of the interested persons and any judge assigned to the matter, or on the general counsel's own motion, may extend a filing deadline.

§10.4. Continuance of Matter Set for a Commission Meeting.

(a) The chairman may continue a matter scheduled for a commission meeting from time to time and from place to place.

(b) Motions for continuance shall be in writing or stated on the record. The general counsel, either by agreement of the parties and any judge assigned to the matter, or on the general counsel's own motion, may reschedule the presentation of a matter at a commission meeting.

(c) If the time and place for the meeting to reconvene are not announced at the meeting, the chief clerk shall send notice of the rescheduled meeting date to the parties in a contested case no later than ten days before the rescheduled meeting. The parties may agree to waive the notice requirement.

§10.5. Preparation of Draft Order. If the commission or general counsel request a party to prepare a draft order to reflect the commission's action concerning a contested case, the party should attempt to reach an agreement among the parties on the form of the draft order. A written explanation of the parties' positions on the form of the draft order shall accompany the filed draft order.

§10.6. Execution of Orders Showing Action Taken at Commission Meetings.

(a) The chairman may sign written orders to show actions taken by the commission at a meeting. In the chairman's absence, or in accordance with subsection (b) of this section, another commissioner may sign an order.

(b) The chairman or a commissioner may sign a written order showing an action taken by the commission only if during the meeting he or she voted in favor of the action.

§10.7. Minutes of Commission Meeting. The chief clerk shall make audio recordings of commission meetings, which shall serve as the minutes. The chief clerk shall not, however, make audio recordings of closed sessions of commission meetings properly held in accordance with the requirements of the Open Meetings Act. The chief clerk shall keep all recordings in the commission's permanent records.

§10.8. Evidentiary Hearing Held by Commission. When an evidentiary hearing is held before one or more commissioners, the rules of

Chapter 80 of this title (relating to Contested Case Hearings) will apply. Judge shall mean the commissioner presiding over the hearing.

§10.9. Document Filing Procedures.

(a) All documents to be considered in a commission meeting or by judges in contested cases shall be filed with the chief clerk. Hearing requests and responses shall also be filed with the chief clerk.

(b) If a docket number has been assigned, it should appear on the first page of all filed documents.

(c) Documents shall be filed by mail, facsimile, or hand delivery. If a person files a document by facsimile, he or she must file with the chief clerk the appropriate number of copies by mail or hand delivery within three days.

(d) The original or one copy of a document shall be filed, except for documents to be considered at a commission meeting. For documents to be considered at a commission meeting, 11 copies shall be filed.

(e) The time of filing is upon receipt by the chief clerk as evidenced by the date stamp affixed to the document by the chief clerk, or as evidenced by the date stamp affixed to the document or envelope by the commission mail room, whichever is earlier.

(f) The chief clerk shall accept all documents presented for filing. The chief clerk's acceptance is not a determination that the document meets filing deadlines or other requirements.

(g) If the requirements of this section are not followed, the commission, or a judge in a SOAH proceeding, may choose not to consider the documents. In the absence of a waiver under subsection (h) of this section, the commission may choose not to consider documents filed within two days of a commission meeting.

(h) The judge may waive one or more of the requirements of this section, or impose additional filing requirements in the SOAH proceedings. The commission or general counsel may waive one or more of the requirements of this section, or impose additional filing requirements for commission meetings.

(i) This section does not apply to offers of evidence during a hearing.

§10.10. Service on Judge, Parties, and Interested Persons.

(a) For responses to hearing requests filed under Chapter 55 of this title (relating to Request for Contested Case Hearing), copies of all documents filed with the chief clerk shall be served on the executive director, the public interest counsel, the applicant, and any persons filing hearing requests, no later than the day of filing.

(b) For contested case hearings referred to SOAH, copies of all documents filed with the chief clerk shall be served on the judge and all parties or their representatives no later than the day of filing.

(c) All documents filed and served under this section shall include a certificate of service, certifying compliance with this section, and signed by the person or attorney filing the document. Failure to timely furnish copies may be grounds for withholding consideration of the document.

(d) Service by mail is complete upon deposit in the mail, properly addressed, with postage prepaid. Service by courier-receipted delivery is complete upon the courier taking possession. Service by facsimile is complete when sent to the recipient's current facsimile number. Service by facsimile after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Service by facsimile must be followed by serving an extra copy by mail or hand delivery within one day. Judges may impose different service requirements for SOAH proceedings.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601944 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

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Chapter 70. Enforcement

The Texas Natural Resource Conservation Commission (commission) proposes new §§70.1-70.11, 70.51, and 70.101-70.109, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-20-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapter 70-79-enforcement; Chapter 80-89-hearings contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

Proposed new Chapter 39 contains requirements for notices of public hearings moved or duplicated from Chapter 305. Sections 1-100 of this new chapter are reserved for other public notice requirements.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive

changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50 Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50 Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305 Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. Newspaper notice regarding possible action by the executive director is moved to §305.100, and continues to apply only to water and waste permit applications. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §50.13(b).

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. To speed the resolution of disputed issues, §55.27 makes clear it is unnecessary to file a motion for reconsideration of the denial of a hearing request prior to seeking judicial review. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payments of "costs" required for withdrawal of an application without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter have been recodified in Chapters 39 and 50.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to include requirements for pump installers as well as water well drillers from Chapter 339. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the Council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these Council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held March 19, 1996, at 9:00 a.m. in Room 254S of TNRCC Building E, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through March 27, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. Enforcement Generally

• 30 TAC §§70.1-70.11

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new sections implement Texas Water Code, §§5.103, 5.105, 13.041, 26. 011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§70.1. Purpose. The purpose of this chapter is to provide general rules governing enforcement actions before the commission. Procedures for contested enforcement cases are located in Chapter 80 of this title (relating to Contested Case Hearings). If some part or parts of these rules cannot be interpreted as consistent with the Texas Water Code, the Texas Health and Safety Code, or the APA, or

where applicable parts of those statutes are not specifically included in these rules, the referenced statutes shall control.

§70.2. Definitions. Unless specifically defined in this chapter, all terms used in these rules bear the same definitions ascribed by the Texas Water Code, the Texas Health and Safety Code, the APA, and commission rules. The terms specifically defined for the purposes of this chapter are as follows.

Contested enforcement case–An action in which the executive director seeks an enforcement order and the respondent, where having a right to do so, contests the issuance of the order by requesting an evidentiary hearing.

Executive director's preliminary report (EDPR)–A pleading filed by the executive director which, when issued and served in accordance with this title, seeks an enforcement order against a respondent. EDPR is further defined in Subchapter C of this chapter (relating to Enforcement Referrals to SOAH).

Enforcement action–A legal action, initiated by the executive director, seeking an enforcement order.

Enforcement order–Any commission order enforcing or directing compliance with any provisions; whether of statutes, rules, regulations, permits or licenses, or orders; which the commission is entitled by law to enforce or with which the commission is entitled by law to compel compliance.

Petition–The instrument by which the executive director states a cause of action for an enforcement order against a respondent. When an EDPR is filed and issued in accordance with the general requirements of this chapter and title, such EDPR and notice constitute a petition, as do amended EDPRs and amended or supplemental petitions.

Respondent–A person against whom the executive director is seeking an enforcement order.

§70.3. Enforcement Guidelines. The executive director may use enforcement guidelines which are neither rules or precedents, but rather announce the manner in which the agency expects to exercise its discretion in future proceedings. These guidelines do not establish rules which the public is required to obey or with which it is to avoid conflict. These guidelines do not convey any rights or impose any obligations on members of the public. These guidelines will be available to the public under the terms of Public Information Act, Texas Government Code, Chapter 552.

§70.4. Annual Enforcement Report. The executive director shall prepare an annual report of enforcement actions covering the previous fiscal year. This report shall include, at a minimum, the following:

(1) the number of complaints received by the agency, indicating the distribution of those complaints geographically;

(2) an estimate of the total number of facilities subject to inspection by the agency, categorized by region and program area;

(3) a list of facilities actually inspected, giving location and program area conducting the inspection;

(4) number of cases referred from Regions to Central Office for enforcement, categorized by Region;

(5) number of cases resolved informally (without issuance of an agency order), categorized by Regional Offices and Central Office;

(6) a listing of all orders issued, including names of respondents, location of facility covered by the order, programs covered by the order, and amount of administrative penalty assessed (including whether any amount was deferred and, if an amount was deferred pursuant to approval of a supplemental environmental project, a description of the project);

(7) a calculation of the total, average, and mean of administrative penalties assessed, excluding deferred penalties, with an additional categorization of these numbers by program area;

(8) the number of permit revocations, suspensions, or amendments issued resulting from enforcement actions; and

(9) the average number of regional inspectors employed.

§70.5. Remedies. Remedies available to the commission in enforcement actions conducted pursuant to these rules include all those found in the Texas Water Code, the Texas Health and Safety Code, and the APA. These include, but are not limited to, issuance of administrative orders with or without penalties, referrals to the Texas Attorney General's Office for civil judicial action, referrals to the Environmental Protection Agency for civil judicial or administrative action, referrals for criminal action, or permit revocation or suspension. Nothing herein shall be construed to preclude the executive director from seeking any remedy in law or equity not specifically mentioned in these rules. In addition, an enforcement matter may be resolved informally without the necessity of a contested case proceeding in appropriate circumstances.

§70.6. Judicial Civil Enforcement. The executive director is authorized to cause to be instituted, in courts of competent jurisdiction, legal proceedings to enforce and compel compliance with any provisions, whether of statutes, rules, regulations, permits or licenses, or orders, which the commission is entitled or required by law to enforce or with which the commission is entitled or required by law to compel compliance. Such legal proceedings may be initiated at any time by the executive director by a letter from the executive director or his authorized representative referring the matter to the Texas Attorney General's Office and requesting that the attorney general take action on behalf of the commission.

§70.7. Force Majeure.

(a) Any pollution, or any discharge of waste without a permit or in violation of a permit, shall not constitute a violation under this chapter if such pollution or discharge is the result of causes which are outside the control of the permittee or the permittee's agents and could not be avoided by the exercise of due care. Such acts include, but are not limited to, an act of God, war, strike, riot, or other catastrophe.

(b) The owner or operator of the affected facility shall have the burden of proof to demonstrate that any pollution or discharge is not a violation as provided by subsection (a) of this section.

(c) If force majeure is claimed as an affirmative defense to an action brought under this chapter, the permittee must submit notice to the executive director as provided by §305.125(9) of this title (relating to Standard Permit Conditions).

(d) The executive director shall respond in writing within 30 days from receipt of the notification provided under subsection (c) of this section with a determination as to whether the event constituted a force majeure and an affirmative defense to an enforcement action as provided by subsection (a) of this section.

§70.8. Financial Inability to Pay; Amount Necessary to Obtain Compliance.

(a) If any respondent, in response to an EDPR or petition, asserts an inability to pay the penalty recommended in that pleading, or challenges the executive director's recommendation regarding the amount of penalty which is necessary to deter future violations, that party shall have the burden of establishing that a lesser penalty is justified under that party's financial circumstances.

(b) A party asserting a claim under this section must pro-

duce all financial records that would be potentially relevant to that issue within 30 days of raising that claim, but no later than 30 days prior to the specified date for hearing without leave from the judge. The executive director is not required to make a discovery request for such financial records. The failure of the party raising such a claim to provide all potentially relevant financial records within the time discussed in this subsection shall constitute a waiver of the claim.

§70.9. Installment Payment of Administrative Penalty.

(a) Any person(s), firm, or business may, upon approval of the commission, be allowed to make installment payments of an administrative penalty imposed in an agreed order.

(b) A qualifying small business upon written request shall be allowed to make installment payments of an administrative penalty imposed in an agreed order, subject to the following.

(1) For purposes of this provision, a small business shall be defined as any person(s), firm, or business which employs, by direct payroll and/or through contract, fewer than 100 full-time employees and with net annual receipts of less than $3 million. For the purposes of this provision, net annual receipts is defined as annual gross receipts less returns, discounts, and adjustments. The period used to determine net annual receipts under this section shall be the preceding 12-month accounting year and can be either a calendar or fiscal-based period.

(2) A business that is a wholly-owned subsidiary of a corporation shall not qualify as a small business under this section if the parent organization does not qualify as a small business under this section.

(3) The amount and payment schedule of the monthly installments must be specified by an agreed order.

(4) Payment schedules issued may not exceed a 12-month period.

§70.10. Agreed Orders.

(a) The executive director and the respondent may reach an agreement, or settlement, in an enforcement action such that an agreed order is recommended to the commission for approval and issuance. In such an agreed order, the respondent may agree to: admit to none, any, or all of the violations alleged in any EDP or petition in the case; assessment of a specific administrative penalty; remedial ordering provisions; any combination of these; and any other lawful provisions agreed to by the executive director and the respondent. In order to have legal effect as an order of the commission, and in any case in which penalties are assessed, an agreed order must be approved and issued by the commission.

(b) The effective date of an order for purposes of compliance with terms and conditions therein, including deadlines, shall be the date on which service of notice of the order is achieved in accordance with the APA, §2001. 142.

(c) When an agreement is reached, the executive director shall file the agreed order with the chief clerk. The chief clerk shall then schedule the agreed order for consideration during a commission meeting under Chapter 10 of this title (concerning Commission Meetings). If the enforcement action is under the jurisdiction of SOAH, the judge shall remand the action to the executive director who will file the agreed order with the chief clerk for commission consideration. The judge is not required to prepare a proposal for decision or memorandum regarding the settlement.

§70.11. Notice of Decisions and Orders.

(a) Notice of enforcement orders and decisions. For rulings, orders, or decisions issued by the commission, parties shall be given notice, either personally or by first class mail, in accor- dance with the APA, §2001.142. Notice shall also be given in accordance with Texas Health and Safety Code, §382.096, where applicable.

(b) Notice of enforcement orders. In addition to the requirements of subsection (a) of this section, when the commission issues an enforcement order in which administrative penalties have been assessed, the chief clerk shall file notice of the commission's decision and order in the *Texas Register* not later than ten days after the date on which the decision is adopted.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601945 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

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Subchapter B. Mandatory Enforcement Hearings
• 30 TAC §70.51

The new section is proposed under Texas Water Code, §§5.103, 5.105, 13. 041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed section implements Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§70.51. Mandatory Enforcement Hearings.

(a) The executive director shall monitor compliance with all permits and licenses issued by the commission. If the evidence available to the executive director through the monitoring process indicates that a permittee or licensee is in substantial noncompliance for a period of four consecutive months, or for a shorter period of time if the executive director considers an emergency to exist, the executive director shall report this fact to the commission together with the information relating to the noncompliance. A certificate of convenience and necessity is not considered to be a permit or license for the purpose of this section.

(1) The executive director may consider the magnitude and frequency of noncompliances with permit or license limitations and conditions in determining the existence of substantial noncompliance.

(2) Substantial noncompliance includes situations involving permit or license violations which cause or have the potential to cause a significant water quality problem in, or impairment of the uses of a receiving stream, groundwater, or other water in the state, infringes upon the water rights of diverters or appropriators of water of the state, or results in a release or threat of release of hazardous waste to the environment, or any other set of circumstances which present a threat to public health or safety or the environment. This set of circumstances includes, but is not limited to, a failure to monitor operations or report information required by a permit or license regarding the operation of a facility without which the operator and/or the commission may be unable to adequately assess the performance of the facility and thereby assure that environmental harm or threats to public health have not occurred and may not occur. In addition, substantial noncompliance will be assessed in

terms of the degree of deviation from any requirement of a permit or license independent of the harm or potential harm to the environment or to public health.

(3) An emergency, for purposes of this subsection, involves an unforeseen set of circumstances which calls for immediate commission action due to an actual or potential hazard to public health and safety, or severe adverse impact on or to the uses of a receiving stream, groundwater, or other water in the state. If the emergency is of sufficient gravity, the executive director shall report the emergency to the commission together with the information relating to the noncompliance and shall advise the commission of the necessity of seeking a temporary restraining order, temporary injunction, or any other remedy in equity or law necessary for the abatement of the condition or conditions causing or contributing to the emergency, if such remedy is authorized by statute.

(4) Substantial noncompliance with provisions of Texas Health and Safety Code, Chapter 382, or with rules, permits, or orders promulgated pursuant to that chapter, shall be handled pursuant to Texas Health and Safety Code, §382.082.

(b) On receiving a report under subsection (a) of this section, the commission shall call and hold a hearing to determine whether the permittee or licensee who is the subject of the executive director's report to the commission has been in substantial noncompliance with his or her permit or license. Notice for this hearing shall issue in accordance with §70.104(b) and (c) of this title (relating to Notice of Executive Director's Preliminary Report), except that in the event that notice is performed under §70.104(b) of this title, by publication, the contents of that notice need only include the name of the respondent, a summary of the relief sought by the executive director, and the right of the person to a hearing if such exists.

(c) At the conclusion of the hearing, the commission shall issue an order stating one of the following:

(1) no violation of the permit or license has occurred;

(2) a violation of the permit or license has occurred, but has been corrected and no further action is necessary to protect the public interest;

(3) the executive director is authorized to enter into a compliance agreement;

(4) a violation of the permit or license has occurred and an administrative penalty is assessed as provided by the Texas Water Code or the Texas Health and Safety Code; or

(5) a violation of the permit or license has occurred, and the executive director is directed to have enforcement proceedings instituted against the permittee or licensee through the office of the attorney general.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601946 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

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Subchapter C. Enforcement Referrals to Soah

• 30 TAC §§70.101-70.109

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401. 011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new sections implement Texas Water Code, §§5.103, 5.105, 13.041, 26. 011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§70.101. Executive Director's Preliminary Report.

(a) Any enforcement action brought under these rules may be initiated by the EDPR being filed by the executive director with the chief clerk.

(b) The EDPR shall include a brief statement of the nature of the violation, the statute or statutes violated, the facts relied upon by the executive director in concluding that a violation has occurred, a recommendation that an administrative penalty be assessed, the amount of the recommended penalty, and an analysis of the factors required in the relevant statute to be considered by the commission in determining the amount of the penalty. This EDPR may be superseded by a petition.

§70.102. Pleadings Other than the Executive Director's Preliminary Report.

(a) In a contested enforcement case, all pleadings for which no other form is prescribed shall contain:

(1) the name of the party seeking to bring about or prevent action by the commission;

(2) the names of all other known parties;

(3) a concise statement of the facts and the law relied upon by the pleader;

(4) a prayer stating the type of relief, action, or order desired by the pleader;

(5) any other matter required by statute;

(6) a certificate in accordance with §1.11 of this title (relating to Service on Judge, Parties, and Interested Persons), showing service; and

(7) the signature of the submitting party or the party's authorized representative.

(b) All pleadings shall include the docket number assigned the case by the chief clerk and shall be served on the parties in accordance with Chapter 1 of this title (relating to Purpose of Rules, General Provisions).

(c) Up to seven days prior to the hearing, parties may file pleadings, supplemental or amended, so long as such do not operate as an unfair surprise to the opposite party. Amendments after that time will be at the discretion of the judge and may constitute grounds for a continuance.

(d) The executive director may amend an EDPR by filing a petition with the chief clerk, in which the executive director may make such changes as the law allows, including but not limited to changes in the following: the amount of the penalty, up to the maximum allowable by statute; the violations alleged, to include any or all violations which are not precluded by law from being brought; the number of days of occurrence of previously alleged violations; and the injunctive relief (or remedial ordering provisions) sought. The right to change the violations alleged includes the right to add causes of action based on statutes within the commission's jurisdiction other than the one or ones upon which the EDPR in the case was based. Petitions are pleadings and shall be served on the parties in accordance with this Chapter and Chapter 1 of this title.

(e) Any pleading may adopt and incorporate, by specific reference thereto, any part of any document or entry in the official

files and records of the agency. Copies of the relevant portions of such documents must be attached to the pleadings.

§70.103. Petitions which Initiate a Cause of Action.

(a) Generally. The executive director may file a petition as the instrument for initiating an enforcement action. The EDPR, when properly noticed and served, constitutes a petition.

(b) Service. Where enforcement actions are initiated with a petition, as per this section, and there is a statutory requirement that the respondent be given notice, the petition shall be filed and notice given as if it were an EDPR, in accordance with §70.104 of this title (relating to Notice of Executive Director's Preliminary Report).

§70.104. Notice of Executive Director's Preliminary Report.

(a) General requirements. Not later than the 10th day after the date on which the EDPR is issued, the executive director shall give written notice of the EDPR to the person charged therein. The EDPR is considered issued when it is filed with the office of the chief clerk. Notice shall consist of a copy of the EDPR, a statement of the amount of the penalty recommended, if any, and a statement of the right of the person charged to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(b) Timeliness and method of service. Notice shall be timely served if:

(1) sent to the respondent by registered or certified mail, return receipt requested, no later than the 10th day after the date on which the EDPR is issued; or

(2) delivered to the respondent in person, with the date of delivery endorsed thereon, no later than the 10th day after the date on which the EDPR is issued.

(c) Service by publication. Where the executive director has been unable to deliver notice to the respondent through reasonable attempts to serve respondent by the methods described in subsection (b) of this section, notice may be effected by publishing in a newspaper of general circulation in the county of the last known business or residential address of the respondent, for a period of seven consecutive days, the following:

(1) the name of the person charged;

(2) a brief summary of the charges;

(3) a statement of the amount of the penalty recommended, if any;

(4) a statement that injunctive or remedial relief is sought; and

(5) a statement of the right of the person charged to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(d) Proof of notice. Where proof of notice of the EDPR or petition is relevant, such as at a hearing for default judgment, a certificate by a party or an attorney of record or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service. In addition, the executive director may offer live testimony as well as such other documentary evidence as permitted by the presiding officer, showing that the notice has been perfected. Nothing herein shall preclude any party from offering proof that the notice was not received, or if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the presiding officer may extend the time for taking the action required of such party or grant such other relief as it deems just.

§70.105. Answer.

(a) A respondent may file a pleading with the chief clerk, which may be in the nature of a general denial as that term is used in state district courts, entitled an answer, either consenting to the imposition of the penalties and injunctive relief recommended in the EDPR, or requesting a contested enforcement case hearing. Any answer must be filed no later than 20 days, or 30 days for irrigators and irrigation system installers, after the date on which notice of an EDPR is received. Failure to file the answer by the required date after the date on which notice of EDPR is received may result in a default order, as described in §70.106 of this title (relating to Default Order), being issued against the respondent.

(b) If the person charged consents to the EDPR including the recommended penalty, the answer shall so state.

(c) An answer must also be filed in response to a petition which initiates an enforcement action.

(d) Answers to amended or supplemental petitions shall be filed if additional facts and claims are alleged in response to the amended or supplemental petitions.

(e) Any affirmative defenses must be specifically pled in an answer.

(f) A respondent may consent in writing to parts of the EDPR, initial petition, or amended or supplemental petition, whichever is the most recent pleading. If the enforcement action is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings), the respondent may also enter into agreements with the executive director regarding evidence or other issues pending in the enforcement action by stipulations presented in writing to the judge.

§70.106. Default Order.

(a) If any respondent to an EDPR or petition initiating an enforcement action fails to timely file an answer as required by §70.105 of this title (relating to Answer), the executive director may file a motion with the chief clerk recommending that a default order be entered against the respondent. The executive director may support the motion with such documentary evidence, including affidavits, exhibits and pleadings, and oral testimony, to demonstrate that the respondent received proper notice under §70.103 or §70.104 of this title (relating to Petitions which Initiate a Cause of Action and Notice of EDPR) of the pleading initiating the cause of action; and that the respondent failed to timely file an answer under §70.105 of this title and that the respondent is liable for the violations asserted in the cause of action. The chief clerk will schedule the default order for consideration at a commission meeting under Chapter 10 of this title (relating to Commission Meetings). The executive director may also present documentary evidence and oral testimony regarding the amount of penalties that should be assessed against the respondent. In the motion for default order, or at the hearing on the motion, the executive director may also ask for additional penalties for violations alleged in the EDPR or petition, which have continued from the time of the filing of the EDPR or petition, up to the date of the default order. If the executive director recommends additional penalties for continuing violations, he shall briefly describe, either orally or in writing, the continuing violations and the evidence, circumstantial or otherwise, that form the basis for the allegation that the violations are in fact continuing. The commission may grant the relief recommended in the EDPR or petition, or such other amount as may be justified by the evidence presented by the executive director.

(b) Even though some or all of the parties fail to appear at a contested enforcement case hearing in person or through their duly authorized representatives, the commission may consider fully and dispose of the matter pending if notice has been given in accordance

with law.

(c) Upon issuance of a default order, notice of such order shall be given to the respondent according to the provisions of §70.104 of this title.

§70.107. Enforcement Hearings. If required by law, an enforcement hearing shall be held prior to the commission issuance of any final enforcement order. In cases for which an enforcement hearing is not required by law to be held prior to issuance of an enforcement order, the commission may elect to hold a hearing, on its own motion, or upon the request of the executive director, prior to issuing a final enforcement order or direct SOAH to hold such a hearing. In those cases for which an enforcement hearing is not required by law to be held prior to issuance of an enforcement order, or for which procedures for an enforcement hearing are not specifically prescribed by rule or statute, the commission may elect to have such hearings be held by SOAH under rules prescribed by the commission, including the procedures established by this chapter for contested enforcement cases.

§70.108. Contested Enforcement Case Hearings to be Held by SOAH. In a contested enforcement case, unless the commission chooses to hear the case itself, SOAH shall have the delegated authority to preside over the case proceedings in accordance with the rules of Chapter 80 of this title (relating to Contested Case Hearings).

§70.109. Request for SOAH to Acquire Jurisdiction Over Case. Not less than 30 days after the respondent has filed an answer under §70.105 of this title (relating to Answer), either the respondent or the executive director may request that the chief clerk refer the case to SOAH for a contested enforcement case hearing. The parties may request this referral by filing a letter with the chief clerk and serving that letter on the other parties. If the chief clerk receives authorization pursuant to this subchapter to refer a case to SOAH, the chief clerk shall take the following actions:

(1) file a Request for Setting of Hearing form, or Request for Assignment of Administrative Law Judge form, whichever is appropriate. The executive director's petition or EDPR shall serve as the list of issues or areas that must be addressed, which the chief clerk shall file with SOAH; and

(2) issue public notice of the hearing as required by law, and in coordination with the policies and procedures of SOAH.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601947 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

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Chapter 261. General Provisions

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §§261.1-261.19, 261.21-261.26, 261.30, and 261.41-261.43, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-20-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapter 70-79-enforcement; Chapter 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

Proposed new Chapter 39 contains requirements for notices of public hearings moved or duplicated from Chapter 305. Sections 1-100 of this new chapter are reserved for other public notice requirements.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50 Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50 Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305 Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. Newspaper notice regarding possible action by the executive director is moved to §305.100, and continues to apply only to water and waste permit applications. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §50.13(b).

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. To speed the resolution of disputed issues, §55.27 makes clear it is unnecessary to file a motion for reconsideration of the denial of a hearing request prior to seeking

judicial review. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payments of "costs" required for withdrawal of an application without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter have been recodified in Chapters 39 and 50.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to include requirements for pump installers as well as water well drillers from Chapter 339. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the Council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these Council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held March 19, 1996, at 9:00 a.m. in Room 254S of TNRCC Building E, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through March 27, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. General Procedure

• 30 TAC §§261.1-261.19

(Editor's Note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§261.1. Definitions.

§261.2. Purposes of Rules.

§261.3. Construction of Rules.

§261.4. Business Office and Mailing Address of the Commission.

§261.5. Seal of the Commission.

§261.6. Commissioners' Meetings.

§261.7. Minutes of Commissioners' Meetings.

§261.8. Designation of Executive Director.

§261.9. Official Records are Public.

§261.10. Classified Data and Confidential Information.

§261.11. Copies and Certificates.

§261.12. Lost Records and Papers.

§261.13. Inscriptions on Commission Vehicles.

§261.14. Conduct and Decorum in Commissioners' Meetings.

§261.15. Rulings in Evidentiary Hearings before the Commissioners.

§261.16. Docket System.

§261.17. Document Filing Procedures.

§261.18. Service on Judge, Parties, and Interested Persons.

§261.19. Computation of Time.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601948 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

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Subchapter B. Environmental, Social, and Economic Impacts Statements

• 30 TAC §§261.21-261.26

(Editor's Note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§261.21. Relevance of Impacts Evidence.

§261.22. Filing of Federal Statement Required.

§261.23. Executive Director's Recommendation.

§261.24. Statement Filed with Executive Director.

§261.25. Impacts Statement Guidelines.

§261.26. Impact Statement Supplemented by Testimony.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601949 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

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Subchapter C. Expiration

• 30 TAC §261.30

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

The repeal is proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeal implements Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§261.30. Expiration.

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

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TRD-9601950 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

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Subchapter D. Guidelines for Preparation of Environmental Impact Studies

• 30 TAC §§261.41-261.43

(Editor's Note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§261.41. Introduction.

§261.42. Impact Assessment Process.

§261.43. Specific Guidelines for the Impacts Statement.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601951 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

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Chapter 331. Underground Injection Control

Subchapter A. General Provisions

• 30 TAC §331.6, §331.9

The Texas Natural Resource Conservation Commission (TNRCC) proposes amendments to §331.6 and §331.9, concerning underground injection. The proposed amendments incorporate rules promulgated by the U.S. Environmental Protection Agency pursuant to its authority under the federal Safe Drinking Water Act (SDWA). The proposed changes are needed to provide consistency with the federal regulations regarding Class IV wells used in authorized Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) cleanups and to allow for more flexibility in groundwater remediation than currently allowed by state regulations.

The current state regulation, §331.6, prohibits all Class IV well injection. The corresponding federal regulation, 40 CFR §144.13(c), prohibits all Class IV injection except when part of an authorized RCRA or CERCLA cleanup. The TNRCC proposes to amend the language of §331.6 to allow hazardous waste-contaminated fluids that have been treated to be reinjected into the same formation if the remediation plan is approved by the TNRCC under either RCRA or CERCLA. The TNRCC does not propose to allow reinjection of radioactive waste-contaminated fluids.

The proposed change is necessary to allow facilities that are undergoing RCRA or CERCLA cleanups to reuse treated groundwater as part of remediation, rather than disposing of all groundwater produced during remediation and using clean water from other sources to complete remediation. The proposed amendments will conserve groundwater resources and will provide operators more flexibility and increased cost savings in RCRA/CERCLA cleanups, as is already allowed by federal regulation.

Since all injection wells must be authorized by permit or rule, the TNRCC proposes that §331.9 be amended to authorize by rule reinjection of hazardous waste-contaminated fluids into the same formation as part of approved RCRA/CERCLA cleanups.

Standards for injection and remediation levels will be determined by appropriate RCRA and CERCLA remediation standards, including risk reduction (30 TAC 335, Subchapters A and S). Operators using these wells as part of an approved remediation plan will continue to be required to submit inventory information to the TNRCC prior to construction of the well(s), as required by §331.10. For purposes of record keeping, these wells will be referred to as exempted Class IV wells in order to differentiate from Class V remediation wells.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections as proposed are in effect there are no significant fiscal implications for state or local governments anticipated as a result of enforcement and administration of the sections. The effect of the rules will be to authorize certain Underground Injection Control disposal activities by rule and could potentially result in a reduction in the receipt of permit applications related to the affected activity. The effect on the commission will be a small reduction in potential workload and a small reduction in potential revenue associated with application fees for permits. Neither effect is anticipated to be significant.

Mr. Minick also has determined that for the first five-year period the sections as proposed are in effect the public benefit anticipated as a result of enforcement of and compliance with the section will be more effective efforts to remediate contaminated groundwaters, more cost-effective requirements for corrective actions at industrial facilities, and reduced consumption of water resources as a result of groundwater remediation activities. The effect of the section as proposed will be to reduce certain potential costs to operators undertaking corrective actions for the treatment of contaminated groundwaters. The actual cost savings for any operator or any individual cleanup project will vary on a case-by-case basis and cannot be estimated at this time. There are no economic costs anticipated for any person required to comply with this section as proposed.

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, Section 2007.043. The following is a summary of that assessment. The specific purpose of the rule is to provide consistency with the Environmental Protection Agency regulations regarding Class IV wells used in Resource Conservation and Recovery Act and Comprehensive Environmental Response, Compensation and Liability Act cleanups. The rules will substantially advance this specific purpose by allowing hazardous waste-contaminated fluids that have been treated to be reinjected into the same formation if the remediation plan is approved by the TNRCC under either RCRA or CERCLA. The proposed amendments will conserve groundwater resources and allow Texas facilities the same flexibility that is allowed under federal law. Promulgation and enforcement of these rules could affect private real property which is the subject of the rules.

However, the following exceptions to the application of the Texas Government Code, Chapter 2007 listed in Texas Government Code, §2007.003(b) apply to these rules: it is an action reasonably taken to fulfill an obligation mandated by federal law; and it is an action that is taken in response to a real and substantial threat to public health and safety, is designed to significantly advance the health and safety purpose, and does not impose a greater burden than is necessary to achieve the health and safety purpose.

Written comments may be submitted to the TNRCC central office in Austin for a period of 30 days following the date of this publication. Material received by the TNRCC Office of Policy and Regulatory Development by 5:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail written comments to Bettie Mabry-Bell, Office of Policy and Regulatory Development, MC-201, P.O. Box 13087, Austin, Texas 78711-3087 and refer to Rule Log Number 95108-331-WS when commenting on the proposed rule. For further information, please contact Betty Rogers at (512) 239-0048.

The amendments are proposed under the Texas Water Code, §5.103 and §5. 105 (Vernon 1988), which authorizes the TNRCC to promulgate rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of the state, and under the Texas Health and Safety Code, §361.017 and §361.024 (Vernon 1992), which further authorizes the TNRCC to promulgate rules necessary to manage industrial solid and municipal hazardous wastes.

There are no other codes, rules or statutes that will be affected by this proposal.

§331.6. Prohibition of Class IV Well Injection. The injection of hazardous fluids or radioactive wastes into or above a formation which within one quarter mile of the well contains an underground source of drinking water is prohibited. **Wells used to inject hazardous waste-contaminated ground water that is of acceptable quality to aid remediation and is being reinjected into the same formation from which it was drawn are not prohibited by this section if such injection is approved by the commission pursuant to provisions for cleanup of releases under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C.9601-9657, or pursuant to requirements and provisions under the Resource Conservation and Recovery Act (RCRA), 42 United States Code. 6901 through 6987.**

§331.9. Injection Authorized by Rule.

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

(j) Class IV wells injecting hazardous waste-

contaminated ground water that is of acceptable quality to aid remediation and is being reinjected into the same formation from which it was drawn, as authorized by §331.6 of this title (relating to Prohibition of Class IV Wells Injection), shall be authorized by rule.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601965 Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 239-6087

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Chapter 337. Enforcement Rules

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §§337.1-337.6, 337.8-337.10, 337.21-337.48, 337.50-337.58, and 337.71, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-20-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapter 70-79-enforcement; Chapter 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

Proposed new Chapter 39 contains requirements for notices of public hearings moved or duplicated from Chapter 305. Sections 1-100 of this new chapter are reserved for other public notice requirements.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50 Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50 Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305 Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. Newspaper notice regarding possible action by the executive director is moved to §305.100, and continues to apply only to water and waste permit applications. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §50.13(b).

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. To speed the resolution of disputed issues, §55.27 makes clear it is unnecessary to file a motion for reconsideration of the denial of a hearing request prior to seeking judicial review. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payments of "costs" required for withdrawal of an application without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter have been recodified in Chapters 39 and 50.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to include requirements for pump installers as well as water well drillers from Chapter 339. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council as appropriate. Enforcement rules

are deleted and references made to the proposed new Chapters 70 and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the Council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these Council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held March 19, 1996, at 9:00 a.m. in Room 254S of TNRCC Building E, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through March 27, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Subchapter A. Enforcement Generally

• 30 TAC §§337.1-337.6, 337.8-337.10

(Editor's Note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§337.1. Purpose.

§337.2. Construction of Sections Incorporated by Reference.

§337.3. Definitions.

§337.4. Filing and Service Procedures for Documents, Notice.

§337.5. Computation of Time.

§337.6. Judicial Civil Enforcement.

§337.8. Enforcement Hearings.

§337.9. Enforcement Guidelines.

§337.10. Enforcement Report.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601952 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

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Subchapter B. Contested Enforcement Case Hearings

• 30 TAC §§337.21-337.48, 337.50-337.58

(Editor's Note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§337.21. Contested Enforcement Case Hearings to be Held by SOAH.

§337.22. Remedies.

§337.23. Executive Director's Preliminary Report (EDPR).

§337.24. Pleadings Other than Executive Director's Preliminary Report (EDPR).

§337.25. Petitions which Initiate a Cause of Action.

§337.26. Notice of Executive Director's Preliminary Report (EDPR).

§337.27. Service of Notice and Pleadings.

§337.28. Answer.

§337.29. Default Order.

§337.30. Agreed Orders.

§337.31. Request for SOAH to Acquire Jurisdiction Over Case

§337.32. Consolidation and Severance.

§337.33. Continuance.

§337.34. Preliminary Hearing.

§337.35. Notice of Contested Enforcement Case Hearing.

§337.36. Rights of Parties in Contested Enforcement Case Hearings.

§337.37. Discovery.

§337.38. Abuse of Discovery; Sanctions.

§337.39. Summary Judgment.

§337.40. Interlocutory Appeals.

§337.41. Final Prehearing Conference.

§337.42. Exhibits.

§337.43. Automatic Continuance for Settlement Negotiations

§337.44. Agreements to be in Writing.

§337.45. Presentation of Evidence.

§337.46. Burden of Proof.

§337.47. Order of Presentation.

§337.48. Oral Argument.

§337.50. Financial Inability to Pay; Amount Necessary to Obtain Compliance.

§337.51. Proposal for Decision (PFD).

§337.52. Waiver of Right to Review Proposal for Decision (PFD).

§337.53. Pleadings Following Proposal for Decision (PFD).

§337.54. Amending the Proposal for Decision (PFD).

§337.55. Motion to Re-open the Record after Proposal for Decision (PFD).

§337.56. Commission's Decision after Contested Enforcement Case Hearing.

§337.57. Notice of Decisions and Orders.

§337.58. Appeals of Enforcement Orders.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601953 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

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Subchapter C. Special Enforcement Proceedings

• 30 TAC §337.71

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

The repeal is proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeal implements Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§337.71. Mandatory Enforcement Hearings.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601954 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

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Chapter 345. Advisory Committee Rules

• 30 TAC §§345.1-345.14

(Editor's Note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Natural Resource Conservation Commission (commission)

proposes the repeal of §§345.1-345.14, concerning the commission's procedural rules.

This proposal is the second phase (Phase II) of an ongoing project to reorganize, clarify, and consolidate the procedural rules of the commission. The first phase of the project (Phase I) was intended to implement recent legislation and was completed in the summer of 1995. Phase I made limited substantive changes to the commission's rules and began limited reorganization. Phase II is a more ambitious attempt to reorganize and consolidate the commission's procedural rules, and to eliminate conflicting procedural requirements based solely on media or type of hearing. By consolidating these rules, the commission seeks to cut back on the duplication of requirements and definitions that might create unwarranted non-statutory differences in the treatment of persons working with the commission. As part of this ongoing project, the commission is continuing to examine program and media specific rules for inconsistency with the general rules of the agency. It is anticipated that any further consolidation will be proposed as amendments to specific programs or chapters and not as a further major revision to these procedural rules.

Proposed numbering changes attempt to impose a more logical organization upon the most widely applicable rules of the commission by taking advantage of newly available chapters in Title 30. Chapters 1-99 will be reserved for the procedural rules and broadly applicable substantive rules of the commission. By locating generally applicable rules at the beginning of Title 30, commission rules should be organized in a more logical and user-friendly format. The proposed new format consists of the following reservation of chapters: Chapters 1-10-general rules of the commission; Chapters 11-20-miscellaneous provisions not specific to any media; Chapters 20-29-rulemaking; Chapters 30-49-application procedures; Chapters 50-69-processing of applications; Chapter 70-79-enforcement; Chapter 80-89-hearings-contested/other. The current proposal conforms to this new format.

Media specific substantive rules, and limited procedural rules will continue to be found in Chapters 100-399 of Title 30.

Proposed new Chapters 1 and 10 replace and make limited changes to existing Chapter 261. Chapter 1 sets forth the general rules of the agency. Chapter 10 governs the conduct of commission meetings.

Proposed new Chapter 3 is intended to consolidate the definitions broadly applicable across chapters. Definitions within specific chapters that conflict with definitions in Chapter 3 will continue to apply to the particular chapter within which they are found. Long-term plans call for consolidating these definitions as much as possible, but any further consolidation beyond this proposal will be undertaken as changes to specific chapters.

Proposed new Chapter 5 replaces existing Chapter 345 and sets forth the rules governing the composition of advisory groups to the commission, without substantive changes from the existing rules.

Proposed new Chapter 20 contains the rules governing agency rulemaking from Chapter 275 without substantive changes.

Proposed new Chapter 39 contains requirements for notices of public hearings moved or duplicated from Chapter 305. Sections 1-100 of this new chapter are reserved for other public notice requirements.

Proposed Chapter 40 replaces Chapter 264, relating to Alternative Dispute Resolution (ADR) before the commission. No substantive changes to ADR procedures are proposed.

Proposed new Chapters 50 and 55 replace existing Chapter 263. Chapter 50 relates to actions taken on an application by the commission or the executive director. Chapter 50 Subchapter B relates to actions taken by the commission on uncontested applications. Chapter 50 Subchapter C relates to action by the executive director and is recodified primarily from Subchapter A of Chapter 263, but also duplicates a portion of Chapter 305 Subchapter E. The principal change to current practice proposed in Chapter 50 is the consolidation of the process for executive director approval of air applications into a single process governing all media. This single process eliminates the *Texas Register* notice requirement regarding possible action by the executive director. Newspaper notice regarding possible action by the executive director is moved to §305.100, and continues to apply only to water and waste permit applications. The proposed rules continue the distinction between media of the limitation upon the executive director's authority to act on protested applications. Persons concerned with production area authorizations should note that the public notice requirement for an application has been increased from ten to 30 days in §50.13(b).

Proposed new Chapter 55 relates to commission action upon hearing requests related to permit applications and is a recodification of Subchapter B of Chapter 263. The commission seeks to clarify the process in this new chapter. To speed the resolution of disputed issues, §55.27 makes clear it is unnecessary to file a motion for reconsideration of the denial of a hearing request prior to seeking judicial review. Future rulemaking will be undertaken to further define the factors considered in evaluating hearing requests. At this time, there is insufficient experience with the current process, adopted in August of 1995, to fairly evaluate how well existing rules concerning the processing of hearing requests are meeting the needs of the regulated community, the public, and the commission.

Proposed new Chapter 70 contains the sections from Chapter 337 that were not related to hearing procedures.

Proposed Chapter 80 unifies the contested case hearing procedures contained in current Chapters 265 and 337. Where substantive and procedural issues differed significantly under the existing rules, the commission attempted to maintain these differences. Section 80.25 is modified to clarify that attorney's fees are not included in the payments of "costs" required for withdrawal of an application without prejudice. Section 80.107 duplicates the sanctions list allowed in Senate Bill 12, and unifies the sanctions sections from the other rules proposed for repeal or amendment in this package. Section 80.137 modifies the summary judgment procedure from Chapter 337. Inclusion of this procedure in Chapter 80 will make summary disposition available in all contested cases. Discovery rules that duplicate the Texas Rules of Civil Procedure have been replaced with a reference to those rules. Voluntary discovery rules have been eliminated. Language is added to the discovery rules to make clear that drafts of prefiled testimony are not discoverable. The "freeze rules" in Chapter 265, Subchapter F have been clarified and streamlined, and duplicate procedures have been consolidated with the general procedures in Chapter 80. Language is added to §80.207 to require a reasonable basis for protestants' issues listed in the freeze process. This change was not intended to shift the burden of proof upon an application. Twenty days have been added to the end of the first discovery period in the freeze process to allow more time for the listing of issues.

Proposed new Chapter 86 contains special procedural rules of Chapter 275 (which is proposed for repeal) not moved to Chapter 20. No substantive changes are proposed in this recodification.

Chapter 305, Subchapter E is proposed for repeal. Rules contained in that subchapter have been recodified in Chapters 39 and 50.

Chapter 339 is proposed to be repealed in its entirety.

Chapter 340 is amended to include requirements for pump installers as well as water well drillers from Chapter 339. In addition, references to the former Water Well Drillers Board are changed to commission or Water Well Drillers Advisory Council as appropriate. Enforcement rules are deleted and references made to the proposed new Chapters 70, and 80. Additional changes are proposed to reflect recent changes in the statutory authority of the Council, and to delete sections that are duplicated in new Chapter 5.

Chapter 341, which was the former Water Well Drillers Board procedures for enforcement and hearings, is proposed to be repealed in its entirety and these Council proceedings will be governed by new Chapters 70 and 80.

Persons seeking help in comparing this rule proposal and recodification to the existing rules, can obtain a redlined/strikeout version of this package and disposition/derivation tables from the commission. Please contact David Bolduc at (512) 239-1000 for a copy of this information.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be improvement in the hearings process and for contested matters before the commission and enhanced consistency in the conduct of administrative proceedings for state agencies.

There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

The proposed rule revisions are intended to clarify, streamline, and recodify the procedural rules of the agency. The commission prepared a takings impact assessment of these rules and determined that the proposal will not create any burden on private real property rights.

A public hearing on the proposal will be held March 19, 1996, at 9:00 a.m. in Room 254S of TNRCC Building E, located at 12100 North IH-35, Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Written comments not presented at the hearing may be submitted to the TNRCC Office of Policy and Regulatory Development in Austin through March 27, 1996. Material received by the TNRCC Office of Policy and Regulatory Development by 4:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. Please mail comments to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, and reference Rules Tracking Log Number 95123-263-AD. Please fax comments to (512) 239-4808. Copies of the revision are available from the Office of Policy and Regulatory Development, located at 12100 Park 35 Circle, Building F, Austin, and at all TNRCC regional offices. For further information, please contact Randall Terrell at (512) 239-0577.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

The repeals are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412.

§345.1. Purpose.

§345.2. Definitions.

§345.3. Creation and Duration of Advisory Committees.

§345.4. Purpose and Duties of Advisory Committees.

§345.5. Composition of Advisory Committees.

§345.6. Membership Terms.

§345.7. Membership.

§345.8. Attendance.

§345.9. Reimbursement.

§345.10. Presiding Officer.

§345.11. Manner of Reporting.

§345.12. Subcommittees.

§345.13. Meetings.

§345.14. Records.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601955 Kevin McCalla
Director, Legal Services Division
Texas Natural Resource Conservation Commission

Proposed date of adoption: May 1, 1996

For further information, please call: (512) 239-1966

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TITLE 34. PUBLIC FINANCE

Part I. Comptroller of Public Accounts

Chapter 3. Tax Administration

Subchapter V. Franchise Tax

• 34 TAC §3.569

The Comptroller of Public Accounts proposes new §3.569, concerning eligible child credit. The new section is proposed in accordance with House Bill 327, 74th Legislature, 1995, creating the credit for wages paid to certain children committed to the Texas Youth Commission.

Mike Reissig, chief revenue estimator, has determined that for the first five-year period the rule will be in effect there will be no significant revenue impact on the state or local government.

Mr. Reissig 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 new information regarding tax responsibilities. 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 persons who are required to comply with the proposed rule.

Comments on the new section may be submitted to Karey W. Barton, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

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

The new section implements the Tax Code, §§171.681-171.687.

§3.569. Eligible Child Credit.

(a) Effective date. This section is effective for reports originally due on or after January 1, 1996, and applies only for wages paid or incurred on or after January 1, 1996.

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

(1) Due date-The due date of the franchise tax report, including extensions, if any.

(2) Eligible child-A person who:

(A) is committed to the Texas Youth Commission (TYC) under the Family Code, Title 3, other than a commitment under a determinate sentence under the Family Code, §54.04(d)(3), §54.04(m), or §54.05(f); and

(B) resides at a facility of the TYC.

(c) Amount of credit-eligible child.

(1) A corporation may claim a credit on its report for 10% of the wages the corporation paid to an eligible child, or the TYC for the benefit of the child, during the period upon which the report is based.

(2) By the due date, the eligible child must have been continuously employed by the corporation for at least six months. However, the eligible child need not be employed on the due date.

(3) For purposes of claiming the credit, there is no maximum limit on the length of time the eligible child may be employed.

(4) A certification from TYC must accompany the report and must be filed on or before the due date of the report. The certification must include:

(A) the name of the corporation paying the wages;

(B) the name of each eligible child to which or for which the corporation paid wages;

(C) the amount of wages paid to each eligible child or to TYC for the benefit of the eligible child by the corporation during the period upon which the report is based; and

(D) the date each wage was paid.

(d) Amount of credit-former eligible child.

(1) On or before the due date of the report, a corporation may claim a credit on its report for 10% of the wages the corporation paid to a former eligible child (employee) during the period upon which the report is based.

(2) By the due date, the employee must have been continuously employed by the corporation for at least six months while an eligible child and at least one year after the employee was released from commitment to TYC or released under supervision by TYC. However, the person need not be employed on the due date.

(3) The credit may only be claimed for one year's wages for each employee. The credit does not have to be claimed for the first year's wages after release.

(4) The corporation must be able to prove, upon audit, that the employment is substantially similar to, requires more skill than, or provides greater opportunity than the employee had with the corporation while an eligible child. This can be done by showing that the hours worked per week and the hourly rate are equal to or greater than the hours worked per week and hourly rate while an eligible child.

(e) Limitations-eligible child and former eligible child.

(1) The credit may not exceed 50% of the amount of tax due for the report after all other credits and deductions, including, but not limited to, the business loss carryover, are taken.

(2) The credit must be claimed on the report form.

(3) Only one credit for each wage paid may be taken.

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

Issued in Austin, Texas, on February 8, 1996.

TRD-9601843 Martin E. Cherry
Chief, General Law Section
Comptroller of Public Accounts

Proposed date of adoption: March 22, 1996

For further information, please call: (512) 463-4028

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Part V. Texas County and District Retirement System

Chapter 109. Practice and Procedure Regarding Claims

• 34 TAC §109.12

The Texas County and District Retirement System proposes an amendment to §109.12, concerning payments to alternate payees. The proposed amendment would add a subsection (d) to authorize the system to make a lump-sum payment to an alternate payee at the time when an annuity would otherwise be payable, if the reserves upon which the alternate payee's annuity would be calculated are $5,000 or less. In most instances, reserves in this maximum amount provide the alternate payee with a monthly annuity of less than $50 under the provisions of the system; however, the continuing administration of each benefit payable in the form of an annuity, as well as the preparation of each monthly retirement check, generate fixed administrative costs unrelated to the amount of the annuity. At the time when an annuity would otherwise become payable over the life of an alternate payee, if the value of the reserves providing such an annuity are $5,000 or less, the proposed amendment would authorize the system to pay the alternate payee those reserves as a single sum in lieu of the lifetime annuity. This will reduce administrative costs to the system while preserving the present value of the alternate payee's benefit. Payments under this proposed amendment will not be made prior to the time that the system begins paying an annuity to the participant, the participant's beneficiary or the participant's estate.

Terry Horton, Director of the Texas County And District Retirement System, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section as proposed.

Mr. Horton 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 a reduction in the costs to the system of administering small annuities and issuing monthly checks of small amounts to alternate payees. There is no anticipated economic cost to persons required to comply with the section as proposed.

Comments on the proposal may be submitted to Terry Horton, Director, Texas County And District Retirement System, 400 West 14th Street, Austin, Texas 78701-1688.

The amendment is proposed under Government Code, §845.102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for the effective administration of the System.

The Government Code, Chapter 804, §804.004 is affected by this amendment.

§109.12. Payments to Alternate Payees.

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

(d) In the event that the total reserves upon which an annuity (otherwise payable to an alternate payee under a qualified domestic relations order) would be calculated are $5,000 or less, then the system is authorized to make a single lump-sum payment to the alternate payee in the amount of those reserves instead of paying an annuity to the alternate payee. No such payment shall be made by the system until such point in time as the system begins paying an annuity to the participant or the participant's designated beneficiary, surviving spouse, or estate.

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

Issued in Austin, Texas, on February 8, 1996.

TRD-9601837 Terry Horton
Director
Texas County and District Retirement System

Earliest possible date of adoption: March 22, 1996

For further information, please call: (512) 476-6651

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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 16. ECONOMIC REGULATION

Part VIII. Texas Racing Commission

Chapter 303. General Provisions

Subchapter B. Powers and Duties of the Commission

• 16 TAC §303.41

The Texas Racing Commission has withdrawn from consideration for permanent adoption a proposed amendment to §303.41, which appeared in the December 19, 1995, issue of the *Texas Register* (20 TexReg 10874). The effective date of this withdrawal is February 12, 1996.

Issued in Austin, Texas, on February 12, 1996.

TRD-9601988 Paula Cochran Carter
General Counsel
Texas Racing Commission

Effective date: February 12, 1996

For further information, please call: (512) 833-6699

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• 16 TAC §303.43

The Texas Racing Commission has withdrawn from consideration for permanent adoption a proposed amendment to §303.43, which appeared in the December 19, 1995, issue of the *Texas Register* (20 TexReg 10874). The effective date of this withdrawal is February 12, 1996.

Issued in Austin, Texas, on February 12, 1996.

TRD-9601986 Paula Cochran Carter
General Counsel
Texas Racing Commission

Effective date: February 12, 1996

For further information, please call: (512) 833-6699

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Chapter 305. Licenses for Pari-mutuel Racing

Subchapter C. Racetrack Licenses

General Provisions

• 16 TAC §305.70

The Texas Racing Commission has withdrawn from consideration for permanent adoption a proposed amendment to §305.70, which appeared in the November 7, 1995, issue of the *Texas Register* (20 TexReg 9240). The effective date of this withdrawal is February 12, 1996.

Issued in Austin, Texas, on February 12, 1996.

TRD-9601987 Paula Cochran Carter
General Counsel
Texas Racing Commission

Effective date: February 12, 1996

For further information, please call: (512) 833-6699

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part III. Texas Commission on Alcohol and Drug Abuse

Chapter 141. General Provisions

• 40 TAC §141.7, §141.62

The Texas Commission on Alcohol and Drug Abuse has withdrawn from consideration for permanent adoption the proposed new §141.7 and §141.62, which appeared in the August 18, 1995, issue of the *Texas Register* (20 TexReg 6302). The effective date of this withdrawal is February 8, 1996.

Issued in Austin, Texas, on February 8, 1996.

TRD-9601797 Mark S. Smock
Assistant Deputy for Finance
Texas Commission on Alcohol and Drug Abuse

Effective date: February 8, 1996

For further information, please call: (512) 867-8720

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Chapter 142. Investigations and Hearings

• 40 TAC §142.33

The Texas Commission on Alcohol and Drug Abuse has withdrawn from consideration for permanent adoption a proposed new §142.33, which appeared in the August 18, 1995, issue of the *Texas Register* (20 TexReg 6303). The effective date of this withdrawal is February 8, 1996.

Issued in Austin, Texas, on February 8, 1996.

TRD-9601800 Mark S. Smock
Assistant Deputy for Finance
Texas Commission on Alcohol and Drug Abuse

Effective date: February 8, 1996

For further information, please call: (512) 867-8720

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Chapter 143. Awards

Subchapter B. Eligibility

• 40 TAC §143.22

The Texas Commission on Alcohol and Drug Abuse has withdrawn from consideration for permanent adoption a proposed new §143.22, which appeared in the August 18, 1995, issue of the *Texas Register* (20 TexReg 6304). The effective date of this withdrawal is March 1, 1996.

Issued in Austin, Texas, on February 8, 1996.

TRD-9601804 Mark S. Smock
Assistant Deputy for Finance
Texas Commission on Alcohol and Drug Abuse

Effective date: March 1, 1996

For further information, please call: (512) 867-8720

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Chapter 144. Funding Requirements

Subchapter A. Definitions

• 40 TAC §144.11

The Texas Commission on Alcohol and Drug Abuse has withdrawn from consideration for permanent adoption a proposed new §144.11, which appeared in the August 25, 1995, issue of the *Texas Register* (20 TexReg 6592). The effective date of this withdrawal is February 8, 1996.

Issued in Austin, Texas, on February 8, 1996.

TRD-9601806 Mark S. Smock
Assistant Deputy for Finance
Texas Commission on Alcohol and Drug Abuse

Effective date: February 8, 1996

For further information, please call: (512) 867-8720

Subchapter B. Organizational

• 40 TAC §§144.21-144.29, 144.31-144.34, 144.41-144.44, 144. 51-144.54, 144.61-144.65, 144.71-144.74

The Texas Commission on Alcohol and Drug Abuse has withdrawn from consideration for permanent adoption the proposed new §§144.21-144.29, 144. 31-144.34, 144.41-144.44, 144.51-144.54, 144.61-144.65, and 144.71-144.74, which appeared in the August 25, 1995, issue of the *Texas Register* (20 TexReg 6597). The effective date of this withdrawal is February 8, 1996.

Issued in Austin, Texas, on February 8, 1996.

TRD-9601807 Mark S. Smock
Assistant Deputy for Finance
Texas Commission on Alcohol and Drug Abuse

Effective date: February 8, 1996

For further information, please call: (512) 867-8720

Subchapter C. Fiscal

• 40 TAC §§144.211-144.215, 144.221-144.228, 144.231-144.238, 144.241-144.245, 144.251-144.256, 144.261-144.265, 144.271, 144.281-144.283

The Texas Commission on Alcohol and Drug Abuse has withdrawn from consideration for permanent adoption the proposed new §§144.211-144.215, 144. 221-144.228, 144.231-144.238, 144.241-144.245, 144.251-144.256, 144.261-144. 265, 144.271, and 144.281-144.283, which appeared in the September 1, 1995, issue of the *Texas Register* (20 TexReg 6807). The effective date of this withdrawal is February 8, 1996.

Issued in Austin, Texas, on February 8, 1996.

TRD-9601808 Mark S. Smock
Assistant Deputy for Finance
Texas Commission on Alcohol and Drug Abuse

Effective date: February 8, 1996

For further information, please call: (512) 867-8720

Subchapter D. Prevention and Intervention

• 40 TAC §§144.311-144.316, 144.321, 144.322, 144.333, 144. 341-144.346, 144.351, 144.352

The Texas Commission on Alcohol and Drug Abuse has withdrawn from consideration for permanent adoption the proposed new §§144.311-144.316, 144. 321, 144.322, 144.333, 144.341-144.346, 144.351, and 144.352, which appeared in the August 25, 1995, issue of the *Texas Register* (20 TexReg 6601). The effective date of this withdrawal is February 8, 1996.

Issued in Austin, Texas, on February 8, 1996.

TRD-9601809 Mark S. Smock
Assistant Deputy for Finance
Texas Commission on Alcohol and Drug Abuse

Effective date: February 8, 1996

For further information, please call: (512) 867-8720

Subchapter E. Treatment

• 40 TAC §§144.411-144.427, 144.431-144.435, 144.441-144.444, 144.451

The Texas Commission on Alcohol and Drug Abuse has withdrawn from consideration for permanent adoption the proposed new §§144.411-144.427, 144. 431-144.435, 144.441-144.444, and 144.451, which appeared in the August 25, 1995, issue of the *Texas Register* (20 TexReg 6605). The effective date of this withdrawal is February 8, 1996.

Issued in Austin, Texas, on February 8, 1996.

TRD-9601810 Mark S. Smock
Assistant Deputy for Finance
Texas Commission on Alcohol and Drug Abuse

Effective date: February 8, 1996

For further information, please call: (512) 867-8720

Subchapter F. Reports

• 40 TAC §§144.511, 144.512, 144.521-144.533

The Texas Commission on Alcohol and Drug Abuse has withdrawn from consideration for permanent adoption the proposed new §§144.511, 144.512, and 144.521-144.533, which appeared in the August 25, 1995, issue of the *Texas Register* (20 TexReg 6610). The effective date of this withdrawal is February 8, 1996.

Issued in Austin, Texas, on February 8, 1996.

TRD-9601811 Mark S. Smock
Assistant Deputy for Finance
Texas Commission on Alcohol and Drug Abuse

Effective date: February 8, 1996

For further information, please call: (512) 867-8720

Subchapter G. Audits

• 40 TAC §§144.611-144.615, 144.621-144.624, 144.631-144.633

The Texas Commission on Alcohol and Drug Abuse has withdrawn from consideration for permanent adoption the proposed new §§144.611-144.615, 144. 621-144.624, and 144.631-144.633, which appeared in the August 25, 1995, issue of the *Texas Register* (20 TexReg 6612). The effective date of this withdrawal is February 8, 1996.

Issued in Austin, Texas, on February 8, 1996.

TRD-9601812 Mark S. Smock
Assistant Deputy for Finance
Texas Commission on Alcohol and Drug Abuse

Effective date: February 8, 1996

For further information, please call: (512) 867-8720

Subchapter H. Sanctions

• 40 TAC §§144.711-144.714, 144.721-144.727, 144.731, 144.732

The Texas Commission on Alcohol and Drug Abuse has withdrawn from consideration for permanent adoption the proposed new §§144.711-144.714, 144. 721-144.727, 144.731, and 144.732, which appeared in the August 25, 1995, issue of the *Texas Register* (20 TexReg 6614). The effective date of this withdrawal is February 8, 1996.

Issued in Austin, Texas, on February 8, 1996.

TRD-9601813 Mark S. Smock
Assistant Deputy for Finance
Texas Commission on Alcohol and Drug Abuse

Effective date: February 8, 1996

For further information, please call: (512) 867-8720

Chapter 149. Court Commitments

Subchapter B. Treatment as an Alternative to Arrest

• 40 TAC §§149.81-149.83

The Texas Commission on Alcohol and Drug Abuse has withdrawn from consideration for permanent adoption the proposed new §§149.81-149.83, which appeared in the August 18, 1995, issue of the *Texas Register* (20 TexReg 6316). The effective date of this withdrawal is February 8, 1996.

Issued in Austin, Texas, on February 8, 1996.

TRD-9601822 Mark S. Smock
Assistant Deputy for Finance
Texas Commission on Alcohol and Drug Abuse

Effective date: February 8, 1996

For further information, please call: (512) 867-8720

Chapter 150. Counselor Licensure

• 40 TAC §150.34, §150.35

The Texas Commission on Alcohol and Drug Abuse has withdrawn from consideration for permanent adoption the proposed new §150.34 and §150.35, which appeared in the August 25, 1995, issue of the *Texas Register* (20 TexReg 6617). The effective date of this withdrawal is February 8, 1996.

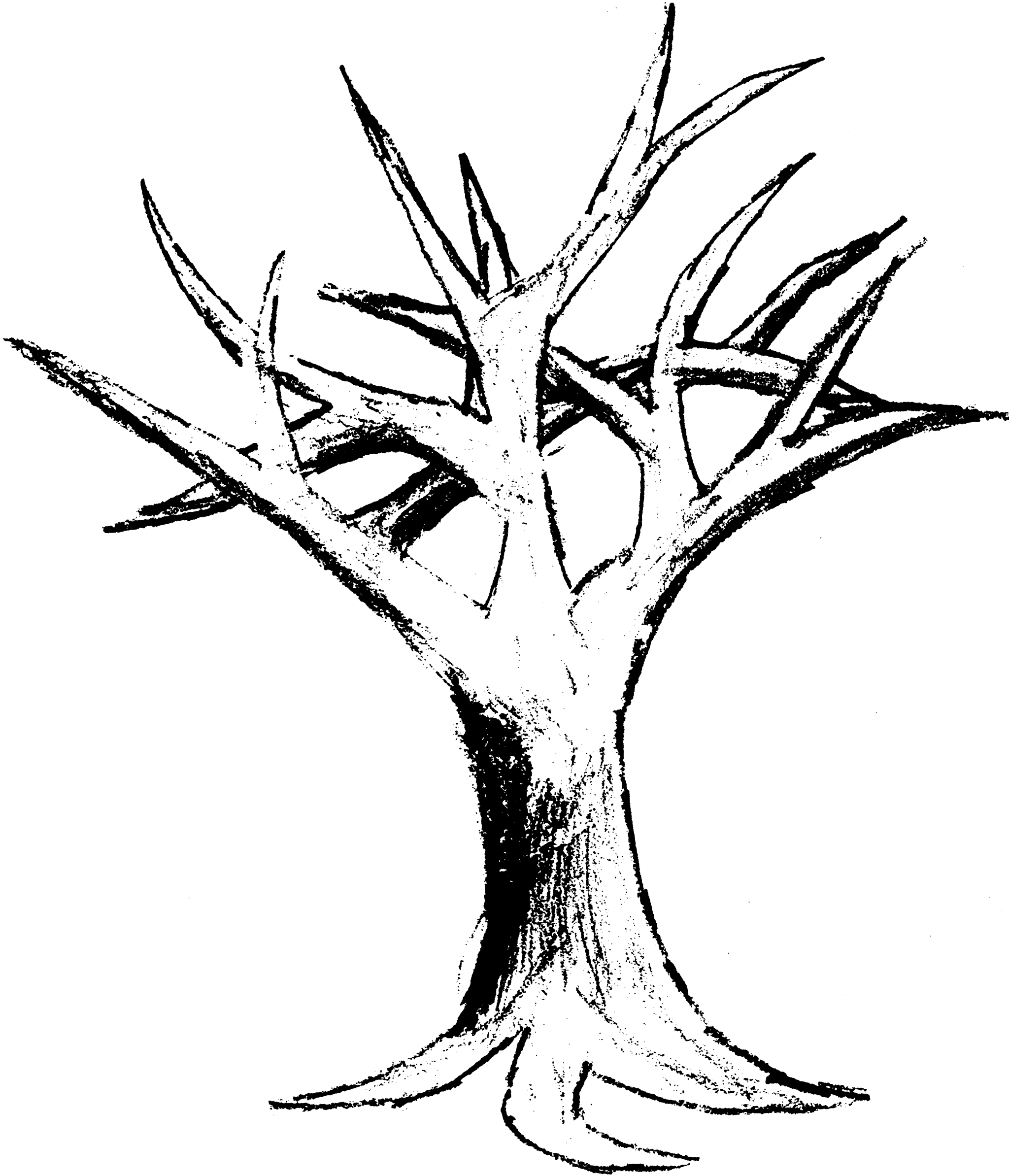
Issued in Austin, Texas, on February 8, 1996.

TRD-9601824 Mark S. Smock
Assistant Deputy for Finance
Texas Commission on Alcohol and Drug Abuse

Effective date: February 8, 1996

For further information, please call: (512) 867-8720

Name: Shane Morris
Grade: 5
School: Sheridan Elementary School, Cypress Fairbanks ISD



ADOPTED RULES

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

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

TITLE 1. ADMINISTRATION

Part III. Office of the Attorney General

Chapter 61. Crime Victims Compensation

- **1 TAC §§61.2, 61.7, 61.10, 61.20, 61.23, 61.25, 61.31, 61. 33, 61.35**

The Office of the Attorney General adopts amendments to §§61.2, 61.7, 61.10, 61.20, 61.23, 61.25, 61.31, and 61.35; and new §61.33, concerning crime victims' compensation. Sections 61.10, 61.20, and 61.31 are adopted with changes to the proposed text as published in the January 2, 1996, issue of the *Texas Register* (21 TexReg 15). Amendments to §§61.2, 61.7, 61.23, 61. 25, and 61.35; and new §61.33 are adopted without changes and will not be republished.

The amendments and new section are necessary to clarify administrative procedures regarding new and old benefits, and in order to maintain consistency with the Crime Victims' Compensation Act. The public will benefit from having increased awards made on their behalf to providers of services.

Section 61.2 will function to clarify that certain damaged property constitutes a pecuniary loss under the Act. Section 61.7 establishes which medical professionals will be responsible for certifying disability for the payment of lost wages. Section 61.10 deletes limits on transportation rates. Section 61.20 contains no substantive change and functions to clarify the definition of cooperation. Section 61.23 changes the time limit for providing information to be consistent with the Act. Section 61.25 adds a condition upon which a claim may be closed. Section 61.31 deletes the pay discrepancy among providers. Section 61.33 functions to enable the fund to compensate more fully those victims who have medical insurance. Section 61.35 functions to clarify the hearing process.

The Office of the Attorney General suggested changing the formats of §61. 10 and §61.20 to include (a) and (b) subsections in order to clarify the meaning of the rules. The only substantive comment received regarding the proposed rules was submitted by the Coalition for Nurses in Advanced Practice. They noted that the proposed amendment to §61.31 deleted language which resulted in the exclusion of clinical nurse specialists from the category of compensable providers. They suggested that we add language to include these professionals. The agency agrees with this comment and adopts the rule with changes so as to include the clinical nurse specialists in the list of professionals who may be compensated in this manner.

The amendments and new section are adopted under the Crime Victims' Compensation Act, Texas Code of Criminal Procedure, Article 56.33, which provides the Office of the Attorney General with the authority to promulgate and adopt rules relating to the method of filing claims and the proof of entitlement to compensation and the review of health care services subject to compensation under this chapter.

§61.10. Limits on Compensation.

(a) In addition to the rates established under the Act, the following limits for compensation are deemed to be an amount reasonably incurred under the Act, Article 56.32(9):

(1) funeral and burial expenses are limited to $4,500;

(2) loss of earnings and loss of support to a dependent are limited to $400 per week;

(3) care of dependents or minor children is limited to $100 per week per dependent or child;

(4) costs of crime scene cleanup are limited to $750 in the aggregate; and

(5) costs for the replacement of clothing, bedding or other property is limited to $750 in the aggregate.

(b) Under unusual fact and circumstance, the Chief may authorize awards in excess of the limits contained in this rule.

§61.20. Cooperation with Law Enforcement Agencies.

(a) When determining whether a crime victim has cooperated with the reasonable requests of the law enforcement agency investigating the criminally injurious conduct, the Chief shall consider the following factors:

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

(4) whether the victim cooperated with the investigating law enforcement agency within a reasonable period of time after the crime, but not later than 30 days after the victim receives a request from the law enforcement agency, so as to enable the law enforcement agency to identify and apprehend the offender or conduct a complete investigation of the crime.

(b) The Chief may waive the provisions of this rule upon good cause shown by the victim or claimant.

§61.31. Mental Health Counseling Expenses. Counseling expenses are limited to 40 sessions or an amount not to exceed $3,000 for psychiatrists, psychologists, clinical nurse specialists (CNS in psychiatric care), licensed professional counselors, marriage and family therapists and certified social workers–advanced clinical practitioners. Fees and billing procedures per session are to be determined as established by the Office of the Attorney General. Under unusual facts and circumstances, additional sessions may be allowed, but limited to those which are pre-authorized and approved in accordance with general standards of utilization review.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9601873 Suzanne Marshall
Special Assistant Attorney General
Office of the Attorney General

Effective date: March 1, 1996

Proposal publication date: January 2, 1996

For further information, please call: (512) 465-4291

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TITLE 7. BANKING AND SECURITIES

Part I. Finance Commission of Texas

Chapter 3. Banking Section

Subchapter B. General

• 7 TAC §3.25

The Finance Commission of Texas (the commission) adopts the repeal of §3.25, concerning accounting for other real estate owned by a state bank, without changes to the proposed text as published in the December 22, 1995, issue of the *Texas Register* (20 TexReg 10933). A new §12.91 in this title is adopted in this issue of the *Texas Register* to address other real estate owned.

The repeal is necessary because of changes in law made regarding other real estate owned by state banks as a result of the recent enactment of Texas Civil Statutes, Articles 342-1.001 et seq (Texas Banking Act, §§1.001 et seq) (the Act), particularly by the Act, §5.002. Required amendments are sufficiently extensive to warrant repeal and replacement of §3.25 by a new section.

No comments were received regarding repeal of this section.

The repeal of this section is adopted pursuant to rulemaking authority under the Act, §1.012(a)(1), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act. As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

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

Issued in Austin, Texas, on December 15, 1995.

TRD-9601919 Everette D. Jobe
General Counsel
Texas Department of Banking

Effective date: March 1, 1996

Proposal publication date: December 22, 1995

For further information, please call: (512) 475-1300

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Subchapter F. Access to Information

• 7 TAC §3.111

The Finance Commission of Texas (the commission) adopts new §§3.111, concerning confidentiality of certain information relating to the financial condition or business affairs of a financial institution or a present, former, or prospective shareholder, participant, officer, director, manager, affiliate, or service provider of a financial institution, with changes to the proposed text as published in the December 22, 1995, issue of the *Texas Register* (20 TexReg 10933). New §3.111 is the initial section in new Subchapter F, entitled Access to Information.

New §3.111 prohibits the Banking Commissioner of Texas or an employee or agent of the Texas Department of Banking (the department) from disclosing confidential information, as that term is defined in the section, and prohibits a financial institution, its service provider or affiliate, or a governmental agency that has received confidential information from the department from disclosing it, subject to stated exceptions. In addition, the section establishes procedures for discovery of confidential information, filing notices of compulsory process related to confidential information and requesting records or testimony containing confidential information, and releasing or withholding confidential information.

The department received three sets of written comments, none of which opposed adoption of the section as a whole.

Four comments were received, none opposed to adoption.

The Independent Bankers Association of Texas (IBAT), the Texas Bankers Association (TBA), and two other persons suggested that §3.111(c) be modified. All four have requested that an attorney other than an employee of the financial institution (i.e., an in-house attorney) be permitted access to confidential information without a board resolution designating such person as "officially connected" to the institution and without executing a confidentiality agreement. Noting that the Act, §2.104, specifically provides that the recipient of confidential information may disclose it to its attorney, auditor or independent auditor, IBAT requested that access also be extended to the auditor and the independent auditor without requiring board resolution. Furthermore, TBA and one of the persons have requested the deletion of that portion of subsection (e)(2) of the section requiring a written confidentiality agreement between outside counsel and the financial institution before the release of confidential information to the attorney. After examining these comments, the Department concurs that the statute does not impose these requirements and has changed the text of the proposed new section to delete the requirement of board designation in order for outside counsel, auditors, or independent auditors to receive confidential information. Moreover, under the adopted section, such persons are not required to enter into a confidentiality agreement with a financial institution in order to receive confidential information.

As required by the Act, §1.012(b), in proposing this section, the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

The department made additional changes for clarification.

The new section is adopted pursuant to various rulemaking authority under Texas Civil Statutes, Articles 342-1.001 et seq (Act, §1.001 et seq). The Act, §2.104, provides that a financial institution, affiliate or service provider that receives confidential information from the department may not disclose that information to anyone who is not officially connected to the recipient, except as authorized by rules adopted under the Act. The Act, §2. 105 provides that discovery of confidential information pursuant to subpoena from a person subject to the Act, Chapter 2, Subchapter B, must comply with rules adopted under the Act. The Act, §2.105 also provides that the rules may restrict release to confidential information that is directly relevant to the legal dispute at issue and that the rules may require a court-issued protective order, in form and under circumstances the rules specify, prior to release. The Act, §1.012(a), provides that the commission may adopt rules "to accomplish the purposes of this Act," including rules that "implement and clarify" it or "preserve or protect the safety and soundness of banks." Texas Civil Statutes, Article 342-1106(b), provides that the commission may adopt rules to accomplish the purposes of trust company regulation. Texas Civil Statutes, Article 342-1103, §5, renders the confidentiality provisions of the Act, §§2.101-2.108, applicable to trust companies. Finally, the Act, §9.002(b) provides that the finance commission may adopt rules specifically applicable to foreign bank agencies. The Act, §9.002(a) provides that a foreign bank agency is subject to the Act and, consequently, to the confidentiality provisions of the Act, §§2.101-2.108, as if it were a state bank.

§3.111. Confidential Information.

(a) Policy. The Texas Department of Banking (the department) is committed to the concept of open state government. As a regulator of financial institutions, however, the department recognizes the mandate of the legislature to balance the competing interests of the need of financial institutions for confidentiality regarding their financial condition and business affairs with the general public's need for information. The legislature has determined that confidential information, with limited exceptions, should not be disclosed. See Texas Civil Statutes, Articles 342-2. 101 et seq (the Act, §§2.101 et seq). Inappropriate disclosures can result in substantial harm to financial institutions and to those persons and entities (including other financial institutions) that have relationships with them. In accordance with the historical availability of records

of financial institutions and the sound public policy that generally protects them, non-disclosure under this section protects the stability of such institutions by preventing disclosures that could adversely impact financial institutions. For example, the department may criticize a bank in an examination report for a financial weakness that does not currently threaten the solvency of the bank. If improperly disclosed, the criticism can lead to adverse impacts such as the possibility of bank "runs," short-term liquidity problems, and volatility in costs of funds, which in turn can exacerbate the problem and cause the failure of the bank. Bank failures lead to reduced access to credit and greater risk to depositors. Further, specific loans may be criticized in an examination report, and confidentiality of the information protects the financial privacy of customers. Finally, protecting confidential information from disclosure facilitates the free exchange of information between the financial institution and the regulator, encourages candor, and promotes regulatory responsiveness and effectiveness. Information that does not fall within the meaning of confidential information as defined in this section may be confidential under other definitions and controlled by other laws, and is not subject to this section.

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

(1) Act–The Texas Banking Act, Texas Civil Statutes, Articles 342-1.001 et seq (the Texas Banking Act, §1.001 et seq).

(2) Affiliate–A company that directly or indirectly controls, is controlled by, or is under common control with a bank or other company.

(3) Confidential information–Written and oral information obtained directly or indirectly by the department relative to the financial condition or business affairs of a financial institution, or a present, former, or prospective shareholder, participant, officer, director, manager, affiliate, or service provider of a financial institution, whether obtained through application, examination, or otherwise, and all related files and records of the department, regardless of the form of the information when obtained or as held by the department or when the department first obtained it, and whether or not the information is part of the department's official files or records. The term does not include the public portions of call reports and profit and loss statements.

(4) Financial institution–As defined in the Act, §1.002(a)(25). For purposes of this section only, the term includes a trust company incorporated under Texas Civil Statutes, Articles 342-1101 et seq, and a foreign bank agency licensed under the Act, §§9.001 et seq.

(5) Governmental agency–Another department of this state, another state, the United States, a foreign sovereign state, or any related agency or instrumentality.

(6) Court–A court of law or equity or other adjudicatory tribunal with jurisdiction to issue a subpoena or other legal process for the production of documents, including a government agency exercising adjudicatory functions and an alternative dispute resolution mechanism, voluntary or required, under which a party may compel the production of documents.

(c) Authority to receive, hold or disclose confidential information. Authority to disclose confidential information to an individual, business, or governmental agency under this section constitutes authority to disclose it to the appropriate person officially connected to such individual, business, or governmental agency that has a need to know the information in connection with the discharge of official responsibilities and authority for the person who is officially connected to such individual, business, or governmental agency to receive such information. A person officially connected to a financial institution includes its holding company, officer, director, manager, attorney, auditor, independent auditor, employee, and a person reasonably designated as officially connected with the financial institution by resolution duly adopted by the board of directors of the financial institution. A financial institution or its service provider, or affiliate may disclose confidential information, other than as specifically mentioned, to a non-employee, such as its agent, bonding company, or a prospective acquirer, only pursuant to board resolution designating the person or entity as officially connected with the financial institution, affiliate, or service provider. The financial institution, affiliate, or service provider may not disclose confidential information to a shareholder or participant that is specifically denied to such person under the Act, §2.108. Only a person to whom confidential information has been released pursuant to lawful authority may disclose that information to another, and all such further disclosures must be in accordance with the Act and this section.

(d) Disclosure prohibited.

(1) Pursuant to the Act, §2.101, and *Stewart v.* McCain, 575 S.W.2d 509 (Tex. 1978), the department possesses an absolute privilege against disclosure of confidential information held by the department. Except as provided by the Act and rules adopted under the Act, the finance commission, a member of the finance commission, the banking commissioner, or an employee or agent of the department may not directly or indirectly disclose confidential information, whether voluntarily or pursuant to subpoena or other legal process. Confidential information is discoverable from the department under this section only pursuant to a protective order under subsection (f) of this section in a case in which the department is a party other than as intervenor under this section. Pursuant to the Act, §2. 106, and notwithstanding any other provision of this section authorizing the release of confidential information, the banking commissioner may refuse to release information or records in the custody of the department if, in the opinion of the banking commissioner, release of the information or records might jeopardize an ongoing investigation by the department or other governmental agency of potentially unlawful activities.

(2) Except as provided by the Act and this section, a financial institution, its service provider, or its affiliate may not disclose confidential information received from the department. Confidential information includes an examination report of, correspondence with, and formal and informal actions of the department taken against the financial institution, service provider, or affiliate.

(e) Exceptions to non-disclosure.

(1) Disclosures by the department. Confidential information disclosed by the department pursuant to an exception to disclosure remains the confidential property of the department. The department may:

(A) disclose confidential information to the finance commission and other governmental agencies as provided by the Act, §2.102 and §2.103;

(B) publish final removal, prohibition, and cease-and-desist orders and information regarding the existence of a cease-and-desist order as provided by the Act, §6.012;

(C) release employment information as provided by the Act, §2.107;

(D) provide a copy of the regular report of examination and an order, opinion, or other confidential information to the financial institution, its service provider, or affiliate for which it was prepared and to which it relates and correspond with that financial institution, service provider, or affiliate regarding such information;

(E) provide a copy of the regular report of examination of a service provider and an order, opinion, or other confidential information relating to the service provider to the financial institution or institutions it services; and

(F) forward to a court of proper jurisdiction, subject to any existing administrative protective order, the record of an administrative hearing under appeal that contains confidential information. In the event an administrative protective order does not exist, the department or another party shall file a motion with the court for a protective order consistent with the terms of subsection (f)(4) of this section prior to filing the administrative record. Discretion of the banking commissioner or finance commission to vacate an administrative protective order entered under §9.22 of this title (relating to In Camera Materials) ceases at the time the appeal is filed.

(2) Further disclosure by a governmental agency, financial institution, service provider or affiliate. Except for disclosures pursuant to subsection (f) of this section, confidential information released to a financial institution, its service provider, or affiliate may be disclosed by the recipient only to a person officially connected to the recipient as provided by subsection (c) of this section and, if authorized under the terms of a confidentiality agreement between the department and another governmental agency, to that governmental agency in the discharge of its official duties. Disclosures to a person designated by board resolution as officially connected to the financial institution, service provider, or affiliate must be made pursuant to a confidentiality agreement between the financial institution, service provider, or affiliate and the recipient. Confidential information released to a governmental agency may be disclosed by the agency only to a person officially connected to the agency as provided by subsection (c) of this section or to another governmental agency to the extent authorized by this section or other law, and must be in accordance with the terms of this section and a confidentiality agreement with or letter of instructions from the department.

(3) Disclosures of certain information.

(A) Statistical data. Confidential information consisting solely of statistical data may be disclosed, providing its release does not directly or indirectly disclose the identity of an individual or financial institution related to the data.

(B) Records of a failed financial institution. Subject to an appropriate finding of the banking commissioner under this subparagraph, the department may release confidential information in or related to the records of a failed financial institution. Release may not occur under this subparagraph earlier than three years after the date such financial institution failed. Information subject to release must pertain only to the condition of the financial institution and cannot include confidential customer information, absent customer consent, or information made confidential by laws other than the Act or this section. Confidential information, as limited herein, may be released if the banking commissioner, in the exercise of discretion, finds that:

(i) production of records is neither overly burdensome nor contrary to the public interest;

(ii) the need for the information clearly outweighs the need to maintain the confidentiality of the information; or

(iii) a compelling need exists for release of the records.

(C) Records of another governmental agency. Information the department has obtained from a federal or state governmental agency that is confidential under federal or state law or by agreement with the other agency is not considered part of the department's records. The department may not release such information unless the request for release is submitted with a certification from the appropriate state or federal authority that the information is subject to release under the laws of that jurisdiction.

(f) Discovery of confidential information from a governmental agency, financial institution, service provider, or affiliate.

(1) General rule. A governmental agency, financial institution, service provider, or affiliate that receives a subpoena or other legal process in any proceeding for the release of confidential information shall promptly notify the department of the request, provide the department with a copy of the process and of the requested documents or information, and object by written motion or other means available under applicable rules of procedure. Notice and documents should be sent to the Texas Department of Banking at 2601 North Lamar Boulevard, Austin, Texas, 78705-4294, to the attention of the General Counsel, and should be labeled "Request for Release of Confidential Information under 7 TAC §3.111." Prior to the release of confidential information, such government agency, financial institution, service provider, or affiliate also must file and obtain a ruling on a motion for a protective order and in camera inspection in accordance with this subsection. Confidential information may be released only pursuant to a protective order in a form consistent with that set out in this section and only if a court with jurisdiction has found that:

(A) the party seeking the information has a substantial need for the information;

(B) the information is directly relevant to the legal dispute in issue; and

(C) the party seeking the information is unable without undue hardship to obtain its substantial equivalent by other means.

(2) Discretionary filings by department. On receipt of notice under subsection (f)(1) of this section, the department may take action as may be appropriate to protect confidential information. The department has standing to intervene in a suit or administrative hearing for the purpose of filing a motion for protective order and in camera inspection in accordance with this subsection.

(3) Motion for protective order and in camera inspection. The movant shall ask the court to enter a protective order in accordance with this subsection regarding the release of confidential information. If necessary to resolve a dispute regarding the confidential status or direct relevance of any information sought to be released, the party seeking the protective order shall move for in camera inspection of the pertinent information. Until subject to a protective order, confidential information may not be released, and the party seeking a protective order shall request the court officer to deny discovery of such confidential information. The party seeking the protective order must comply with the court's applicable rules of procedure.

(4) Protective order. A protective order obtained pursuant to the terms of this subsection must:

(A) specifically bind each party to the litigation, including one who becomes a party to the suit after the protective order is entered, each attorney of record, and each person who becomes privy to the confidential information as a result of its disclosure under the terms of the protective order;

(B) describe in general terms the confidential information to be produced;

(C) state substantially the following in the body of the protective order:

(i) absent court order to the contrary, only the court reporter and attorneys of record in the cause may copy confidential information produced under the protective order in whole or part;

(ii) the attorneys of record are custodians responsible for all originals and copies of confidential information produced under the protective order and must insure that disclosure is limited to those persons specified in the protective order;

(iii) confidential information subject to the protective order and all information derived therefrom may be used only for the purpose of the trial, appeal, or other proceedings in the case in which it is produced;

(iv) confidential information to be filed or included in a filing in the case must be filed with the clerk separately in a sealed envelope bearing suitable identification, and is available only to the court and to those persons authorized by the order to receive confidential information, and all originals and copies made of such documents and records must be kept under seal and disclosed only in accordance with the terms of the protective order;

(v) confidential information produced under to the protective order may be disclosed only to the following persons and only after counsel has explained the terms of the order to the person who will receive the information and provided that person with a copy of the order:

(I) to a party and to an officer, employee, or representative of a party, to a party's attorneys (including other members and associates of the respective law firms and contract attorneys in connection with work on the case) and, to the extent an attorney of record in good faith determines disclosure is necessary or appropriate for the conduct of the litigation, legal assistants, office clerks and secretaries working under that attorney's supervision;

(II) to a witness or potential witness in the case;

(III) to an outside expert retained for consultation or for testimony, provided the expert agrees to be bound by the terms of the protective order and the party employing the expert agrees to be responsible for the compliance of its expert with this confidentiality obligation; and

(IV) to the court or to an appellate officer or body with jurisdiction of an appeal in the case;

(vi) at the request of the department or a party, only the court, the parties and their attorneys, and other persons the court reasonably determines should be present may attend the live testimony of a witness or discussions or oral arguments before the court that may include confidential information or relate to such confidential information. The parties shall request the court to instruct all persons present at such testimony, discussions, or arguments that release of confidential information is strictly forbidden;

(vii) a transcript, including a deposition transcript, that may include confidential information subject to non-disclosure is subject to the protective order. The party requesting the testimony of a current or former department officer, employee, or agent shall, at its expense, furnish the department a copy of the transcript of the testimony once it has been transcribed.

(viii) upon ultimate conclusion of the case by final judgment and the expiration of time to appeal, or by settlement or otherwise, counsel for each party shall return to the party that produced the confidential information all copies of every document subject to the protective order and for which the counsel is custodian; and

(ix) production of documents subject to the protective order does not waive a claim of privilege or right to withhold the documents from a person not subject to the protective order.

(D) Clauses (i), (ii), and (v)-(vii) of subsection (f)(4)(C) of this section are subject to modification by the court for good cause before the conclusion of the proceeding, upon notice and opportunity to appear to the department.

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

Issued in Austin, Texas, on December 15, 1995.

TRD-9601920 Everette D. Jobe
General Counsel
Texas Department of Banking

Effective date: March 1, 1996

Proposal publication date: December 22, 1995

For further information, please call: (512) 475-1300

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Part II. Texas Department of Banking

Chapter 12. Loans and Investments

Subchapter A. Lending Limits

• 7 TAC §§12.1-12.7

The Finance Commission of Texas (the commission) adopts the repeal of the entirety of Chapter 12 of Title 7, specifically 7 TAC §§12.1-12.7, concerning lending limits applicable to state banks, without changes to the proposal as published in the November 14, 1995, issue of the *Texas Register* (20 TexReg 9335). New §§12.1-12.11 are adopted in this issue of the *Texas Register*.

The repealed sections were last revised in 1988, and amendments in law made by the Texas Banking Act (the Act), §5.201, as enacted by Act of May 18, 1995, 74th Legislature, Chapter 914, §1, 1995 Texas Session Law Service 4451, 4494-4496, required the existing sections to be rewritten. Revisions were sufficiently extensive to require repeal and replacement by new sections.

No comments were received regarding the adoption of the repeals.

The repeals are adopted under the Act, §1.012(a), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act, preserve or protect the safety and soundness of state banks, and grant the same rights and privileges to state banks that are or may be granted to national banks domiciled in this state. As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

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and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

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

Issued in Austin, Texas, on December 15, 1995.

TRD-9601904 Everette D. Jobe
General Counsel
Texas Department of Banking

Effective date: March 1, 1996

Proposal publication date: November 14, 1995

For further information, please call: (512) 475-1300

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• 7 TAC §§12.1-12.11

The Finance Commission of Texas (the commission) adopts new §§12.1-12. 11, to constitute all of Chapter 12, Subchapter A, regarding legal lending limits applicable to state banks and trust companies, with changes to the proposed text as published in the December 22, 1995, issue of the *Texas Register* (20 TexReg 10936). Chapter 12 is retitled "Loans and Investments" and Subchapter A is titled "Lending Limits." All previously existing sections of Chapter 12 are repealed in this issue of the *Texas Register.*

The adopted sections do not substantially change the existing law established by the existing sections of Chapter 12 as reorganized and modified to account for changes in law made by Texas Civil Statutes, Articles 342-1.001 et seq (the Texas Banking Act, §§1.001 et seq) (the Act), particularly the Act, §5.201, and for existing regulatory determinations and other changes in law made since the legal lending limit rules were last revised in 1988. The sections articulate and expand upon exceptions to the statutory legal lending limit and create several exceptions not addressed by the Act or repealed sections of Chapter 12, both to improve clarity and answer frequently asked questions. The sections as adopted also implement parity with national banks in several respects, and the staff of the department of banking closely compared the sections to the national bank lending limits adopted by the Office of the Comptroller of the Currency (OCC) on February 15, 1995, published in the *Federal Register* at 60 Federal Regulation 8526, and codified at 12 Code of Federal Regulations (CFR), §§32.1-32.6, while attempting to preserve the lending limit scheme set forth in the Act. Percentage limits imposed by the OCC have been adjusted upward in appropriate circumstances to create parity in light of the smaller calculation base under the Act.

The Texas Bankers Association (TBA), Independent Bankers Association of Texas (IBAT), Consumers Union, and nine other persons submitted comments. No commenter opposed adoption of the sections as a whole, five commenters were in favor of adoption, and eight commenters wrote to suggest both stylistic and substantive revisions regarding specific issues. The agency's responses to comments appear in the discussion of specific provisions of the sections in the remainder of this preamble.

Section §12.1 restates the public policy underlying legal lending limits and addresses the scope of the subchapter. References are specifically made to federal law that creates additional restrictions on state banks. The reader is specifically cautioned that legal lending limits are designed to limit the bank's exposure to one borrower or source of repayment and to encourage diversification in the bank's loan portfolio, and do not address the application of prudent lending standards and safe and sound banking practices. The obligation to engage in prudent lending is the overriding standard.

Consumers Union commented that one purpose of the legal lending limit, as stated in former §12.1(b), is "to safeguard the bank depositors by spreading the loans among a relatively large number of persons engaged in different lines of business." Consumers Union believes that the stated purpose in the proposal of promoting "diversification of loans to reduce portfolio and credit risk" is not synonymous with the public policy of spreading loans throughout a community, and the latter should also be stated. The agency disagrees that §12.1(a) (relating to Purpose) should be modified as requested. The purpose of the legal lending limit is to require diversification of loans to reduce portfolio and credit risk. One effect of legal lending limits is a larger number of smaller loans in the portfolio of the lending bank, and thus supports the bank in its effort to reinvest in the community and avoid discrimination in lending. This beneficial effect notwithstanding, state law at present does not require a bank to ensure that loans are spread fairly and equitably among members of the community; indeed, no state law requires a bank to lend its funds at all. At present, fair lending and community reinvestment requirements are imposed solely by federal law, see, e.g., 12 United States Code (USC), §2901 et seq, and 15 USC, §1691 et seq.

TBA pointed to the inclusion of the term "affiliates" in §12.1(b)(2) (relating to Scope) as inconsistent with §12.1(b)(1), arguing that loans to affiliates are exempt from state legal lending limits under the statute and affiliates should therefore not be mentioned. The agency responds by noting that loans to affiliates are exempt only if bank deposits are federally insured, thereby subjecting the bank to regulation under 12 USC, §371c. Loans to affiliates of uninsured banks are still subject to state legal lending limit provisions. The agency has rephrased the provision slightly to eliminate the perceived inconsistency.

Section 12.2 sets forth definitions of "Act", "borrower", and "Federal funds sold" to be applicable to the entire subchapter. The definition of "Federal funds sold was inadvertently omitted from the proposal and is now included. Section 12.3 extensively analyzes the term "loans or extensions of credit" as used in the Act, setting forth specific inclusions in the term as well as specific exclusions.

Section 12.3(a)(1) includes overdrafts in loans and extensions of credit. One commenter asked whether interbank overdrafts caused by cash letter difficulties or the failure of a securities transaction cause the selling or lending bank to incur a legal lending limit violation. The agency responds by noting that the provision is primarily aimed at retail deposit accounts and that the Act, §5.201(a)(5), expressly exempts interbank borrowings with settlement period of less than one week.

Section 12.3(a)(4) includes the purchase of third party paper as a loan or extension of credit. TBA requests clarification that such inclusion does not invalidate the exemption for purchase of consumer installment paper provided by the Act, §5.201(a)(11). Clarification has been added.

Section 12.3(a)(5) includes as a loan or extension of credit the sale of Federal funds with a maturity of more than one business day, but not Federal funds sold with a maturity of one day or less or Federal funds sold under a continuing contract. Two commenters questioned whether the provision denied exemption to a series of transactions under a continuing contract that provided for weekly settlement. The agency added clarification to this subsection and §12.3(b)(5) that contracts that provide for weekly or other periodic settlement are exempt if the parties have the right to obtain their funds at maturity.

In any event, interbank borrowings with settlement periods of less than one week are exempt from the legal lending limit, see the Act, §5.201(a)(5). The stricter definition of "Fed funds" is heavily influenced by federal law and call report instructions.

Section 12.3(a)(6) regarding treatment of charged off loans has been minimally reworded for more clarity in response to a suggestion by TBA.

Section 12.3(b)(1) permits a bank to advance funds to protect its collateral without such advance being considered a loan or extension of credit, provided that any such advances must be considered as outstanding indebtedness in evaluating whether the bank can fund a new loan or extension of credit to the same borrower. Examples include advances for taxes, insurance, utilities, security, and maintenance expenses, but only if necessary to preserve the value of the real property or other collateral security and consistent with safe and sound banking practices. Under federal law, the OCC has also included advances for operating expenses within the exception, see 12 CFR, §32.2(j)(2)(I). The agency feels strongly that advances for operating expenses should be considered a new loan or extension of credit and is not reasonably related to preservation of collateral. The lending bank is expected to maintain adequate documentation demonstrating that the additional advance is necessary to preserve the value of the real property or other collateral security. TBA requested a stylistic change that the agency accepts. Another commenter expressed concern that

emergency loans for feed rations during adverse climate conditions could be considered operating expenses. The agency believes such advances would be maintenance rather than operating expenses, necessary to preserve the value of the livestock collateral. Accordingly, no textual changes are made.

As is the case under prior law, accrued and discounted interest is excluded from loans and extensions of credit under §12.3(b)(2). The OCC further excluded interest that has been capitalized from prior notes and interest that has been advanced under a loan agreement, under 12 CFR, §32.2(j)(2)(ii). The OCC states that such an addition assists primarily large banks with loans to foreign governments and also grants more flexibility to banks in working out troubled loans. TBA has again urged the commission to adopt the OCC position. Another commenter believes the flexibility under proposed §12.8(a), which permits the banking commissioner, on application, to grant exceptions to the lending limit on a case by case basis, should be available for capitalized interest situations. The adopted section does not include capitalized interest as a general exclusion from loans or extensions of credit. The agency believes inclusion of the provision on capitalized and advanced interest is contrary to safe and sound banking practices for most state banks. The adopted section therefore does not include capitalized interest as a general exclusion from loans or extensions of credit. The possibility exists that §12.8(a) may be utilized for the purpose of excluding capitalized and advanced interest in a proper case.

Section 12.3(b)(3) provides that valid loan participations are excludable from the loans and extensions of credit of the originating bank. Two commenters pointed out that the provision does not contemplate the sale of participations in existing loans and does not address commonly used weekly settlements involving participated loans with a high volume of daily transactions. The agency accepts the comments, and new §12.3(b)(3)(C) and (D) address these concerns. One commenter expressed concern that §12.3(b)(3)(A) was not clearly expressed and the provision is rephrased for clarity.

New §12.3(b)(6) is an added cross-reference to §12.10(b). TBA suggested the subject matter of §12.10(b) may more appropriately fit under §12.3, citing to the manner in which the subject is handled under federal law, 12 CFR, §32.2(j)(2)(iv). The agency disagrees with relocation but has added the cross-reference for clarity.

Adopted §12.4(a) elaborates on the subject of loan commitments, a source of considerable confusion in prior years. In the view of the agency, no change in law or policy is made by §12.4(a). TBA expressed concern that the requirement of a concurrently executed participation (which may be deducted for purposes of measuring outstanding loans) may be construed too narrowly, and suggested including prior executed commitments. The agency concurs, and has amended the subsection to refer to participation agreement executed before or concurrently with the bank's commitment.

Section 12.4(b) implements an increased lending limit for additional advances to complete project financing, under the commission's authority to add exceptions by rule. The section is intended to permit a bank to renew a loan commitment for purposes of completing the original intended funding under the commitment, to enable a project to be finished rather than force the unfinished property into foreclosure, if certain conditions are met. The intent of the subsection is to allow renewal of an expiring commitment in those circumstances in which the new commitment would result in a legal lending limit violation, provided the specified conditions are met. As stated in §12.4(a), advances may be made under a binding commitment to lend even if the advances would exceed the bank's lending limit on the date of funding, provided the aggregate commitment was within the bank's lending limit at the time of origination. A cross-reference to this provision is also added to §12.10(b)(1).

Adopted §12.5(a) sets out the general standard for legal lending limits, and clarifies that the sum of capital and certified surplus, as a measurement device, must be reduced in the event undivided profits is sufficiently negative to cause equity capital of a bank to be less than capital and certified surplus. In the view of the agency, no change in prior law or policy is made by §12.5(a). TBA notes that §12.5(a) seems to go beyond the Act, §5.201, in using equity capital as a measurement device when less than capital and certified surplus, but TBA also states that it understands the reasons for doing so. If the comment is construed as suggesting that capital and certified surplus should be the measurement device in all cases, the agency disagrees. The agency believes the intent of the Act, §5.201, is best satisfied by taking negative retained earnings (undivided profits) into account and that it has authority to impose this alteration pursuant to the Act, §5.201(b)(1).

The remainder of §12.5 sets out in detail the circumstances under which the general limit of §12.5(a) can be exceeded, although banks are reminded that prudent lending standards are always applicable. The increased lending limits generally are cumulative; i.e., each limit expressed is in addition to the general 25% limit and any other special limit applicable to a transaction with the same borrower except as otherwise specifically provided. Section 12. 5(b)-(d) implement and clarify statutory exceptions. Section 12.5(e)-(g) creates several new exceptions on the basis of parity with national banks. One commenter questioned the use of the term "immediate" in §12.5(b)(2). Section 12.5(b) governs loans to one borrower secured by a bill of lading, bonded warehouse receipt, or similar document transferring or securing title to readily marketable goods. In §12.5(b)(2), the holder of the bonded warehouse receipts, order bills of lading, documents of title, or other similar documents must have control and be able to obtain "immediate" possession of the goods so that the bank is able to sell the underlying goods and promptly transfer title to the buyer if default were to occur on a loan secured by such documents. The agency does not see a need for clarification. The thrust of §12.5(b)(2) is to require the bank to be in such a position that no obstacle exists to prompt presentation of documents sufficient to gain legal title to the collateral.

A commenter expressed concern that §12.5(c)(1) would limit the duration of an "annual" line of credit for grain elevators to a maximum period of 10 months. The duration provision is directed more at individual transactions under a credit facility and is related to ensuring that agricultural product collateral does not become unmarketable through age and spoilage. Clarification is added. The agency will interpret this provision in the same manner as the OCC, see 12 CFR, §32.3(b)(1)(iii).

IBAT and another commenter urge a new exception for transactions with third party providers of cashier's check services. Under a conventional program, funds derived from sale of cashier's checks are provided to and cashier's checks are processed through the third party provider's account, yet the bank remains contractually liable on the instrument since the third part provider disclaims direct liability. IBAT suggests handling this kind of transaction similar to the manner in which "due from" accounts with correspondent banks are handled, see 12 CFR, §210.1 et seq, but recognizes that the service provider is not a bank. The other commenter, a third party provider of such services, suggests that the exception impose a net worth test on the third party provider, specifying a net worth that coincidentally is met by the commenter but not all of its competitors. The agency declines to create a new exception at this stage of the rulemaking process on the grounds that the suggestion is outside the scope of the contemplated action, but will continue to study how best to support and protect banks utilizing such services.

Section 12.6 clarifies certain exemptions under the Act, §5.201, for which no limits are specified, without significant change from prior law and regulatory interpretations. Adopted §12.6(c) and (e) will exempt a loan to a governmental entity of this state or to a federal agency that would constitute a purchase of an investment security under the Act, §5.101(d)(1), if the obligation were marketable. Section 12.6(f) exempts government guaranteed loans. TBA commented that the term "legally created" should more properly be phrased as "valid and enforceable" to ensure that the requirements for a legal opinion meet established opinion standards in the legal community. The agency concurs in this comment and the subsection is so modified.

The specialized area of lease financing is addressed by §12.7, which defines the structure of a financed lease sufficient to allow the bank to look to the lessee and not the lessor as borrower.

Section 12.8 specifies the process of obtaining an exemption upon application as well as obtaining emergency relief from the banking commissioner in the situation of a legal lending limit that has become too low to allow a bank to adequately serve its community. The agency believes the ability to obtain an exemption on the facts of a particular case provides a significant advantage for state banks over national banks.

Aggregation and attribution of loans, the process of determining the

consolidated risk or exposure of the lending bank to a single source of repayment, is addressed in §12.9 and, with two exceptions, is substantially unchanged from existing law although reorganized for clarity.

TBA, IBAT, and two other commenters urged the agency to either delete §12. 9(a)(4), which asserts banking commissioner discretion to attribute loans to another person, or establish objective standards for how this discretion will be utilized, although none of the commenters suggested what these standards might be. The agency declines the request. Discretion to deal with creative evasion of the legal lending limits must remain unfettered. Deletion of §12. 9(a)(4) would not affect this discretion since it is merely repetitious of the Act, §5.201(c), which itself carries forward the provision from the repealed Texas Banking Code, Article 342-507(d). Further, national banks are subject to the same discretionary authority granted to the OCC, see 12 USC, §84(d)(2). Historically, this authority has been invoked by commissioners and examiners sparingly and only in clear cases of abuse.

One commenter urged creation of a review board to add more objectivity to the process of §12.9(a)(4), and another commenter argued that the application of this provision would be unconstitutional as violative of due process rights since a legal lending limit violation is subject to penal sanctions. The agency disagrees. First, unlike the repealed Texas Banking Code, the Act does not impose criminal penalties for a legal lending limit violation. Second, a violation cited in an examination report is not subject to civil money penalties. The bank must first ignore or defy the examination finding, the agency must issue a cease and desist order (which is appealable to and reviewable by the commission, and ultimately may be appealed to the courts), and the bank must violate a final and nonappealable cease and desist order before penalties may be imposed, and a penalty order itself is appealable. For the same reasons, the agency declines to create a review board.

Under §12.9(c), the common enterprise test for aggregation and attribution is stated in one instance regarding affiliated borrowers as the existence of "substantial financial interdependence ... between or among the borrowers." Section 12.9(c)(2) states that substantial financial interdependence exists if 50% or more of one borrower's annual gross receipts or gross expenditures derive from transactions with the other, affiliated borrower, and further creates a rebuttable presumption of substantial financial interdependence exists if 25% or more of one borrower's annual gross receipts or gross expenditures derive from transactions with the affiliated borrower. The 50% irrebuttable presumption is the same as the OCC has imposed on national banks, see 12 CFR, §32.5(c)(2)(ii). TBA urges deletion of the 25% rebuttable presumption, arguing that the provision will make it harder for banks to make loans to businesses at a time when they are under constant criticism for failing to meet the credit needs of their communities. The agency is sympathetic to the argument raised, but declines to delete the provision. The presumption that substantial financial interdependence exists if 50% or more of one borrower's annual gross receipts or gross expenditures derive from transactions with the other, affiliated borrower does not mean that substantial financial interdependence does not exist at 49%. A business that is dependent for a quarter to a half of its revenues or raw materials on an affiliate could reasonably be characterized as financially interdependent with the affiliate, depending on other factors such as alternative suppliers and customers.

One commenter argues strenuously that §12.9(c)(1)(A) will result in aggregation of loans between parties that contract with one another if the consideration is material to the overall revenues and expenses of one party. The agency intends the section to apply the financial interdependence test only to affiliated businesses, and the provision is amended for clarification to refer directly to "affiliated borrowers." The term is defined in §12.9(c) (2) in a manner consistent with the Act, §1.002(a)(1).

TBA suggests additional clarification of §12.9(d) with respect to treatment of wages and salaries of employees, pointing to comparable federal law in 12 CFR, §32.5(c)(1). The agency cannot identify any ambiguity and therefore declines to make the requested modification. Under federal regulations, the source of repayment test (§32.5(c)(1)) is a subset of the common enterprise test (§32.5(c)), therefore, the federal provisions must qualify the exception for wages and salary with reference to other formulations of the common enterprise test. Under the adopted sections, the source of repayment test (§12.9(d)) is independent of the common enterprise test (§12.9(c)). Therefore, the exception of employee wages and salaries from the source of repayment test does not need to be qualified by reference to the common enterprise test.

The OCC has imposed a separate limit on loans to corporate groups (generally defined as a group of business entities under common control, including forms of business entities other than corporations) in 12 CFR, §32. 5(d). Section 12.9(e) imposes the same requirement in recognition of the inherent risk in loans to a controlled group of business entities and to simplify application of the attribution rules in that context.

TBA suggests that the concluding clause of §12.9(f)(1) be deleted as redundant. Section 12.9(f)(1) specifies circumstances under which a loan to a partnership is not considered a loan to a partner. The agency declines to delete the language "and that have not agreed to guarantee or be personally liable on the loan or extension of credit" in that it is descriptive and potentially useful to the reader.

Section 12.9(g) clarifies the applicability of aggregation to guarantors and other accommodation parties. Generally, the derivative obligation of a drawer, endorser, or guarantor of a loan or extension of credit, including a contingent obligation to purchase collateral that secures a loan, is not aggregated with direct loans or extensions of credit to such drawer, endorser, or guarantor if the lending bank is relying primarily on the creditworthiness of the primary obligor and neither the direct benefit, common enterprise, nor source of repayment test is met.

Nonconforming loans are loans made on or after September 1, 1995, that were within a bank's legal lending limit when made but no longer comply because of specified reasons, and are governed by §12.10. Such loans will be cited as nonconforming loans but not as violations of the legal lending limit if they are nonconforming by reason of a decline in the bank's capital and certified surplus or equity capital, subsequent merger or affiliation of borrowers in such a way as to invoke aggregation of previously separate loans, subsequent changes in lending limit or capital definitions or standards after the effective date of Chapter 12, or a decline in value of collateral securing a loan or extension of credit that causes noncompliance with a special lending limit or exception. In the last case, a bank must take action to restore collateral value within 30 days after the nonconformity is discovered. In other cases of nonconformity, the bank is obligated to use reasonable efforts to bring the credit into compliance, and in some circumstances may renew or restructure the loan. The requirement that a bank exercise "reasonable" efforts is changed from the proposal, which required "best efforts," in response to a comment by TBA noting that 12.10(b) seemed more narrowly drafted than the comparable federal provision, 12 CFR, §32.2(j)(2)(iv).

Section 12.10(b) generally provides that a bank must exercise reasonable efforts to bring certain nonconforming loans or extensions of credit into conformity with the legal lending limit, "consistent with safe and sound banking practices." TBA suggests that the clause "consistent with safe and sound banking practices" be modified to state "unless to do so would be inconsistent with safe and sound banking practices." The agency declines the suggestion, noting that it would create a loophole capable of abuse.

Section 12.11 addresses transition from the Texas Banking Code to the Texas Banking Act regarding treatment of loans in existence on the effective date of the Act, primarily by providing an exemption based on specified standards, including standards for renewing and restructuring a loan if necessary. Subject to satisfaction of the specified standards, loans subject to §12.11 will not be cited as violations of lending limits or as nonconforming loans.

The new sections are adopted under the Act, §5.201(d), which authorizes the commission to adopt rules to administer and carry out the Act, §5.201, regarding legal lending limits, including rules to define or further define terms used in the statute, or establish limits, requirements, or exemptions other than specified by the statute for particular classes or categories of loans or extensions of credit. The sections are also adopted under the Act, §1.012(a), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Act, preserve or protect the safety and soundness of state banks, and grant the same rights and privileges to state banks that are or may be granted to national banks domiciled in this state. As required by the Act, §1.012(b), in adopting these sections, the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

§12.1. Purpose and Scope.

(a) Purpose. The purpose of this subchapter is to administer and carry out the objectives of Texas Civil Statutes, Articles 342-1.001 et seq (the Texas Banking Act, §§1.001 et seq) (the Act), particularly the Act, §5.201, to protect the safety and soundness of state-chartered banks by preventing excessive loans to one person or a relatively small group of persons who are financially interdependent, and to promote diversification of loans to reduce portfolio and credit risk. Notwithstanding the provisions of the Act, §5.201, and this subchapter, loans and extensions of credit by state banks and their operating subsidiaries remain subject to the exercise of prudent lending standards and safe and sound banking practices.

(b) Scope.

(1) This subchapter applies to all loans and extensions of credit made by a state bank and its operating subsidiaries on or after September 1, 1995. This subchapter does not apply to loans made by an insured state bank and its domestic operating subsidiaries to the bank's "affiliates," as that term is defined in 12 United States Code (USC), §371c(b)(1), pursuant to the Act, §5.201(a) (13), or to loans made by a state bank to the bank's operating subsidiaries, pursuant to the Act, §5.201(a)(14). Except as otherwise provided, this subchapter does not apply to other loans specifically exempted from the lending limit pursuant to the Act, §5.201(a).

(2) Loans and extensions of credit to affiliates, executive officers, directors, and principal shareholders of state banks, and their related interests, are subject to the limits prescribed by 12 USC, §§371c, 371c-1, 375a, and 375b, Regulation O (12 Code of Federal Regulations (CFR), §215.1 et seq), and 12 CFR, §337.3, in addition to the lending limits established by the Act, §5.201, and this subchapter, where applicable.

(3) The lending limits in this subchapter are separate and apart from the investment limits set forth in the Act, §5.101, and regulations adopted to govern investment limits. A state bank may make loans or extensions of credit to one borrower up to the full amount permitted by this subchapter and also purchase and hold eligible investment securities issued by the same obligor up to the full amount permitted under the Act, §5.101.

§12.2. General Definitions. Words and terms used in this subchapter that are defined in the Act, §1.002, have the same meanings as defined in the Act. The following words and terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

Act–Texas Civil Statutes, Articles 342–1.001 et seq (the Texas Banking Act, §§1.001 et seq).

Borrower–A person who is named as a borrower, obligor, or debtor in a loan or extension of credit, or any other person, including but not limited to a drawer, endorser, or guarantor who is considered to be a borrower under the direct benefit, source of repayment, or common enterprise tests set forth in §12.9 of this title (relating to Aggregation and Attribution).

Federal funds sold–A transaction between depository institutions involving the transfer of immediately available funds resulting from credits to deposit balances at Federal Reserve Banks, or from credits to new or existing deposit balances due from a correspondent depository institution.

§12.3. Loans and Extensions of Credit.

(a) Loans or extensions of credit for purposes of the Act, §5.201, and this subchapter include:

(1) an overdraft, regardless of whether such overdraft was pre–arranged, other than an overdraft for which payment or deposit is received by the bank before the time at which the bank closes its accounting records for the business day on which the funds were advanced;

(2) a contractual obligation to advance funds to or on behalf of a person, including a bank's obligation to:

(A) make payment, directly or indirectly, to a third party contingent upon default by a customer of the bank in performing an obligation owed to the third party or upon another stated condition;

(B) guarantee or act as surety for the benefit of a person;

(C) advance funds under a legally binding commitment to lend; or

(D) advance funds under a standby letter of credit, a put, or other similar arrangement, however named or described, that represents an obligation to the beneficiary on the part of the issuing bank to repay money borrowed by or advanced to or for the account of the account party (the customer or applicant in a letter of credit transaction), make payment on account of any indebtedness undertaken by the account party, or make payment on account of a default by the account party in the performance of an obligation, but not including a bank's obligation under a commercial letter of credit or similar instrument if the issuing bank reasonably expects the beneficiary to draw on the issuer and the instrument neither guarantees payment nor provides for payment in the event of a default by a third party;

(3) a maker or endorser's obligation arising from the discount of commercial paper;

(4) third–party paper purchased to the extent it is subject to an agreement that the seller will repurchase the paper, including an obligation to repurchase the paper upon default or at the end of a stated period, less any applicable dealer reserves held by the bank as collateral security, unless such transaction is exempt under other provisions of the Act or this subchapter;

(5) the sale of Federal funds with a maturity of more than one business day, but not Federal funds sold with a maturity of one day or less or Federal funds sold under a continuing contract, including contracts that provide for weekly settlement if the parties have the contractual right to obtain their funds at maturity of each transaction;

(6) loans or extensions of credit that have been charged off on the books of the bank, in whole or part, unless the loan or extension of credit s no longer legally enforceable by reason of:

(A) discharge in bankruptcy;

(B) expiration of the statute of limitations or judicial decision; or

(C) another reason, provided the bank maintains sufficient records to demonstrate that the loan is unenforceable;

(7) lease financing transactions made pursuant to the Act, §5.203, unless otherwise exempt under §12.7 of this title (relating to Lease Financing); and

(8) nonrecourse or limited recourse loans or extensions of credit.

(b) Loans or extensions of credit for purposes of the Act, §5.201, and this subchapter do not include:

(1) funds advanced to or for the benefit of a borrower by a bank for taxes or insurance associated with collateral security for a loan or extension of credit, as well as funds advanced for utilities, security, and maintenance expenses associated with real property securing a loan or extension of credit, but only if necessary to preserve the value of the real property or other collateral security and consistent with safe and sound banking practices, provided the bank maintains sufficient records to demonstrate the necessity of the advance, and such advances are included in loans and extensions of credit thereafter until repaid for the purpose of determining whether additional loans or extensions of credit to the same borrower may be made within applicable lending limits;

(2) accrued and discounted interest on an existing loan or extension of credit;

(3) that portion of a loan or extension of credit sold as a participation by a bank on a nonrecourse basis, provided the participation results in a pro rata sharing of credit risk proportionate to respective interests of the originating and participating lenders, except that:

(A) if the participation agreement provides that repayment must be applied first to the portions sold, a pro rata sharing will be considered to exist only if, in the event of default or comparable event provided in the agreement, the participants share in all subsequent repayments and collections in proportion to their actual percentage participation at the time of the occurrence of the event;

(B) if the originating bank funds the entire loan, the participants must be contractually obligated to remit their portion to the bank before the close of business (the time at which the bank closes its accounting records for the business day) on the next business day of the originating bank or its portion funded by the originating bank will be considered a loan by the originating bank to the borrower;

(C) in the case of a participation sold in an existing loan, the amount of the participation may not be subtracted from the outstanding loans and extensions of credit of the originating bank until the proceeds of sale are in the possession of the originating bank; and

(D) a loan participation agreement that provides for weekly settlement of amounts due to and from the participants meets the requirements of this paragraph if the outstanding balance to the borrower from the originating bank does not at any time exceed the bank's legal lending limit;

(4) an advance against uncollected funds in the normal course of collection pursuant to the bank's availability schedule issued in compliance with Regulation CC (12 CFR, §229.1 et seq), including the amount of an item that must be credited to the customer under the bank's availability schedule but remains uncollected and unreturned because of a delay or defect in the collection system;

(5) the sale of Federal funds with a maturity of one day or less, or Federal funds sold under a continuing contract, including contracts that provide for weekly settlement if the parties have the contractual right to obtain their funds at maturity of each transaction; or

(6) a renewal or restructuring of a nonconforming loan as a new loan or extension of credit, subject to compliance with §12.10(b) of this title (relating to Nonconforming Loans).

§12.4. Loan Commitments.

(a) A commitment to lend, when combined with all other loans or extensions of credit to a borrower, must be within the bank's legal lending limit at the time the commitment becomes binding, and advances may be made under a binding commitment to lend even if the advances would exceed the bank's lending limit on the date of funding. In determining whether a commitment to lend is within a bank's lending limit when made, the bank may deduct from the amount of the commitment the amount of each legally binding loan participation agreement executed before or concurrently with the bank's commitment that would be excluded from a loan or extension of credit under §12.3(b)(3) of this title (relating to Loans and Extensions of Credit).

(b) Pursuant to the Act, §5.201(b)(2), a state bank may renew a commitment to lend and complete funding under that commitment to one borrower in circumstances where the renewed commitment would exceed the bank's current, general lending limit if:

(1) the completion of funding is consistent with safe and sound banking practices and is made to protect the position of the bank;

(2) the completion of funding will enable the borrower to complete the project for which the original, expiring commitment to lend was made; and

(3) the amount of the additional funding does not exceed the unfunded portion of the bank's original, expiring commitment to lend.

§12.5. Percentage Lending Limits.

(a) General lending limit. Generally, a bank's total outstanding loans and extensions of credit to one borrower, as provided in the Act, §5.201, may not exceed 25% of the lesser of the bank's capital and certified surplus or the bank's total equity capital. However, certain loans or extensions of credit are subject to special lending limits as set forth in this section. These special lending limits are cumulative of one another and of the general lending limit under this subsection except as otherwise provided.

(b) Loans secured by title to readily marketable goods.

(1) Pursuant to the Act, §5.201(a)(3), loans to one borrower secured by a bill of lading, bonded warehouse receipt, or similar document transferring or securing title to readily marketable goods may not exceed 50% of the lesser of the bank's capital and certified surplus or the bank's total equity capital, in addition to the amount for that borrower allowed under the bank's general lending limit for loans and extensions of credit other than as provided by this subsection, provided the bank's interest in the collateral is adequately insured against loss if it is customary to do so. The market value of the goods securing the loan must at all times equal at least 115% of the amount of the outstanding loan that exceeds the general lending limit. The duration of the loan or extension of credit may not exceed six months if secured by goods that are refrigerated or frozen, or ten months if secured by nonperishable goods.

(2) The holder of the bonded warehouse receipts, order bills of lading, documents of title (as defined under the Business and Commerce Code), or other similar documents must have control and be able to obtain immediate possession of the goods so that the bank is able to sell the underlying goods and promptly transfer title to the buyer if default were to occur on a loan secured by such documents. The requirement under applicable law for a brief notice period or other similar procedural condition prior to disposal of the goods will not affect the eligibility of the instruments for this special lending limit.

(3) For purposes of this subsection, readily marketable goods are articles of commerce or industry in the form of fungible units that are easy to sell in a market with sufficiently frequent price

quotations, and includes basic metals, such as tin, copper, or lead, consumer goods, and packaged processed foods, including refrigerated or frozen foods. The exact price must be easy to determine and the article itself must be easy to sell at any time at a price that would not be considerably less than the amount at which it is valued as collateral. Whether an article qualifies as readily marketable goods is determined on the basis of the conditions existing at the time the loan or extension of credit secured by the article is made. Whether goods are nonperishable must be determined on a case-by-case basis because of the differences in types of goods and differences in the shipping, handling, and storing of goods.

(c) Loans secured by liens on stored agricultural products.

(1) Pursuant to the Act, §5.201(a)(4), loans to one borrower secured by liens on agricultural products in secure and properly documented storage in bonded warehouses or elevators may not exceed 50% of the lesser of the bank's capital and certified surplus or the bank's total equity capital, in addition to the amount for that borrower allowed under the bank's general lending limit for loans and extensions of credit other than as provided by this subsection, provided the bank's interest in the collateral is adequately insured against loss. The market value of the agricultural products securing the loan must at all times equal at least 125% of the amount of the outstanding loan. The duration of the loan or extension of credit arising from a single transaction or the same agricultural products may not exceed six months if secured by agricultural products that are refrigerated or frozen, or exceed ten months if secured by nonperishable agricultural products.

(2) The bank must have control and be able to obtain immediate possession of the agricultural products so that the bank is able to sell the underlying products and promptly transfer title to the buyer if default were to occur on a loan secured by such products. The requirement under applicable law for a brief notice period or other similar procedural condition prior to disposal of the products will not affect the eligibility of the products for this special lending limit.

(3) Field warehouse receipts are an acceptable form of collateral when issued by a duly bonded and licensed grain elevator or warehouse having exclusive possession and control of the agricultural products even though the grain elevator or warehouse is maintained on the premises of the owner of the products. Warehouse receipts issued by the borrower-owner that is a grain elevator or warehouse company, duly bonded and licensed and regularly inspected by state or federal authorities, may be considered eligible collateral under this provision only when the receipts are registered with an independent registrar whose consent is required before the products may be withdrawn from the warehouse.

(4) Agricultural products are any product of agriculture, excluding livestock but not the products of livestock, and includes wheat and other grains, cotton, wool, flowers, eggs, and milk. Whether agricultural products are nonperishable must be determined on a case-by-case basis because of the differences in types of agricultural products and differences in the shipping, handling, and storing of agricultural products.

(d) Loans secured by readily marketable collateral.

(1) Pursuant to the Act, §5.201(a)(12), loans or extensions of credit to one borrower may exceed the bank's general lending limit by an additional 15% of the lesser of the bank's capital and certified surplus or the bank's total equity capital if the amount that exceeds the bank's general lending limit is fully secured by readily marketable collateral. The bank must properly perfect its security interest in the collateral to qualify for this added special lending limit and the collateral at all times must have a market value of at least 100% of the amount of the loan or extension of credit that exceeds the bank's general lending limit.

(2) For purposes of this subsection, readily marketable collateral must be financial instruments or bullion that can be promptly sold under ordinary market conditions at a fair market value determined by reliable and continuously available price quotations, based upon actual transactions on an auction or similarly available daily bid and ask price market. Financial instruments are stocks, bonds, notes, and debentures traded on a national securities exchange, over-the-counter margin stocks as defined in Regulation U (12 CFR, §§221.1 et seq), commercial paper, negotiable certificates of deposit, bankers' acceptances, and shares in a money market mutual fund of the type that issues shares in which banks may perfect a security interest, but not including individual mortgages. Financial instruments may be denominated in foreign currencies that are freely convertible into United States dollars.

(e) Loans secured by documents covering livestock.

(1) Pursuant to the Act, §5.201(b)(2), loans or extensions of credit to one borrower secured by shipping documents or instruments that transfer or secure title to or grant a first lien security interest in livestock may not exceed 15% of the lesser of the bank's capital and certified surplus or the bank's total equity capital, in addition to the amount allowed under the bank's general lending limit. The market value of the livestock securing the loan must at all times equal at least 115% of the amount of the outstanding loan that exceeds the general lending limit.

(2) The bank must maintain in its files an inspection and valuation for the livestock pledged that is reasonably current, taking into account the nature and frequency of turnover of the livestock to which the documents relate, but in no event more than 12 months old.

(3) For purposes of this subsection, livestock includes dairy and beef cattle, hogs, sheep, goats, poultry, and fish, whether or not held for resale.

(f) Loans secured by dairy cattle paper. Pursuant to the Act, §5.201(b)(2), loans and extensions of credit to one borrower arising from the discount by dealers in dairy cattle of paper given in payment for the cattle may not exceed 15% of the lesser of the bank's capital and certified surplus or the bank's total equity capital, in addition to the amount allowed under the bank's general lending limit. To qualify, the paper must carry the full recourse endorsement or unconditional guarantee of the seller and must be secured by the cattle sold, pursuant to liens that allow the bank to maintain a perfected security interest in the cattle under applicable law.

§12.6. Loans Not Subject to Lending Limits.

(a) Loans arising from the discount of commercial or business paper.

(1) Pursuant to the Act, §5.201(a)(1), loans or extensions of credit arising from the discount of negotiable commercial or business paper that evidences an obligation to the person negotiating the paper are not subject to the lending limits of the Act, §5.201, or this subchapter, provided that:

(A) the paper is given in payment of the purchase price of commodities purchased for resale, fabrication of a product, or another business purpose that may reasonably be expected to provide funds for payment of the paper; and

(B) the paper bears the full recourse endorsement of the owner of the paper, except that paper discounted in connection with export transactions may be transferred without recourse or with limited recourse if supported by an assignment of appropriate insurance, acceptable to the banking commissioner, covering the political, credit, and transfer risks applicable to the paper, such as insurance provided by the Export-Import Bank.

(2) A default in the payment of principal or interest on commercial or business paper when due does not disqualify the exception under this subsection or result in a loan or extension of credit to the maker or endorser of the paper that is subject to lending limits, provided that the amount of such defaulted paper must be included in loans and extensions of credit thereafter until the default is remedied for the purpose of determining whether additional loans or extensions of credit to the same borrower may be made within applicable lending limits.

(b) Bankers' acceptances. Pursuant to the Act, §5.201(a)(2), acceptance of drafts eligible for rediscount under 12 USC, §372 and §373, or a bank's purchase of acceptances created by other banks that are eligible for rediscount under those sections, is not subject to the limits of the Act, §5.201, or this subchapter. Bankers' acceptances within this exception do not include:

(1) acceptance of drafts ineligible for rediscount, thereby resulting in a loan from the bank to the customer for whom the acceptance was made, in the amount of the draft;

(2) purchase of ineligible acceptances created by other banks, thereby resulting in a loan from the purchasing bank to the accepting bank, in the amount of the purchase price; or

(3) a bank's purchase of its own acceptances, thereby resulting in a loan to the bank's customer for whom the acceptance was made, in the amount of the purchase price.

(c) Obligations of state or local government. Pursuant to the Act, §5.201(b)(2), a loan or extension of credit to this state or an agency or political subdivision of this state, including a county or municipality or an agency or political subdivision of a county or municipality, is not subject to the limitations of the Act, §5.201, or this subchapter to the extent the loan or extension of credit constitutes a legally created general obligation of the borrower, if the lending bank has obtained an opinion of counsel that the loan or extension of credit is a valid and enforceable general obligation of the borrower.

(d) Loans secured by U.S. obligations. Pursuant to the Act, §5.201, a loan or extension of credit to a borrower is not subject to the limitations of the Act, §5.201, or this subchapter if the bank perfects a security interest in the collateral under applicable law and the bank is fully secured by the current market value of:

(1) bonds, notes, certificates of indebtedness, or Treasury bills of the United States or by similar obligations fully and unconditionally guaranteed as to principal and interest by the United States; or

(2) loans to the extent unconditionally guaranteed as to repayment of principal by the full faith and credit of the United States, as further described by subsection (f) of this section.

(e) Loans to a federal agency. Pursuant to the Act, §5.201(b)(2), a loan or extension of credit to an agency or instrumentality of the United States including a department, agency, bureau, board, commission, or establishment of the United States, or any corporation wholly owned directly or indirectly by the United States, is not subject to the limitations of the Act, §5.201, or this subchapter.

(f) Government guaranteed loans. Pursuant to the Act, §5.201(a)(8), a loan or extension of credit to a borrower is not subject to the limitations of the Act, §5.201, or this subchapter to the extent secured by unconditional takeout commitments, insurance, or guarantees of a governmental entity described in subsection (c) or (e) of this subsection, provided the commitment or guarantee is payable only in cash or its equivalent within 60 days after demand for payment is made. If the purchasing, insuring, or guaranteeing entity is described in subsection (c) of this section, the lending bank must obtain an opinion of counsel that the unconditional takeout commitment, insurance, or guarantee is a valid and enforceable general obligation of the purchasing, insuring, or guaranteeing entity. A takeout commitment, insurance, or guarantee is considered unconditional if the protection afforded the bank is not substantially diminished or impaired if loss should result from factors beyond the bank's control. Protection against loss is not materially diminished or impaired by procedural requirements such as an agreement to take over only in the event of default, including default over a specific period of time, a requirement that notification of default be given within a specific period after its occurrence, or a requirement of good faith on the part of the bank.

(g) Loans secured by segregated deposit accounts. Pursuant to the Act, §5.201(a)(10), loans or extensions of credit are not subject to the limitations of the Act, §5.201, and this subchapter to the extent secured by a segregated deposit account in the lending bank, provided that:

(1) the lending bank has perfected its security interest in the deposit under applicable law;

(2) if the deposit is eligible for withdrawal before the secured loan matures, the bank establishes internal procedures to prevent release of the security without the lending bank's prior consent;

(3) if the deposit is denominated and payable in a currency other than that of the loan or extension of credit that it secures, the deposit currency is freely convertible to U.S. dollars, except that only that portion of the loan or extension of credit that is fully secured by the U.S. dollar value of the deposit qualifies for exception and only if the lending bank establishes procedures to periodically revalue foreign currency deposits to ensure that the loan or extension of credit remains fully secured at all times.

(h) Discount of installment consumer paper.

(1) Loans and extensions of credit to one borrower arising from the discount of negotiable or nonnegotiable installment consumer paper that carries a full recourse endorsement or unconditional guarantee of payment by the person transferring the paper to the bank is considered a loan or extension of credit to the transferor, as well as the maker, and subject to the general lending limit, except that the loan or extension of credit will not be considered made to the transferor to the extent the bank has met the requirements of the Act, §5.201(a)(11), and this subsection. If the transferor of the paper offers only partial recourse to the bank, the exception provided by the Act, §5.201(a)(11), and this subsection is available only to the extent of the total amount of paper the transferor may be obligated to repurchase or has guaranteed. An unconditional guarantee may be in the form of a repurchase agreement, separate guarantee agreement, or other agreement having the same effect. A condition reasonably within the power or control of the bank to perform will not render conditional an otherwise unconditional guarantee.

(2) In order to claim the installment consumer paper exception under the Act, §5.201(a)(11), and this subsection, the bank must demonstrate its reliance on the maker of the paper by maintaining records supporting the bank's independent credit analysis of the maker's ability to repay the loan or extension of credit, maintained by the bank or a third party that is contractually obligated to make those records available for examination purposes, and a written certification by an officer of the bank, specifically designated by the board of the bank for this purpose, that the bank is relying primarily on the maker for repayment of the loan or extension of credit and not on a full recourse endorsement or unconditional guarantee by the transferor. If installment consumer paper is purchased in substantial quantities, the required records, evaluation, and certification must be in a form appropriate for the class and quantity of paper involved. The bank may use sampling techniques, or other appropriate methods, to independently verify the reliability of the credit information supplied by the seller.

(3) As used in this subsection, a consumer is the end user of a product, commodity, good, or service, whether leased or purchased, but not a person who purchases products or commodities for the purpose of resale or fabrication into goods for sale. Consumer paper includes paper relating to the lease or purchase of automobiles, mobile homes, residences, office equipment, household items, tuition fees, insurance premiums, and other consumer items. Consumer paper also includes paper relating to the lease or purchase of equipment for use in manufacturing, farming, construction, or excavation, if the bank is neither the lessor nor owner of the property.

(4) A bank may purchase and temporarily hold mortgages for sale to investors in the secondary market, and consider the purchases as loans to individual mortgagors rather than a mortgage warehouse facility, by purchasing without recourse to the transferor or, if purchased with recourse, by complying with this subsection. Whether an actual purchase is considered to occur depends on both the nature of the relationship established between the bank and other parties to the contractual arrangements and on assessment of the economic substance of the transaction. Failure to meet any one of the criteria applied by the department does not necessarily result in characterization of an ostensible purchase transaction as a mortgage warehouse facility to the originator. In determining whether the economic substance of a transaction constitutes a purchase, the department will consider whether:

(A) provisions of the contractual arrangements governing the mortgage transfers consistently reflect a relationship of buyer and seller between the bank and the transferor, and whether the bank in fact acts as the owner of the mortgages;

(B) the bank obtains possession or control of the bearer instruments conveying ownership, including the original note, deed of trust, assignment from the transferor, and a power of attorney from the transferor for instruments endorsed in blank, provided that possession or control may also be established through safekeeping or custodial arrangements between the bank and a third party agent or bailee;

(C) the bank takes possession or control of underlying underwriting documents, provided that possession or control of the underwriting documents by the investor is not inconsistent with characterization of the bank as a purchaser and owner of the mortgages;

(D) the bank receives and controls the sales proceeds when remitted from the investor;

(E) the bank demonstrates reliance on the maker by reviewing the credit quality and documentation underlying a mortgage prior to committing to make the purchase, provided that a bank purchasing mortgages in significant quantities may use sampling techniques or other appropriate methods to independently verify the reliability of the credit information supplied by the transferor;

(F) recourse and repurchase obligations of the transferor are subject to conditions outside the control of the transferor, such as a commitment to repurchase the mortgage if rejected by the investor for reasons other than fraud or underwriting deficiency; and

(G) the bank earns interest on the mortgages according to the interest rate on the face of each note rather than at a rate separately negotiated with the transferor.

§12.7. Lease Financing.

(a) Loans to industrial development authorities. Pursuant to the Act, §5.201(b)(2), a loan or extension of credit to an industrial development authority or similar public entity created to construct and lease a plant facility, including a health care facility, to an industrial occupant is considered a loan to the lessee, provided that:

(1) the bank documents the basis for its reliance on the industrial occupant as the primary source of repayment before the loan is extended to the authority;

(2) the authority's liability on the loan is limited solely to whatever interest it has in the particular facility;

(3) the authority's interest is assigned to the bank as security for the loan or the industrial occupant issues a promissory note to the bank that provides a higher order of security than the assignment of a lease; and

(4) the industrial occupant's lease rentals are assigned and paid directly to the bank.

(b) Loans to leasing companies. Pursuant to the Act, §5.201(b)(2), a loan or extension of credit to a leasing company for the purpose of purchasing equipment for lease is considered a loan to the lessee, provided that:

(1) the bank documents the basis for its reliance on the lessee as the primary source of repayment before the loan is extended to the leasing corporation;

(2) the loan is without recourse to the leasing corporation;

(3) the bank receives a security interest in the equipment and, in the event of default, may proceed directly against the equipment and the lessee for any deficiency resulting from the sale of the equipment;

(4) the leasing corporation assigns all of its rights under the lease to the bank;

(5) the lessee's lease payments are assigned and paid to the bank directly by the lessee; and

(6) the lease terms are subject to the same limitations that would apply to a state bank acting as a lessor under the Act, §5.203.

§12.8. Other Exceptions.

(a) By application. The banking commissioner in the exercise of discretion may grant an exception to any legal lending limit in the Act, §5.201, or this subchapter, based on extenuating facts and circumstances. A decision to deny a requested exception is not appealable. In deciding whether to grant an exception under this subsection, the banking commissioner will consider:

(1) the proposed transaction for which the exception is sought;

(2) how the requested exception would affect the capital adequacy and safety and soundness of the requesting bank if the exception is not granted or, if the exception is granted, if the proposed borrower should ultimately default;

(3) how the requested exception would affect the loan portfolio diversification of the requesting bank;

(4) the competency of management to handle the proposed transaction and any resulting safety and soundness issues;

(5) the marketability and value of the proposed collateral; and

(6) the extenuating facts and circumstances that warrant an exception in light of the purpose of legal lending limits as set forth in §12.1 of this title (relating to Purpose and Scope).

(b) Emergency lending limits. In the event that a bank's capital and certified surplus or total equity capital declines sufficiently to seriously impair the bank's ability to effectively operate in its marketplace or serve the needs of its customers or the community in which it is located, the banking commissioner may, upon written application, grant the bank temporary permission to fund loans or extensions of credit in excess of the bank's legal lending limit. The banking commissioner in the exercise of discretion may limit emergency lending authority under this section to particular types or classes of loans or extensions of credit.

§12.9. Aggregation and Attribution.

(a) General rule. A loan or extension of credit to one borrower is attributed to another person, and each person will be considered a borrower, if:

(1) proceeds of the loan or extension of credit are to be used for the direct benefit of the other person, to the extent of the proceeds so used, as provided by subsection (b) of this section;

(2) a common enterprise is deemed to exist between the persons as provided by subsection (c) of this section; or

(3) the expected source of repayment for each loan or extension of credit is the same for each person as provided by subsection

(d) of this section; or

(4) notwithstanding another provision of this section, the banking commissioner determines that a loan should be attributed to another person pursuant to the Act, §5.201(c).

(b) Direct benefit. The proceeds of a loan or extension of credit to a borrower is considered used for the direct benefit of another person and attributed to the other person if the proceeds, or assets purchased with the proceeds, are transferred in any manner to or for the benefit of the other person, other than in a bona fide arm's length transaction where the proceeds are used to acquire property, goods, or services.

(c) Common enterprise.

(1) A common enterprise is considered to exist and loans to separate borrowers will be aggregated in the case of:

(A) loans or extensions of credit made to affiliated borrowers if substantial financial interdependence exists between or among the borrowers; or

(B) loans made to separate persons for the purpose of acquiring more than 50% of the voting securities or voting interests of a business enterprise, in which case the acquisition loans are aggregated and attributed to the business enterprise.

(2) For purposes of paragraph (1)(A) of this subsection, borrowers are affiliated if one borrower directly or indirectly controls, is controlled by, or is under common control with another borrower. Substantial financial interdependence exists if 50% or more of one borrower's gross receipts or gross expenditures (on an annual basis) are derived from transactions with the other borrower and is presumed to exist, subject to rebuttal, if 25% or more of one borrower's gross receipts or gross expenditures (on an annual basis) are derived from transactions with the other borrower. Gross receipts and expenditures include gross revenues and expenses, intercompany loans, dividends, capital contributions, and similar receipts or payments.

(d) Source of repayment. The expected source of repayment for each loan or extension of credit is considered the same if the primary source of repayment is the same for each borrower. An employer will not be considered a primary source of repayment under this subsection solely because of wages and salaries paid to an employee.

(e) Loans to a corporate group. Pursuant to the Act, §5.201(b)(c), loans or extensions of credit by a bank to a corporate group may not exceed 75% of the lesser of the bank's capital and certified surplus or the bank's total equity capital. This limitation applies only to loans subject to the general lending limit. For purposes of this subsection, a corporate group is comprised of a person and all of its subsidiaries, and a corporation or other entity is a subsidiary of a person if the person owns or beneficially owns directly or indirectly more than 50% of the voting securities or voting interests of the corporation or other entity. Subject to the special limit of this subsection, loans or extensions of credit to a person and its subsidiary, or to different subsidiaries of a person, are not aggregated or attributed to other members of the corporate group unless either the direct benefit, common enterprise, or source of repayment test is met.

(f) Loans to partnerships or partners.

(1) A loan or extension of credit to a partnership, joint venture, or association is considered to be a loan or extension of credit to each member of the partnership, joint venture, or association other than those partners or members that, by the terms of the partnership or membership agreement, are not held generally liable for the debts or actions of the partnership, joint venture, or association, provided those provisions are valid against third parties under applicable law, and that have not otherwise agreed to guarantee or be personally liable on the loan or extension of credit.

(2) A loan or extension of credit to a member of a partnership, joint venture, or association is generally not attributed to the partnership, joint venture, or association, or to other members of the partnership, joint venture, or association, except as otherwise required by subsections (b)-(d) of this section, provided that a loan or extension of credit made to a member of a partnership, joint venture or association for the purpose of purchasing an interest in the partnership, joint venture or association, is attributed to the partnership, joint venture or association.

(g) Guarantors and accommodation parties. The derivative obligation of a drawer, endorser, or guarantor of a loan or extension of credit, including a contingent obligation to purchase collateral that secures a loan, is not aggregated with direct loans or extensions of credit to such drawer, endorser, or guarantor if the lending bank is relying primarily on the creditworthiness of the primary obligor and none of the tests set forth in this section are satisfied. The reliance of the lending bank on the primary obligor must be evidenced by the certification of an officer of the bank that the bank is, on stated facts, relying primarily on the responsibility and financial condition of the primary obligor for payment of the loan or extension of credit and not on the guarantee, or commitment in whatever form, of the guarantor, drawer, or endorser. In the event that the loan or extension of credit to the primary obligor, considered by the bank to be of sufficient credit quality at its inception, experiences subsequent deterioration to the point that the primary obligor is no longer performing in accordance with the terms of the initial loan agreement, such event will not result in a lending limit violation on behalf of the guarantor by virtue of the primary obligator's nonperformance. However, the total amount of the deteriorated loans guaranteed by such accommodating person must be combined with all other obligations of such guarantor in determining whether the guarantor may obtain additional loans or extensions of credit from the bank.

§12.10. Nonconforming Loans.

(a) A loan or extension of credit, within a bank's legal lending limit when made, will not be considered a violation of the

applicable lending limit but will be cited as nonconforming if the loan no longer complies with the bank's legal lending limit because:

(1) the bank's capital and certified surplus or total equity capital, if less, has declined;

(2) borrowers have merged or otherwise become affiliated in such a way as to invoke aggregation under §12.9 of this title (relating to Aggregation and Attribution);

(3) the lending limit or capital definitions or standards have changed after the effective date of this subchapter; or

(4) collateral securing the loan or extension of credit to satisfy the requirements of a special lending limit or lending limit exception has declined in value.

(b) A bank must exercise reasonable efforts to bring a loan or extension of credit that is nonconforming as a result of circumstances described in subsection (a)(1) -(3) of this section into conformity with the legal lending limit, consistent with safe and sound banking practices. As a last resort, a bank may renew or restructure an existing, nonconforming loan or extension of credit as a new, nonconforming loan or extension of credit without violating the Act or this subchapter, unless:

(1) additional funds are advanced by the bank to the borrower, except as permitted by §12.4(b) of this title (relating to Loan Commitments);

(2) the original borrower is replaced by a new borrower; or

(3) the banking commissioner determines that the renewal or restructuring of the loan or extension of credit is designed to evade the bank's lending limit.

(c) A bank must bring a loan or extension of credit that is nonconforming as a result of the circumstance described in subsection (a)(4) of this section into conformity with the legal lending limit on or before the 31st day after the nonconformity is discovered unless judicial proceedings, regulatory action, or other extraordinary circumstances beyond the bank's control prevent the bank from taking action.

§12.11. Transition Rules.

(a) This subchapter applies to loans or extensions of credit made on or after September 1, 1995. A loan or extension of credit existing prior to September 1, 1995, that was within a bank's legal lending limit when made, is not a violation of the Act, §5.201, and this subchapter, and is considered a conforming loan.

(b) A bank may renew, extend the maturity of, or restructure an existing loan or extension of credit that is exempt under this section if the bank makes a reasonable effort, consistent with safe and sound banking principles, to bring the credit into conformance with the Act, §5.201, and this subchapter, unless:

(1) additional funds are advanced by the bank to the borrower except as permitted by §12.5(e) of this title (relating to Percentage Lending Limits);

(2) a new borrower replaces the original borrower; or

(3) the banking commissioner determines that the renewal, extension, or restructuring of the loan or extension of credit is designed to evade the bank's lending limit.

(c) An extension, if any, of the maturity of the loan or extension of credit, in the aggregate, may not exceed the lesser of the original term of the loan or one year.

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

Issued in Austin, Texas, on December 15, 1995.

TRD-9601905 Everette D. Jobe
General Counsel
Texas Department of Banking

Effective date: March 1, 1996

Proposal publication date: December 22, 1995

For further information, please call: (512) 475-1300

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TITLE 10. COMMUNITY DEVELOPMENT

Part I. Texas Department of Housing and Community Affairs

Chapter 1. Administration

Subchapter A. General Policies and Procedures

• 10 TAC §1.3

The Texas Department of Housing and Community Affairs (Department) adopts new §1.3, concerning general eligibility for the Department's programs, without changes to the proposed text as published in the December 19, 1995, issue of the *Texas Register* (20 TexReg 10873).

The adoption of the section will provide procedures for holding certain applicants ineligible to receive funds from the Department if a required audit report is past due or if there are unresolved audit issues.

The Department did not receive any public comment in opposition to the adoption of this rule.

The new section is adopted under §2306.053(b)(4), the Texas Government, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

The Texas Government Code, Chapter 2306 is affected by this new section.

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

Issued in Austin, Texas, on February 7, 1996.

TRD-9601792 Larry Paul Manley
Executive Director
Texas Department of Housing and Community Affairs

Effective date: February 29, 1996

Proposal publication date: December 19, 1995

For further information, please call (512) 475-3916

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TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission of Texas

Chapter 22. Practice and Procedure

The Public Utility Commission of Texas (Commission) adopts amendments to §22.52(a), concerning notice in electric licensing proceedings, and §22. 104(d), concerning late intervention in such proceedings, with changes to the proposed text as published in the October 6, 1995, issue of the *Texas Register* (20 TexReg 8109).

The proposed changes address concerns raised by the commissioners, the commission staff, and parties to various commission proceedings about the type and content of notice provided to landowners and the public in proceedings issuing or amending certificates of convenience and necessity (CCN) for electric utility transmission lines. The amendments specify in greater detail the format and content of notice to be provided to owners of land directly affected by a proposed transmission line. The amendments also provide a procedure for providing supplemental notice to directly affected landowners who initially

do not receive notice, including a specific provision for late intervention. Finally, the amendments mandate that electric utilities hold a public meeting concerning a proposed transmission line prior to filing the CCN application if 25 or more landowners would be directly affected by the line.

The commission received written comments on the proposed rule from Entergy, Central and South West Corporation (CSW), Houston Lighting and Power Company (HL&P), South Texas Electric Cooperative, Inc. (STEC), the Terra Group, Texas Utilities Electric Company (TUEC), El Paso Electric Company (EPEC), the Lower Colorado River Authority (LCRA), and East Texas Electric Cooperative, Inc. (ETEC). A public hearing on the proposed rule was held November 1, 1995 and oral comments were received from Entergy and Central and South West. All of the oral and written comments were reviewed and taken into consideration by the commission. All of the commenters were supportive of the commission's efforts to amend the rules.

The rules currently provide that the utility shall determine who should receive direct notice of a CCN application by reviewing the current county tax rolls. The commission specifically requested comments on the appropriateness of requiring utilities to conduct a review of deed records to determine who should receive notice. Several commenters indicated that the failure to provide timely notice to all directly affected landowners is rare. All commenters who addressed the issue, with the exception of one, indicated that the additional expense associated with reviewing the deed records is significant and is not justified in light of the rarity of the problem, especially when one considers that such a search still would not guarantee 100% accuracy. The one exception proposed allowing utilities have the option to use the source that provides the most current and accurate information.

Several commenters responded to this issue by presenting: (1) a quantification of the additional expense that a utility would incur by conducting a review of deed records rather than the tax rolls to prepare direct notice of a CCN application; and (2) a cost\benefit analysis of the use of deed records to prepare direct notice of a CCN application. CSW estimated that the additional cost to review deed records rather than tax rolls would vary from $500 to $5,000 per mile of transmission line depending on the location of the line and the number of landowners. Another commenter indicated that a deed search to determine ownership would cost approximately $100 per parcel of land. Moreover, LCRA noted that a deed search on 50 tracts of land would require approximately two months versus about one week for a search of the tax rolls. The commission agrees with these comments. Given that utilities rarely fail to provide timely notice to all directly affected landowners and the additional time and cost associated with reviewing deed records, it is not appropriate to require utilities to make such a review. Moreover, requiring a utility to conduct a review of deed records to determine who should receive notice would be unduly costly and would not produce significant benefit.

ETEC proposed relaxing the language in §22.52(a)(1) to allow a utility to describe the approximate location of all preferred and alternative routes in the notice. The commission disagrees with this proposal. The location of all preferred and alternative routes is the primary concern for many directly affected landowners. Moreover, allowing the notice to describe the location of the routes in approximate terms could lead to ineffective notice. The commission believes it necessary for affected parties to be informed of the location of all preferred and alternative routes to the extent they are known at the time notice is provided. Several commenters requested modifications to §22.52(a)(3)(D). This section requires a statement from utilities identifying whether the utility has had any contact with directly affected landowners other than the required notice letter. Each commenter expressed concern over the difficulty of meeting this requirement due to the numerous contacts that often occur between affected landowners and various utility employees and representatives. The commission agrees with these comments. As a result, the language in §22.52(a)(3)(D) has been modified to require that only formal contacts relating to notice of the proceeding between the utility and the landowner, other than the notice, be indicated on the statement. Many times there are disagreements over whether a directly affected landowner has been contacted by the utility. This information provides a useful record of such contacts.

CSW suggested that utilities be allowed to obtain the consent of municipalities, county governments and neighboring utilities before the application is filed. The commission disagrees with this comment. Many times the preferred and alternate routes are modified prior to the filing of the application. Moreover, it should not be burdensome for the utility to wait until the application is filed before it obtains consent from of municipalities, county governments and neighboring utilities.

CSW also suggested that municipalities, county governments and neighboring utilities who receive supplemental notice should be given a 20-day deadline for intervention deadline. This is consistent with the intervention deadline for directly affected landowners given supplemental notice found in §22.52(a) (3)(E). The commission agrees with this suggestion and has included appropriate language in §22.52(a)(2).

Several commenters suggested that public meetings not be required unless 25 tracts of land, rather than 25 landowners, are directly affected. The commission disagrees with linking the requirement to hold a public meeting to the number of affected tracts rather than the number of landowners affected. Many tracts of land have multiple owners who are each entitled to notice and an opportunity to be heard. Furthermore, a mobile home park or apartment complex may have a single owner but many affected residents. In such instances, it is appropriate for the utility to hold a public meeting notwithstanding the number of tracts affected.

HL&P suggested eliminating the requirement that directly affected landowners be informed of any modifications to the proposed route prior to it being adopted. The commission believes that newly affected landowners should be given notice and an opportunity to be heard prior to approval. Such a process will assist the commission in insuring that community values are adequately addressed and that Cans are granted on a nondiscriminatory basis. As a result, the commission rejects this proposal.

Entergy proposed modifying the contents of the notice provided to those landowners residing along an alternate route. The proposed rule requires language which informs directly affected landowners that they may be affected if the commission approves the preferred route or one of the alternative routes. The commission believes that this language will alert landowners to the importance of the notice without causing undue concern. Therefore, the Commission declines to modify the notice language as proposed.

Several commenters objected to having to notify landowners along the primary route after the final order has been entered approving the CCN. Specifically, there were concerns with being required to provide a copy of the commission's final order to landowners. The commission believes that providing directly affected landowners with a copy of the commission's final order reasonably balances of the landowner's right to information and the utilities burden with providing such information. Providing the final order is the most efficient means of avoiding the confusion of informally informing these individuals.

The Terra Group proposed replacing language in the notice related to land valuation with a description of the purpose of the CCN process. The commission believes that the proposed language adequately informs affected landowners of the nature of the proceeding and provides them with important information on how to obtain additional information if they are interested. Therefore, the commission declines to replace the proposed language.

The Terra Group also suggested the commission specify the minimum scale of the map to be included in the notice. The requirement that a map be included in the notice has existed for several years without incident. Consequently, the commission believes it is unnecessary to include such a requirement at this time.

One commenter proposed including a last available day to file in §22. 104(d)(4). This would prevent directly affected landowners from delaying a proceeding for many months. Another commenter expressed similar concerns over a utility's application being adversely delayed by intervenors who are not provided with timely notice. The commission disagrees with these suggestions. In fairness to directly affected landowners who were not properly noticed, the commission believes that it would be inappropriate to establish a last available day to file Otherwise, there could be an incentive for a utility to delay sending notice to individuals in order to prevent their participation. Accordingly, the administrative law judge retains discretion pursuant to the proposed rule, to determine how much time is sufficient to allow the landowner to participate in the proceeding under the circumstances. CSW suggested clarification of the term sufficient time in §22.104(d)(4). As noted, the commission believes that the administrative law judge should retain the discretion to determine a sufficient time for late intervenors to prepare for and participate in the proceeding on a case-by-case basis.

Subchapter D. Notice

• 16 TAC §22.52

The amendment is adopted under the Public Utility Regulatory Act of 1995, Senate Bill 319, 1.101, 74th Legislature, Regular Session 1995, as amended by Senate Bill 378 and House Bill 2128 (PURA), which provides the Public Utility Commission of Texas with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

The following statute is affected by these rule amendments: the Public Utility Regulatory Act of 1995, §1.101.

§22.52. Notice in Licensing Proceedings.

(a) Notice in Electric Licensing Proceedings. In all electric licensing proceedings except minor boundary changes and notice of intent and certification proceedings for new electric generating plants, the applicant shall give notice in the following ways:

(1) Applicant shall publish notice of the applicant's intent to secure a certificate of convenience and necessity in a newspaper having general circulation in the county or counties where a certificate of convenience and necessity is being requested, once each week for two consecutive weeks beginning with the week after the application is filed with the commission. This notice shall identify in general terms the type of facility if applicable, and the estimated expense associated with the project.

(A) The notice shall also include the following statement in the first paragraph: "Persons with questions about this project should contact (name of utility contact) at (utility contact telephone number). Persons who wish to intervene in the proceeding or comment upon action sought, should contact the Public Utility Commission of Texas, at 7800 Shoal Creek Boulevard, Austin, Texas 78757, or call the Public Utility Commission Public Information Office at (512) 458-0256 or (512) 458-0221 for the text telephone. The deadline for intervention in the proceeding is (date 70 days after the date the application was filed with the commission), and a letter requesting intervention should be received by the commission by that date."

(B) The notice shall further describe in clear, precise language the geographic area for which the certificate is being requested and the location of all preferred and alternative routes of the proposed facility. This description shall refer to area landmarks, including but not limited to geographic landmarks, municipal and county boundary lines, streets, roads, highways, railroad tracks, and any other readily identifiable points of reference, unless no such references exist for the geographic area.

(C) The notice shall state a location where a map may be reviewed and from whom a copy of the map may be obtained. The map shall clearly and conspicuously illustrate the location of the area for which the certificate is being requested including the preferred location and any alternative locations of the proposed facility, and shall reflect area landmarks, including but not limited to geographic landmarks, municipal and county boundary lines, streets, roads, highways, railroad tracks, and any other readily identifiable points of reference, unless no such references exist for the geographic area.

(D) Proof of publication of notice shall be in the form of a publisher's affidavit which shall specify the newspaper(s) in which the notice was published, the county or counties in which the newspaper(s) is or are of general circulation the dates upon which the notice was published, and a copy of the notice as published. Proof of publication shall be submitted to the commission as soon as available.

(2) Applicant shall, upon filing an application, also mail notice of its application to municipalities within five miles of the requested territory or facility, neighboring utilities providing the same utility service within five miles of the requested territory or facility, and the county government(s) of all counties in which any portion of the proposed facility or requested territory is located. The notice shall contain the information as set out in paragraph (1) of this subsection and a map as described in paragraph (1) of this subsection. An affidavit attesting to the provision of notice to municipalities, utilities, and counties shall specify the dates of the provision of notice and the identity of the individual municipalities, utilities, and counties to which such notice was provided. Before final approval of any modification in the applicant's proposed route(s), applicant shall provide notice as required under this paragraph to municipalities, utilities and counties affected by the modification which have not previously received notice. The notice of modification shall state such entities will have 20 days to intervene.

(3) Applicant shall, upon filing an application, mail notice of its application to the owners of land, as stated on the current county tax roll(s), who would be directly affected by the requested certificate, including the preferred location and any alternative location of the proposed facility. For purposes of this paragraph, land is directly affected if an easement would be obtained over all or any portion of it, or if it contains a habitable structure that would be within 200 feet of the proposed facility.

(A) The notice must contain all information required in paragraph (1) of this subsection and contain the following statement in the first paragraph of the notice printed in bold-face type: Your land may be directly affected in this proceeding. If the preferred route or one of the alternative routes requested under the certificate is approved by the Public Utility Commission of Texas, the utility will have the right to build a facility which may directly affect your land. This proceeding will not determine the value of your land or the value of an easement if one is needed by the utility to build the facility. If you have questions about this project, you should contact (name of utility contact) at (utility contact telephone number). If you wish to participate in this proceeding by becoming a party or to comment upon action sought, you should contact the Public Utility Commission of Texas, at 7800 Shoal Creek Boulevard, Austin, Texas 78757, or call the Public Utility Commission Public Information Office at (512) 458-0256 or (512) 458-0221 for the text telephone. If you wish to participate in this proceeding by becoming a party, the deadline for intervention in the proceeding is (date 70 days after the date the application was filed with the commission), and you must send a letter requesting intervention to the commission which is received by that date."

(B) The notice must include a map as described in paragraph (1) of this subsection. Applicants may provide either a map of the entire proposed and alternative routes or maps for each county.

(C) Before final approval of any modification in the applicant's proposed route(s), applicant shall provide notice as required under paragraphs (A) and (B) of this paragraph to all directly affected landowners who have not already received such notice.

(D) Proof of notice may be established by an affidavit affirming that the applicant sent notice by first-class mail to each of the persons listed as an owner of directly affected land on the current county tax roll(s). The proof of notice shall include a list of all landowners to whom notice was sent and a statement of whether any formal contact related to the proceeding between the utility and the landowner other than the notice has occurred.

(E) Upon the filing of proof of notice as described in subparagraph (D) of this paragraph, the lack of actual notice to any individual landowner will not in and of itself support a finding that the requirements of this paragraph have not been satisfied. If, however, the utility finds that an owner of directly affected land has not received notice, it shall immediately provide notice in the same form described in subparagraphs (A) and (B) of this paragraph, except that the notice shall state that the person has 20 days to intervene. The utility shall immediately notify the commission that such supplemental notice has been provided.

(4) The utility shall hold at least one public meeting prior to the filing of its licensing application if 25 or more persons would be entitled to receive direct mail notice of the application.

(5) Failure to provide notice in accordance with this section shall be cause for day-for-day extension of deadlines for intervention and for commission action on the application.

(6) Upon entry of a final, appealable order by the commission approving an application, the utility shall provide notice to all owners of land who previously received direct notice. Proof of notice under this subsection shall be provided to the commission's general counsel.

(A) If the owner's land is directly affected by the approved route, the notice shall consist of a copy of the final order.

(B) If the owner's land is not directly affected by the approved route, the notice shall consist of a brief statement that the land is no longer the subject of a pending proceeding and will not be directly affected by the facility.

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

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9501884 Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas

Effective date: March 1, 1996

Proposal publication date: October 6, 1995

For further information, please call: (512) 458-0100

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Subchapter F. Parties

• 16 TAC §22.104

The amendment is adopted under the Public Utility Regulatory Act of 1995, Senate Bill 319, 1.101, 74th Legislature, Regular Session 1995, as amended by Senate Bill 378 and House Bill 2128 (PURA), which provides the Public Utility Commission of Texas with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

§22.104. Motions to Intervene.

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

(d) Late Intervention.

(1) A motion to intervene that was not timely filed may be granted. In acting on a late filed motion to intervene, the presiding officer shall consider:

(A) any objections that are filed;

(B) whether the movant had good cause for failing to file the motion within the time prescribed;

(C) whether any prejudice to, or additional burdens upon, the existing parties might result from permitting the late intervention;

(D) whether any disruption of the proceeding might result from permitting late intervention; and

(E) whether the public interest is likely to be served by allowing the intervention.

(2) The presiding officer may impose limitations on the participation of an intervenor to avoid delay and prejudice to the other parties.

(3) Except as otherwise ordered, an intervenor shall accept the procedural schedule and the record of the proceeding as it existed at the time of filing the motion to intervene.

(4) In an electric licensing proceeding in which a utility did not provide direct notice to an owner of land directly affected by the requested certificate, late intervention shall be granted as a matter of right to such a person, provided that the person files a motion to intervene within 20 days of actually receiving the notice. Such a person should be afforded sufficient time to prepare for and participate in the proceeding.

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

Issued in Austin, Texas, on February 9, 1996.

TRD-9501885 Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas

Effective date: March 1, 1996

Proposal publication date: October 6, 1995

For further information, please call: (512) 458-0100

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Chapter 23. Substantive Rules

Records and Reports

• 16 TAC §23.12

The Public Utility Commission of Texas adopts an amendment to §23.12, with changes to the proposed text as published in the September 22, 1995, issue of the *Texas Register* (20 TexReg 7571).

Section 23.12, as amended, exempts incumbent local exchange companies electing under Subtitle H, Title III of the Public Utility Regulatory Act of 1995, COAs and SPCOAs from the PURA §1.251 sale, transfer and merger reporting requirements. The amendment also requires the commission to complete an investigation under §1.251 of non-exempt telecommunication utilities within 180 days. The purpose of the amendment is to bring §23.12 into compliance with PURA §3.053.

The public benefit anticipated as a result of enforcing the amendment includes removing regulatory uncertainties for some telecommunications utilities.

No parties submitted comments in response to the September 22, 1995, *Texas Register* publication.

Following the publication of the proposed rule, the Commission conducted a public hearing on October 5, 1995, at which three parties were in attendance. None of the three chose to make any comments.

Following the public hearing Texas Telephone Association (TTA) and Texas Statewide Telephone Cooperative, Inc. (TSTCI) filed written comments. Both supported the proposed amendment. In addition,

TSTCI recommended that the phrase "within 30 days after closing" be used in place of "within 30 days of the transaction" so that a utility would be better able to determine when a transaction has occurred. The commission agrees that clarification is needed and has adopted TSTCI's recommendation.

TSTCI also recommended that a paragraph (3) be added to subsection (d) that contains language intended to satisfy the requirements of the Federal Communications Commission (FCC) regarding the commission's statutory position on sale, transfer and merger proceedings in FCC study area waiver applications. Although such an amendment may be appropriate, the commission believes it is beyond the scope of the project which was noticed only for purposes of bringing §23.12 into compliance with PURA §3.053. Therefore, the commission declines to adopt TSTCI's recommendation.

All comments, including those not specifically referenced herein, were fully considered by the commission.

The amendment is adopted under the Public Utility Regulatory Act of 1995, §1.101, 74th Legislature, Regular Session 1995, as amended by House Bill 2128, which provides the Public Utility Commission of Texas with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Index to Statutes: Article 1446c-O (Vernon Supp. 1995)

§23.12. Financial Records and Reports.

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

(c) Reports on sale of property and mergers.

(1) Except for a local exchange company exempted in paragraph (5) of this subsection, an electric utility or dominant carrier shall not sell, acquire, lease or rent any plant as an operating unit or system in the State of Texas for a total consideration in excess of $100,000 unless the public utility reports such transaction to the commission while pending or within 30 days after closing.

(2) Except for a local exchange company exempted in paragraph (5) of this subsection, an electric utility or dominant carrier shall not merge or consolidate with another public utility operating in the State of Texas unless the public utility reports such transaction to the commission while pending or within 30 days after closing.

(3) Electric utilities and dominant carriers shall not purchase voting stock in another public utility doing business in the State of Texas, unless the utility reports such purchase to the commission while pending or within 30 days after closing.

(4) Electric utilities and dominant carriers shall not loan money, stocks, bonds, notes or other evidences of indebtedness to any corporation or person owning or holding directly or indirectly any stock of the public utility unless the public utility reports such transaction to the commission while pending or within 30 days after closing. A properly filed tariff change with respect to energy conservation loans available to customers, who may or may not be shareholders as described in this paragraph, will be considered adequate reporting to the commission.

(5) Incumbent local exchange companies electing under Subtitle H, Title III of the Public Utility Regulatory Act of 1995, COAs, and SPCOAs are exempt from the requirements of paragraphs (1) and (2) of this subsection.

(6) For dominant carriers, investigations by the commission, with or without public hearing, of the transactions described in paragraphs (1) and (2) of this subsection must be completed within 180 days after the date of notification by the dominant carrier. If an order is not entered within that time, the utility's action is considered consistent with the public interest.

(d) Reports on sale of 50% or more of stock. All transactions involving the sale of 50% or more of the stock of an electric utility or dominant carrier except a local exchange company exempted in paragraph (1) of this subsection, shall be reported to the commission while pending or within 30 days after closing.

(1) Incumbent local exchange companies electing under subtitle H, Title III of the Public Utility Regulatory Act of 1995, COAs and SPCOAs are exempt from the requirements of this subsection.

(2) For dominant carriers, investigations by the commission, with or without public hearing, of the transactions described in this subsection must be completed within 180 days after the date of notification by the dominant carrier. If an order is not entered within that time, the utility's action is considered consistent with the public interest.

(e) (No change.)

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

Issued in Austin, Texas, on February 8, 1996.

TRD-9601871 Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas

Effective date: March 1, 1996

Proposal publication date: September 22, 1995

For further information, please call: (512) 458-0100

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The Public Utility Commission of Texas adopts an amendment to §23.66, the repeal of §23.67, and new §23.67, relating to transmission service for electric utilities. New §23.67 is adopted with changes to the proposed text, as published in the November 17, 1995, issue of the *Texas Register* (20 TexReg 9520). Section 23.66 and the repeal of §23.67 is adopted without changes and will not be republished.

The amendment, repeal and new section are being adopted pursuant to new legislation that directs the Public Utility Commission to adopt rules relating to wholesale transmission service no later than February 28, 1996. These amendments are also the product of the commission's own independent inquiry into the rates, terms, and conditions of wholesale transmission service, which was initiated in April 1995, prior to the passage of PURA 95 provisions which direct the commission to adopt rules concerning wholesale transmission service. Among other PURA provisions, this inquiry was initiated under the commission's general authority to regulate electric utilities, and its specific authority to prevent anti-competitive conduct.

The commission held workshops on transmission issues relating to electric utilities on June 16, July 14 and 18, and August 13 and 17, 1995. The commission also conducted an additional workshop on transmission pricing and the role of an ERCOT independent system operator on December 15, 1995. The commission held substantive discussions on wholesale transmission issues during numerous commission open meetings between June 1995 and February 1996. At an open meeting on November 9, the commission voted to publish a proposed rule for comment in the *Texas Register*. In addition to the workshops and the November 9 open meeting, the commission staff has convened meetings of interested parties and established working groups of interested parties to attempt to resolve issues that have arisen, and the commission has held discussions of transmission issues at several open meetings after the publication of the rule. The commission held a public meeting to permit interested persons to make oral comments on December 12. All of these meetings represent an unprecedented industry-wide and commissioner-led effort to discuss relevant issues in an attempt to reach the broadest possible industry consensus on the implementation of open access comparable wholesale transmission service.

In PURA 95, the Texas Legislature adopted a significant revision to its statement of legislative policy regarding the electric utility industry. This revised policy statement concluded that wholesale competition among utilities and certain nonutilities is in the public interest. In order to effectuate this policy, the Legislature directed the commission to adopt rules regarding wholesale transmission service which require utilities to

provide such service at rates, terms, and conditions which are comparable to the rates, terms, and conditions under which the utility uses its own transmission system. This rulemaking is vital to the accomplishment of the Legislature's policy objective of achieving wholesale competition, because the transmission system which is used to deliver wholesale power is also owned by certain competitors in the wholesale market. Wholesale competition in the electric utility industry is occurring in the generation sector. However, the provision of wholesale transmission service remains a natural monopoly. Wholesale competition can produce the Legislature's expected benefits of lower electricity prices and higher quality service only when the market allows participation by a maximum number of buyers and sellers of generation services. Without a requirement for comparable use of the State's transmission system by all wholesale market participants, the Legislature's stated goal of promoting wholesale competition will be frustrated.

The legislation enacted by the Texas legislature requires that the rules adopted by the commission be consistent with the rules adopted by the Federal Energy Regulatory Commission relating to open-access, comparable transmission service. Because the FERC has not completed its rulemaking, the commission will undoubtedly have to review this rule for consistency with the FERC rule, after the FERC rule is adopted. Modifications to the commission's rule may be required at that time.

The commission is adopting a requirement that electric utilities that own transmission facilities provide open-access transmission service to other utilities, exempt wholesale generators, power marketers, and qualifying facilities. The amendments also require certain utilities to provide ancillary services related to the provision of transmission service, prescribe pricing rules for transmission service, and require that utilities separate their transmission and wholesale power purchase and sale operations. The purpose of the amendments is to enhance competition in the wholesale market for electric generation. In adopting new transmission rules, the commission is repealing the existing rules concerning wheeling service in §23.66(d) and §23.67.

Section 23.67(c) of the proposed rule would require utilities to provide wholesale transmission service to other utilities, exempt wholesale generators, qualifying facilities, and power marketers. The rule requires utilities to provide such service, whether it involves only facilities that are regarded as transmission facilities or both transmission and distribution facilities.

Section 23.67(g) of the rule establishes a pricing mechanism for transmission service. A number of interested persons commented on the appropriate pricing mechanism, and this issue is discussed in detail, as follows. Section 23.67(o) of the rule also requires that utilities separate their generation, transmission, and distribution costs and rates. Section 23. 67(p) requires the development of an ERCOT independent system operator and an electronic information system that will afford interested parties access to information about the availability of transmission capacity. Subsection 23. 67(s) establishes standards for an alternative dispute resolution process and requires parties to employ this dispute resolution process if disputes arise concerning transmission service. These provisions of the rule are discussed in greater detail, as follows, in the context of the comments filed by interested persons.

The following parties filed comments in this proceeding: State Senator Ken Armbrister, Associated Power Services, Inc. (APSI), the City of Austin (Austin) , Brazos Electric Power Cooperative, Inc. (Brazos), the Public Utilities Board of the City of Brownsville (Brownsville), the City of Bryan (Bryan), Cities Served by Texas Utilities Electric Company (TU Cities), Cap Rock Electric Cooperative (Cap Rock), the Center for Energy and Economic Dovelopment, Central and South West Corporation (CSW), Consumers Union (CU), the City of Denton (Denton), Destec Energy, Inc. (Destec), Northeast Texas Electric Cooperative, Inc., Sam Rayburn G&T Cooperative, and Tex-La Electric Cooperative of Texas, Inc. (collectively, the East Texas G&Ts), the Electric Reliability Council of Texas (ERCOT), El Paso Electric Company (EPEC), Entergy, the Environmental Defense Fund (EDF), the City of Garland (Garland), the City of Greenville (Greenville), Guadalupe Valley Electric Cooperative (GVEC), Gulf Coast Power Connect, Inc. (GCPC), Houston Lighting & Power Company (HL&P), Mr. Will C. Jones, the Lower Colorado River Authority (LCRA), Lubbock Power & Light (LP&L), Magic Valley Electric Cooperative (Magic Valley), Medina Electric Cooperative, Inc. (Medina), Nucor Steel (Nucor), Enron Capital & Trade Resources, Electric Clearinghouse, Inc., Mesquite Energy Services, and Gulf Coast Power Association (collectively referred to as Power Marketers), Public Counsel, Rayburn Country Electric Cooperative, Inc., (Rayburn Country), City Public Service Board of the City of San Antonio (CPSB), South Texas Electric Cooperative (STEC), Southwestern Public Service Company (SPS), Tenaska, Inc., Texas Electric Cooperatives, Inc. (TEC), Texas Industrial Energy Consumers (TIEC), Texas-New Mexico Power Company (TNP), Texas Public Power Association (TPPA), Texas Ratepayers Organization to Save Energy (Texas ROSE), Texas Retailers Association (TRA), Texas Utilities Electric Company (TU Electric), and the City of Weatherford (Weatherford). In addition, Elizabeth Moler, the Chair of the Federal Energy Regulatory Commission (FERC) filed a letter comparing the proposed rule with the rule proposed by the FERC relating to open-access, comparable wholesale transmission service.

No comments were filed concerning the proposal to amend §23.66.

In the preamble, the commission posed the following questions: Should existing transmission contracts (both stand alone wheeling contracts and the transmission component of bundled wholesale contracts) be modified in light of the changes being effected in the rule? How should the rule affect existing contracts for transmission service?

APSI commented that existing contracts should remain in effect, but that utilities taking bundled wholesale service should have the option of converting all or a portion of their existing service to transmission-only service. Denton, Garland, and Weatherford questioned whether the commission has the authority to require the modification of existing contracts. TU Electric asserted that the commission does not have the authority to unilaterally reform existing contracts. It also pointed out that the FERC has not proposed the modification of existing contracts and argued that modification of existing contracts is not necessary for the introduction of wholesale competition. STEC urged the commission not to abrogate existing contracts. Brazos commented that the commission does not have the authority to abrogate contracts, particularly where a contract is a part of the security for the repayment of government-subsidized loans from the Rural Utilities Service.

Brownsville commented that the commission has the authority to review existing transmission contracts and should do so, in order to facilitate the expeditious introduction of wholesale competition in the State. Destec commented that existing bundled power contracts should have the rates fully unbundled, so that wholesale customers know what they are paying for various utility services. GVEC commented that the benefits of competition need to be passed on to all captive wholesale customers, by unbundling the transmission charges in existing bundled rates and limiting the transmission element of bundled rates to the new statewide transmission costs.

GCPC commented that wholesale power contracts are subject to commission approval and that existing contracts (except those subject to the jurisdiction of the FERC) that have not been approved by the commission are subject to its review, regardless of how long they have been in effect. Cap Rock took a similar position: the commission should review existing power supply contracts to preclude the enforcement of noncompetitive prices, terms and conditions. Cap Rock also argued that transmission-dependent customers should have the right to renegotiate existing contracts when this rule is adopted. The East Texas G&Ts commented that customers under existing transmission contracts should be permitted to convert to transmission service under this rule unless the contract explicitly prohibits such a conversion or establishes terms for conversion that the customer has not met.

The question of re-opening existing power sales contracts involves difficult legal issues. Both at the Federal and state level, the courts have promulgated rules that limit the ability of regulatory commissions to reform existing contracts for utility service, in recognition of the costs that parties to the contracts may have incurred in reliance on the contracts. In Texas, PURA defines the term "rate" very broadly, and any contract between utilities that affects the price that one utility pays another for electric service or affects the kind or quality of that service would be regarded as a rate that is subject to commission review. On the other hand, the commission has typically not reviewed the contracts between utilities for the sale of power or transmission services. The courts' decisions concerning the review of existing contracts appear to require that the circumstances of each contract be considered, if the regulatory agency proposes to reform it.

Permitting the reopening of contracts also involves difficult policy issues that may need to be assessed on a case-by-case basis. Many

of the power sales agreements that are in effect today were presumably shaped by the market power that large vertically-integrated utilities exercised. On the other hand, the commission has had rules in effect since the mid-1980's that required utilities to provide transmission service for qualifying facilities and contemplated that utilities would provide transmission service for other utilities. The commission's fundamental concern, however, is applying the new legislative mandate in PURA. The commission concludes that the mandates of the statute that transmission service be comparable, non-discriminatory and (for third-party contracts) not subsidized by native load customers apply to all transmission service within the state. The commission concludes that it is unlikely that existing contracts meet those requirements, as they have been defined within this rulemaking. The commission is committed to phasing out existing transmission arrangements that are not consistent with the rule that it is adopting. The commission reaches the conclusion that contracts entered into prior to the effective date of PURA 95 are subject to reformation under the statute and the resulting rules. The commission believes that such contract reformation is in the public interest, because it would best effectuate the legislative directive of implementing full transmission service comparability as rapidly as possible.

The commission determines that the parties to the contracts are initially in the best position to the reform the contracts to conform to the statute and rule. Some of the contracts may have involved non-monetary considerations or other factors that should be taken into account in reaching a fair reformation of the terms of the contracts. It is the commission's intent that as many contracts as possible should be reformed without the direct intervention of the commission and directs that parties to such contracts inform the commission upon reaching agreement to convert to transmission service under this rule. The commission has the ability to conduct proceedings to reform contracts as necessary on a case-by-case or generic basis.

Accordingly, the commission is not including a specific provision on the modification of existing contracts. Parties that believe they have grounds for reforming their existing contracts for the sale of power or transmission service may seek such reformation through negotiation with the other parties. As is discussed as follows, the commission intends to review the status of any existing contracts for transmission service if the parties are unable to reach agreement with the other parties to conform the contracts to the new arrangements in this rule. In its review of the contracts, the commission would be able to permit reformation of the contract, if the contract itself permits or if reformation is necessary to meet the comparability standards in the statute and this rule.

LP&L, SPS, and the TPPA requested that the commission clarify which provisions of the rule apply to utilities that are not in ERCOT, particularly in view of the jurisdiction of the FERC over the wholesale sales of such utilities. SPS expressed the view that a number of the provisions of the rule, if they apply to utilities that are outside of ERCOT, would conflict with the regulatory authority of the FERC. In particular, SPS noted apparent conflicts in the concept of comparability, the treatment of ancillary services, the provisions concerning alternative dispute resolution, the construction of new facilities, functional unbundling, and commission review of power sales contracts. SPS recommended that the commission amend the rule to exempt non-ERCOT utilities from its coverage.

The commission's central concern in this proceeding has been requiring that the utilities in ERCOT provide open-access comparable transmission service on equitable terms. The FERC has proposed a rule that would require most of the utilities outside of ERCOT to provide such transmission service. In important respects, the rule being considered by the FERC is different from the rule that the commission is adopting. Requiring that non-ERCOT utilities comply with this rule immediately may result in inconsistent requirements and is certain to engender confusion among the utilities that are required to comply with new regulatory requirements imposed by the commission and the FERC.

This commission is also investigating broader competitive issues in its Project Number 15000. This project may result in the adoption of requirements that utilities unbundle their rates and separately state in rates any costs related to the provision of electric service that exceed current market costs. By the time Project Number 15000 is completed, it is likely to be clearer whether the commission could impose the requirements of this rule on non-ERCOT utilities, without creating a conflict with the FERC's rules. For these reasons, the commission is modifying the rule to make it clear that it does not apply to non-ERCOT utilities, but it may reconsider this issue after the FERC adopts a final transmission rule and after the commission concludes Project Number 15000. The commission notes that the requirements of PURA §2. 057 apply to all public utilities under the commission's jurisdiction, including utilities which operate outside of ERCOT. The commission's view is that the non-ERCOT utilities under its jurisdiction will be in compliance with PURA §2.057 at such time as they receive approval of a wholesale transmission open access comparability tariff from the Federal Energy Regulatory Commission.

Power Marketers urged the commission to adopt a provision on scheduling that would permit a transmission customer to change the schedule of a resource with the same degree of freedom as a utility that is providing transmission service. The working group on operational issues also recommended that the rule be modified to deal with scheduling. This group recommended that control area utilities schedule a transmission customer's resources and accommodate changes to such schedules with as little advanced notice as possible and upon the same terms and in the same timeframe that the control area utility applies in scheduling resources to meet their native load customers.

The commission has developed and is publishing a separate rule dealing with the terms and conditions for transmission services, §23.70. Matters relating to scheduling transmission service are addressed in detail in §23.70. The commission is also adopting a new subsection §23.67(q), in response to these comments, that will require transmission owning utilities to provide scheduling services to their transmission customers on a non-discriminatory basis.

GVEC, TNP, and the East Texas G&Ts proposed that a definition of transmission service be added to the rule. Brazos also proposed additional definitions: transmission provider, transmission customer, wholesale electric energy, control area, control area utility, transmission facilities, wholesale transmission service, ancillary services, energy provider, and ERCOT utility. The working group on operational issues recommended that definitions be provided for the following terms: interconnection agreement and transmission losses.

The commission agrees that it is desirable to add some of the definitions that have been suggested, either in this rule or in §23.70. The commission is adding to this rule definitions for ancillary services, interconnection agreement, planned service, transmission service, transmission losses, and unplanned service. In addition, transmission facilities are described in §23. 67(g), and a list of required ancillary services is provided in §23.67(d). The commission concludes that definitions of the other terms are not necessary.

Power Marketers commented that the requirement in §23.37(c) that utilities take transmission service for their own purposes in accordance with their transmission tariffs is particularly important, but that the commission needs to elaborate on this requirement. In particular, these parties were concerned about the treatment of the transmission component of revenue from bundled utility service.

GVEC recommended that the obligations of a transmission owner be clarified, where the facilities are operated by an entity other than the owner. The LCRA commented that the rule needs to be revised to make it clear that wholesale purchasers that take service at less than 60 kilovolts are entitled to transmission service under the rule.

Brazos commented that the obligation to provide comparable transmission service under the proposed rule is inconsistent with the letter or the intent of the Rural Electrification Act. This Federal statute was enacted to encourage the provision of electric service in rural areas; it facilitated the construction of electric facilities in rural areas through government-subsidized loans. According to Brazos, the provision of the rule that requires a transmission-owning utility to provide service to transmission customers on the same terms that it provides service to its native-load customers is inconsistent with the terms of the loans to cooperatives under the RE Act and might imperil the financial strength of RE Act beneficiaries. Brazos proposed that the rule be amended to give RE Act beneficiaries first priority to service from facilities that have been financed with subsidized loans under this Act.

The preamble to the proposed rule made it clear that the rule would require transmission-owning utilities to provide service even if the service would require the use of facilities that are classified as distribution facilities. A number of parties urged the commission to incorporate

this requirement in the rule. CSW did not take issue with this requirement but suggested that it be limited to existing facilities, and that the provision of transmission service would not require the transmission service provider to construct new local distribution facilities to provide the requested service or to meet a transmission customer's load growth.

The commission concludes that the concerns of the power marketers are adequately addressed, particularly in view of the direct costs that utilities will bear for transmission service and the unbundling of rates that is required by the rule. The matter raised by GVEC warrants clarification, and the rule has been modified to permit the owner of transmission facilities to delegate any responsibilities that it has related to the operation of transmission facilities to another entity that has operational control of the facilities.

The commission concludes that the service priority requested by Brazos for RE Act beneficiaries is inconsistent with the comparable service requirement in §2.057 of PURA. Failure to provide such a priority is not inconsistent with the RE Act. The provision of the RE Act that Brazos referred to in its comments is intended to insure that utilities that borrow funds from the Rural Utility Service are operated in such a way that they will be able to repay these loans. The commission concludes that the introduction of comparable transmission service and the requirement that RE Act beneficiaries provide such service will not imperil the repayment of these loans. This rule may result in higher costs for utilities and may pose greater market risks for utilities, but the rule also creates opportunities for utilities to buy power on attractive terms in a broader generation market. RE Act borrowers are probably better protected from market risks than other utilities, because of the involvement of the Rural Utilities Service in approving their financings and power sales contracts.

Based on the comments that were filed the commission concludes that it is appropriate to modify §23.67(c) to explicitly state that a utility is required to provide comparable transmission service to a wholesale customer, even if the utility is connected to the customer at the distribution level. Where applicable, the commission is also adopting a requirement that utilities file wholesale open access comparability tariffs which apply to the use of their distribution facilities to engage in wholesale transactions. With respect to the issue that CSW raises concerning the construction of additional facilities at the distribution level, the rule on terms and conditions, §23. 70, will deal with these issues relating to planning, construction, and interconnection in more detail. The commission believes that the transmission owner should be required to construct additional distribution facilities where the expansion of distribution facilities owned by the transmission provider is more cost effective than the customer building new distribution facilities. In these circumstances, it would be appropriate to have the transmission owner build the new facilities, with the customer bearing the cost, to the extent that the customer exclusively benefits from the construction of these facilities. The commission concludes that it is not necessary to amend §23. 67(c), to accommodate CSW's concerns.

The working group on ancillary services prepared a report that introduced the concept of a default provider (or provider of last resort) in connection with the obligation to provide ancillary services. Each customer would be assigned a default provider to which it could turn for ancillary services. Under this concept, the default provider for an ancillary service would be the utility currently providing that ancillary service. In the event the customer is either not purchasing an ancillary service from a utility or is obtaining such service from a non-utility, the default provider would be either the utility that is providing control area services for the generation that is to be transmitted to the wholesale customer or the utility that is providing control area services for the wholesale customer's load. The report referred to these control area utilities as the supply host and the load host.

The working group on ancillary services proposed the concept of a default provider of such services and also proposed market-based rates (or pricing flexibility) for ancillary services. The commission recognizes the difficulty in pricing ancillary services and concludes that flexible pricing for such services may be appropriate. The commission is concerned, however, about market power and the limited number of entities that have the capability of providing ancillary services. The commission concludes that the concept of the default provider is inconsistent with flexible pricing, because it would permit the market to be limited to one provider of ancillary services for each purchaser. Flexible pricing of ancillary services can function to the benefit of the consumer only when there are multiple service providers in the market. Accordingly, the commission is not adopting the recommendation of the working group on this issue.

The working group's report also recommended that language be inserted in the rule requiring that the same offer of ancillary services be available to all interested parties in a particular transaction. The report also recommended that the rule make it clear that the obligation to provide ancillary services would also include the obligation to construct additional facilities, provide upgrades and modifications, and procure services.

The commission concludes that these recommendations are appropriate and is modifying the rule to include them. The requirement that the same offer of ancillary services be available to all interested parties in a particular transaction is included in subsection (f). The provision concerning additional facilities is being added to §23.67(n) and will be subject to requirements that the customer for which the new facilities are constructed will, in some circumstances, bear some of the risk associated with their construction.

LCRA and TU Electric urged the commission to recognize the efforts of the working group by adopting the unanimous consensus language as the starting point for the development of the rule. TU Electric also noted that the proposed rule does not include some necessary ancillary services and does not clearly recognize that transmission business units will not be able to provide generation-related ancillary services, because they do not own generation. It is more logical to have the customer procure its own generation-related ancillary services from the source it chooses-either the utility of which the transmission is part, or from some other source.

The commission appreciates the efforts of the parties to resolve difficult issues in the working groups and has adopted some of the groups' recommendations. To some degree, the commission has met the concern expressed by TU Electric by limiting the definition of ancillary services to generation-related services and requiring that the services be provided by utilities that own 100 Mw or more of generation. The commission does not believe that there is a need to amend the rule to differentiate between an integrated utility and the transmission business unit that is a part of such a utility. As long as the transmission business unit is still a part of the utility, there is a likelihood that it will not operate independently of the utility. Section 23.70 deals with some of the issues relating to ancillary services in more detail and requires planning coordination between a customer and utilities providing transmission and ancillary services.

Destec and Cap Rock commented that all transmission-owning utilities should be required to provide ancillary services on an unbundled, comparable basis. The East Texas G&Ts recommended that until there is an established competitive market, every transmission provider that can supply ancillary services to itself should be obligated to supply such services to transmission customers on a comparable basis. According to these cooperatives, §23.67 is not precise on this point; there is some overlap in the proposed rule between obligations of a utility and of the independent system operator. GVEC recommended that, for distribution cooperatives, the rule should be clarified so as not to place a burden on a utility to provide services to others that it does not provide to itself.

Subsection (d) of the rule as proposed would have required that ancillary services be offered on an unbundled, comparable basis, and the commission is including this requirement in the rule it is adopting. The commission believes that the concerns expressed by the East Texas G&Ts have been met in the broad requirement that utilities that own 100 MW or more of generation provide ancillary services. The commission concludes, however, that the definitions of ancillary services and obligation to provide them need to be clarified. The commission is modifying the description of the ancillary services so that most of them are related to generation. Subsection (c) has been modified to provide that var support will be included in transmission service, rather than as an ancillary service. Any utility that owns transmission facilities will be required to provide var support, but under subsection (d), utilities that do not own generation facilities will not be required to provide generation-related ancillary services. These changes should address GVEC's concerns. Questions about the responsibilities of the ISO are addressed as follows.

APSI recommended that the rule be modified to provide that where a

utility requests limitations on its obligation to provide ancillary services, the limitations would also apply equally to the utility's own wholesale and retail operations.

In view of the broad requirement that utilities provide ancillary services, the commission concludes that such a modification is not needed. It seems likely that some of the limitations that utilities will seek relating to the provision of ancillary services will be based on their current facilities for generating power, following load, and monitoring loads. Utilities have installed such equipment to meet the needs of their native load customers but have the capability of providing ancillary services from the same facilities. The degree to which they should be required to provide service that is equal to the service they provide to native load is a matter that should be explored in detail in the context of any application for limitations on the obligation to serve. The commission also notes that the rule includes a broad obligation to provide ancillary services and a prohibition against discrimination.

Brazos commented that there is an apparent conflict between the requirement in the first part of proposed subsection (d), wherein the obligation to provide ancillary services is imposed upon an electric utility in ERCOT that either operates a control area or owns transmission facilities, and the latter part of that subsection that requires only electric utilities that operate a control area to file a tariff for ancillary services and take such services for their own wholesale and retail operations.

Brazos also commented that to require all transmission owning utilities and control area utilities to provide ancillary services and to impose upon the small utilities the burden of requesting and proving the need for limitations on this obligation is inappropriate. The commission should identify those transmission owning and control area utilities capable of providing such services, and require such utilities to provide such services, subject to the request for limitation proposed in the rule. In most instance, control area utilities have provided ancillary services in the past and should be the provider of last resort. However, appropriate good cause limitations on this duty should be available for small control area utilities.

The commission concludes that in restating the obligations of utilities to provide transmission service and ancillary services in the rule that it is adopting, it has addressed the concerns expressed by Brazos. The commission has also concluded that certain small utilities should not be required to provide ancillary services. This issue is discussed as follows.

The ancillary services report recommended that the commission prescribe 11 ancillary services that are listed and defined in the report. They are responsive reserve, spinning reserve, static scheduling, dynamic scheduling, load following, load regulation, generation-schedule imbalance, load-schedule imbalance, scheduled backup, automatic backup, and emergency energy services. The list did not include planning reserves, voltage support, inadvertent energy, or losses as ancillary services. STEC recommended that planning reserve, voltage support, inadvertent energy, and losses not be classified as ancillary services.

The commission has decided to adopt, in subsection (d), the list of ancillary services proposed by the working group. As noted previously, var support would not be an ancillary service but would be a part of transmission service, and the rule would prescribe the treatment of transmission losses, which would not be treated as an ancillary service.

Destec and Cap Rock commented that a rigid listing of ancillary services in the rule is not appropriate before the market evolves. Any number of different entities (utilities, non-utilities, control areas) can provide, and should be allowed to provide, the services described in the proposed rule.

The East Texas G&Ts commented that the list of seven unbundled services in the proposed rule is workable. They recommended, however, that voltage and var support not be unbundled from the provision of transmission service. The cooperatives asserted that the proliferation of ancillary services would erect a barrier to transmission access and result in multiple, overlapping recovery of costs. Ancillary services should be standardized and utilities should not be allowed to unbundle additional ancillary services with non-standard terms and conditions.

As is noted previously, the obligation to provide transmission service includes the obligation to provide var support. The commission agrees with the comments of Destec and Cap Rock and does not agree with the comments of the East Texas G&Ts concerning additional services. The rule would permit utilities to offer new services if a customer wants them. The rule also permits a non-utility to offer ancillary services. It is the commission's expectation that the standardization of ancillary services will create opportunities for a non-utility power seller to put together packages of its own services with ancillary services offered by a utility, to meet the needs of its customers.

The cooperatives commented that the confusion over ancillary services comes from a misleading focus on what to call various ancillary services and how to describe them, instead of a more relevant focus on who can and should provide these services and how they should be priced. The cooperatives asserted that a significant market for unbundled ancillary services is unlikely to develop and is perhaps undesirable. These cooperatives urged the commission to create a maximum role for the independent system operator to operate ERCOT as a single control area, in that the ISO can and must supply all of the services that any control area within the region can supply. The ISO can only supply information about the generation related ancillary services. An ISO operating ERCOT as a single control area can assure that control area utilities do not favor their own operations through restrictive and discriminatory terms and conditions for ancillary services. These cooperatives recommend a rule that starts with a minimum role for an ISO and lays out a path that ISO to evolve to a maximum role.

Questions about the responsibilities of the ISO are addressed as follows.

CSW suggested that the requirement that utilities take ancillary services for their native load customers in accordance with the terms of its tariff for ancillary services is premature. According to CSW, a further subdivision of the native load customer's bill into a basic generation charge and an ancillary service charge would be a distinction without a difference and would serve no useful purpose.

TNP recommended that wholesale market participants that purchase ancillary services be afforded the same rights as ERCOT control areas, in order to allow participants who pay for the ancillary services to have the same rights to emergency energy as the ERCOT control areas. TNP urged the commission to require ancillary services to be unbundled and require that the ancillary services be the responsibility of the transmission organization within an integrated utility. Upon a showing of good cause, small utilities such as TNP should be exempt from this requirement.

The commission concludes that the requirement to take service under the tariff has broader implications than suggested by CSW. In particular, this requirement is meant to ensure that the quality of service provided to transmission customers is the same as that provided to native load customers. In the commission's judgment, this is an essential element of providing comparable transmission service. The commission agrees with CSW that the unbundled elements of electric service need not be shown on retail customers' bills. To the extent that utilities provide each other emergency energy, which is one of the ancillary services, the rule will require them to do so on a nondiscriminatory basis. It is the commission's view that this requirement addresses TNP's concern.

In the preamble, the commission posed the following questions: What is the appropriate pricing method for transmission service. Are there methods other than load-ratio share that would be more appropriate in pricing transmission service?

Many of the parties devoted a significant part of their comments to the issue of the appropriate pricing method and to other issues related to pricing transmission service. The following parties commented in support of a statewide postage stamp rate, based on the transmission customer's share of the total megawatt load in ERCOT: the East Texas G&Ts, TNP, Magic Valley, Destec, STEC, Brownsville, APSI, GVEC, and Rayburn Country Electric Cooperative.

These parties commented that the commission has been presented with a large number of diverse transmission pricing methodologies, each claiming to be superior to all others. According to these parties, the commission must not lose sight of the real objectives in this process: the development of a competitive bulk power market. To the ratepayers throughout ERCOT, having the most precise and accurate transmission pricing is a poor substitute for the benefits that a truly

competitive bulk power market can provide. The standard for evaluating transmission pricing methodologies should be the extent to which each methodology enhances a competitive bulk power market. These parties commented that the simple pricing scheme both works well and fairly compensates transmission owning utilities. Many of these parties also evaluated the competing pricing proposals in terms of the objectives that the commission staff had identified during the workshops on transmission issues and concluded that the postage stamp method meets these objectives better than the megawatt-mile methods.

A number of other parties commented in favor of a pricing method that is "distance sensitive" and supported megawatt-mile methodologies as a means of determining the impact of a transmission event on the transmission network. CPSB and HL&P recommended a pricing method that is based entirely on megawatt-mile impacts. They commented that the commission's proposed statewide postage stamp rate violates PURA by reapportioning the historical transmission costs such that some customers benefit at others' expense. HL&P in particular emphasized the significant cost-shifting that the postage stamp method would entail and asserted that this reapportionment of transmission costs constitutes a regulatory taking. HL&P's preferred pricing method would require transmission-owning utilities to bear their own transmission costs and require transmission-dependent utilities to pay the transmission rates of the utility that provides them a connection to the statewide grid, but it proposed a megawatt-mile method as an alternative.

The LCRA, TIEC, Brazos, Public Counsel, Denton, and Weatherford supported a pricing mechanism that included an allocation of system costs, in part, on the basis of megawatt-mile impacts and, in part, on the basis of load ratio share. Some of these parties commented that under the statewide postage stamp proposal, ratepayers of compact systems would be expected to pay an increased transmission rate to compensate for other systems that are dependent on transmission lines spread over great distances. They also asserted that the postage stamp rate distorts the cost of providing transmission service and creates cross-subsidization between rural and urban customers. They recommended that, at the very least, any pricing methodology involving a postage stamp approach should also have a distance sensitive component.

Other commenters, including Bryan and Greenville, recommended either distance sensitive rates or rates that were based on local transmission costs. These parties asserted that because the proposed postage stamp method is not distance sensitive, it does not measure the impacts of actual transactions on transmission systems, and, consequently, it will neither apportion costs fairly for the users nor reimburse those who incur costs of providing transmission service. They also asserted that the postage stamp method is too costly to a tight municipal system that does not use the state-wide grid, and is too cheap for a remote generator that wants to sell loads across the state

A number of parties expressed their willingness to support a hybrid pricing method, either as their primary recommendation or as a secondary recommendation that they could support. For example, TU Electric supported a hybrid pricing method: 70% utility specific megawatt-mile and 30% postage stamp. The Public Counsel, Denton, Garland, and Weatherford supported the compromise that was offered during the commission workshops by the LCRA: 45% megawatt-mile and 55% statewide postage stamp. The City of Austin and Tenaska supported a hybrid method based on 30% megawatt-mile and 70% statewide postage stamp. Brownsville and the Environmental Defense Fund supported a hybrid method based on 10% megawatt-mile and 90% statewide postage stamp.

One of the parties supporting a hybrid methodology, TIEC, commented on the benefits of such a compromise. First, it is less extreme than a method based solely on either a megawatt-load methodology or a megawatt-mile method. Second, this compromise approach would subject the two methods to ongoing review and scrutiny based on actual practice and implementation rather than judging their merits based only on a debate in this rulemaking forum.

CSW developed a pricing proposal referred to as Efficient Access Pricing. CSW commented that it would be advantageous to all interested parties to continue the evaluation of EAP and other pricing methods in a process directed by the commission staff, so that the commission can determine whether a better pricing method can be developed before March 1, 1996. As a secondary recommendation, the CSW Companies suggested that the commission could achieve a reasonable result by a 50/50 blending of the postage stamp method and the local vector absolute method.

Consumers Union did not recommend a particular pricing methodology but commented that any methodology adopted by the commission must adhere to the requirements of the Public Utility Regulatory Act, which prohibits a utility's native load customers from subsidizing wholesale transmission.

In the preamble, the commission posed the following question: What is the financial impact of the rule on utilities and the rate impact on their customers and is there a need for and operation of mechanisms to ease the cost impacts of the rule?

The City of Bryan commented on the financial impact of the rule on municipally-owned utilities, concluding that the rule will result in a loss in revenue for such utilities, resulting in a need to increase the rates for residential and small commercial customers. A number of other commenters raised similar issues, both in connection with the pricing method and the costs that would be required for small utilities to carry out the unbundling requirements in the proposed rule.

Destec commented that the appropriate mechanism for rate impact mitigation should be based on the financial circumstances of each affected utility, which should be determined on a case-by-case basis. According to Destec, rate impact mitigation plans are not appropriate, if the commission intends to provide benefits to the broadest range of utility customers.

Several parties objected to transition plans, asserting that they merely delay the adverse impact of the adoption of a pricing mechanism. For example, HL&P and Austin commented that employing a transition plan to moderate the impact of increased costs over time does not remedy the cross-subsidization that can be created by a pricing mechanism. However, the City indicated that it would be willing to accept a rate moderation method where a customer's payment for transmission service under the rule would not exceed the current payment by more than five percent, and any increase in a subsequent year would not exceed five percent. The LCRA proposed a similar transition mechanism: a transmission provider's increase in transmission costs would be limited to four percent in any year.

The Public Counsel expressed the view that a proposal which seeks to phase in cost increases or revenues decreases for some utilities should be avoided, because sooner or later the utilities that are the losers will naturally attempt to pass any revenue shortfalls along to captive customers. Public Counsel stated that it would prefer the adoption of a transmission pricing mechanism that does not create significant losses among utilities.

Brazos commented that a transitional mechanism is necessary to ease the cost impacts of the rule. Brazos proposed that the pricing mechanism that the commission adopts be phased in as utility loads begin taking transmission service under the rule. In other words, a utility that purchases its power requirements from another utility would continue paying for its service in accordance with the contract, but it would begin paying for transmission service under the rule when its power sales contract expires and it has the opportunity to access other suppliers.

GVEC proposed several mechanisms to ease the cost impact of the rule. One possible way would be to allow the captive, native-load wholesale customers to include in the statewide transmission pool their costs from their wholesale suppliers in excess of the statewide rate as a transmission cost and that the excessive amount be recovered from the statewide pool. A second way that the captive, native-load wholesale customers can be made whole so that they only pay the approved ERCOT-wide postage stamp rate would be to adopt a Transmission Cost Recovery Factor (TCRF). Any windfall to the supplier as a result of the postage stamp rate would be flowed back to the end-use customers of the captive, native-load wholesale customers through the TCRF.

Several utilities, including HL&P, TU Electric and CSW, argued in favor of a transmission cost-recovery factor that would permit them to recover from their customers, without filing a rate case, any increased costs associated with the transmission rates under this rule. Several customer groups, including the Public Counsel and TIEC, opposed such a factor.

The commission has considered all of the diverse comments on pricing

and has concluded that a hybrid pricing scheme should be adopted, with 70% of the transmission rate based on the regional postage stamp method and 30% based on a megawatt-mile impact method (namely, the vector-absolute megawatt-mile method). As the parties' comments indicate, there are a number of criteria that are important in fixing a pricing method, and the commission concludes that this hybrid method fairly balances these criteria.

The commission specifically finds that the hybrid method meets the requirements of §2.057(c) of PURA. Under the statute, the commission has the responsibility to set rates that will recover "all reasonable costs incurred by the utility." The ERCOT-wide postage stamp portion of the rate reflects the fact that ERCOT is an interconnected grid, and that electrons move throughout the grid without regard to the ownership of the transmission lines on a virtually instantaneous basis. The vector-absolute megawatt mile method measures all changes in the use of the transmission lines; it is more stable than the other variants of the megawatt-mile methodology; it will aid in accurate transmission planning; and it sends appropriate price signals to generators and loads. Thus, the combination of the postage stamp and the VAMM method reflects the usage of the system by both the utility for its native customers and third parties (transmission customers). It will allow the utility to capture "all reasonable costs incurred by the utility." The reasons for the adoption of this hybrid pricing method are explained in more detail as follows.

The commission has also decided that a rate-moderation mechanism should be applied. This mechanism would phase in the transition to transmission rates under the new rule over a three year period, with the annual change in any utility's transmission cost of service during the transition period limited to ten percent of the total change in transmission cost of service that the utility would otherwise experience were it to immediately implement the transmission rates prescribed by this rule. The purpose of this transition mechanism is to give any transmission owning utilities who might suffer an adverse transmission cost impact under the rule adequate time to adjust to the new transmission pricing regime that is being implemented by the commission.

The commission has decided not to adopt a cost-recovery mechanism that would permit a utility to pass increased transmission costs on to its native-load customers. Of course, if a utility files an application for new rates, the additional costs of transmission service would be included in the costs that the commission must consider in setting the utility's rates. The commission concludes that it does not need to reach the question of whether a special cost-recover factor is permitted under PURA, and is not convinced that such a factor is appropriate. The problem is the one that typically arises in connection with the setting of a rate to recover only a part of a utility's costs. Where some time has elapsed since the utility has changed its rates, it is possible that its current costs are lower or its revenues higher than during the period that was considered in setting its rates. Thus there is a risk that in prescribing a special cost-recovery factor, the commission will be authorizing aggregate rates that are more than necessary to permit the utility to recover its reasonable and necessary expenses and earn a reasonable rate of return. In the current circumstances, utilities are concerned about costs that are not fully covered in their existing rates, and customers are concerned about aggregate rates that would be excessive. The commission believes that the rate moderation plan it has adopted is sufficient to meet the parties' concerns in this regard.

Some utilities whose revenues increase or costs decrease as a consequence of the adoption of this rule may wish to apply a flow-through mechanism to permit them to return the additional revenue to their customers. The commission does not express a position on whether such a mechanism would be appropriate.

The Public Utility Regulatory Act includes general principles for pricing utility services that would also apply to pricing transmission service, broad principles that specifically apply to transmission service, and specific pricing principles for transmission service. The general pricing principles set out in PURA include the following:

Section 2.202: Every rate shall be just and reasonable and may not be unreasonably preferential, prejudicial, or discriminatory, but shall be sufficient, equitable and consistent in application.

Section 2.203: Revenues shall be fixed at a level which will permit a utility a reasonable opportunity to earn a reasonable return on its invested capital over and above its reasonable and necessary operating expenses.

Section 2.206: Rates shall be based on the original cost of property as recorded on the books of the utility, less depreciation.

The general principles applicable to transmission service are set out as follows:

Section 2.056(a): The rules for transmission service shall not be contrary to an applicable decision, rule, or policy statement of a federal agency that has jurisdiction.

Section 2.057(a): A utility that owns transmission facilities shall provide wholesale transmission service at rates, terms of access, and conditions that are comparable to the rates, terms of access, and conditions of the utility's use of its system. The commission's rules shall be consistent with this section, shall not be contrary to federal law, including any applicable policy statement, decision, or rule of a federal regulatory agency that has jurisdiction, and shall require transmission services that are not less than the transmission services the Federal Energy Regulatory Commission may require in similar circumstances.

The specific transmission pricing rules in PURA are set out as follows:

Section 2.057(a): The Commission's rules shall provide that all ancillary services shall be provided by the utility at the same prices and under the same terms and conditions as such services are provided by the utility and associated with its discounted wholesale sales.

Section 2.057(c): The Commission shall ensure that the costs of transmission service are not borne by the utility's other customers by requiring the utility to recover from the entity for which the transmission is provided all reasonable costs incurred by the utility in providing transmission service.

The FERC issued a Policy Statement in its Inquiry on Pricing for Transmission Services that established five pricing principles for transmission service. Under this Policy Statement, conforming transmission pricing proposals (1) must meet the traditional revenue requirement, (2) must reflect comparability, (3) should promote economic efficiency, (4) should promote fairness, and (5) should be practical. Considering the statutory provisions applicable to utility pricing in general and transmission services specifically, the commission concludes that the following pricing principles should be considered in adopting a pricing method for transmission service:

Simplicity: the method is easily calculated, not involving many complex studies.

Predictability: transmission customers will be able to predict prices easily and consistently over time.

Accuracy of Price Signals: the method will send accurate price signals to transmission and/or generation owners.

Consistent With Laws: the method will not contradict FERC rules or policies or PURA.

Robustness: the method will easily adapt to many types of future changes.

Administrative Feasibility: a low level of resources is required by the commission and other parties to calculate prices and monitor implementation.

Low Gaming Potential: competitors will have little chance or incentive to "game the system".

Promotes Competition: the method will increase the probability of a successful competitive wholesale market.

Comparability: comparability can be achieved under the method.

The commission has concluded that the principal pricing alternatives that parties have advocated are consistent with the law and meet, in varying degrees, the criteria set out previously.

The three basic pricing methods that were proposed by interested parties in this rulemaking proceeding were (1) a local transmission rate, in which each utility that owns transmission would continue to pay for its own transmission system, and transmission-dependent utilities would pay the transmission rate of the utility through which they are connected to the state-wide network, (2) impact rates, in which the transmission rates would be based on calculations of the impact of generators and loads on the transmission network, and (3) postage-stamp rates, in which all transmission costs of all utilities would be

allocated among utilities on an equitable basis, usually based on each utility's share of the total megawatts of load in ERCOT.

The postage-stamp rates are obviously easy to calculate, are highly predictable, and encourage competition. With postage-stamp rates, competition is not limited by geography, at least within ERCOT. Any generator could be contracted to supply the load for a utility, and the transmission cost would not be affected by the location of the generator. The chief drawback of the postage-stamp rates relates to the criterion of economic efficiency. The commission concludes that distance between a generator and a load that it serves is an important factor in the cost of transmission; pure postage-stamp rates do not impose a cost on transmission customers related to the distance between the generator and load. The impact rates meet the efficiency criterion better, but are more difficult to calculate and predict.

The local rate method also meets the criteria set out previously to varying degrees. Two of the chief objections to this method are that it might encourage uneconomic construction of additional transmission facilities and that it does not recognize the unitary nature of the ERCOT transmission network. With respect to the first point, a transmission-dependent utility that is connected to the statewide network through a high-cost utility might decide to build additional transmission facilities to connect to the network through a different, lower-cost transmission provider. Construction of the facilities would make sense in light of the prices for transmission service, but they would be unnecessary from an engineering standpoint, if the existing facilities were adequate to serve the customer's needs. Moreover, this pricing method does not compensate other utilities whose facilities are used in providing transmission service. It is the commission's view that in a competitive market, participants should compensate transmission owners for the use of their facilities.

An additional factor that some of the parties focused on in their comments was the impact of a pricing method on a utility and its customers. HL&P argues, for example, that the postage stamp method would increase the transmission costs of utilities that are primarily urban and reduce the costs of utilities that are primarily rural. Under a statewide postage-stamp pricing method or a hybrid method that uses a statewide postage-stamp component, each utility that takes transmission service would pay a facilities charge that includes costs of other utilities' transmission operations. The commission concludes that such charges are reasonable, for two reasons: (1) utilities actually use the transmission facilities of other utilities, and (2) the open-access rules that the commission is adopting will greatly increase the ability of utilities to use the transmission systems of other utilities to buy from remote generating facilities or sell to remote utilities.

Even today, utilities use the interconnected utility system to assist them in the delivery of power to their customers. The flow of electricity cannot be constrained to particular paths between a generator and the loads that the generator serves. Rather, power flows from generators to loads along the paths of least resistance. This means that while a utility such as HL&P may own transmission lines that connect all of its generators to its loads, the power produced by its generators may actually flow over both its own transmission lines and the transmission lines of neighboring utilities. There are other ways in which the transmission network functions as a unitary system, in which the boundaries between utilities are of minor importance. The transmission network and the interconnections between utilities are important factors in maintaining continuous, reliable service at reasonable cost. Failures of individual generating plants and transmission lines may take place without affecting customers' service, because the network of transmission lines and inter-utility connections permits additional sources or transmission paths to be used to supply power. Similarly, the network of inter-utility connections permits the exchange of power and special services (such as responsive reserves) among utilities where one utility has a cost advantage in providing the service.

Under the transmission pricing rules that have been in effect, each utility has paid its own transmission costs, for the most part. Wheeling rates have been developed by the commission that require utilities to pay each other for the transmission service that they provide each other, but the system of inter-utility compensation is not comprehensive. Under current rules, for example, a utility does not pay other utilities for using their transmission systems in serving load from a generator within its service area.

With the adoption of this rule the ERCOT transmission network will be opened to the transmission of power between utilities to a greater extent than ever before. Broader use of the transmission network in an expanding wholesale market supports the treatment of the transmission network, which is the highway for this trade, as a common facility for the use by all market participants.

Virtually all consumers of electricity are transmission customers, and this rule will treat all customers alike for the purpose of pricing transmission service. A vertically-integrated utility's native retail load uses the transmission system in the ways that are described previously. This use is not limited by the boundaries of the control area. The rates for the native load customers and the customers who are taking transmission service only are determined in the same way, and the rule does not require native load customers to bear costs that should be borne by transmission customers.

The rule works a change in pricing transmission service; under current rules, the transmission operations of one utility that affect another utility are, for the most part, ignored. Current practice is governed by a rule of reciprocity among control-area utilities, while utilities that do not operate a control area are required to pay for the impacts of their transmission transactions. One of the significant changes in the rule is the replacement of a reciprocity rule with explicit prices for these impacts. The use of an ERCOT-wide postage-stamp element in the transmission facilities charge is consistent with this recognition that utilities affect each other's transmission systems and benefit from each other's transmission systems. The ERCOT-wide postage stamp pricing element also recognizes the difficulty of assigning prices to these impacts and benefits.

The commission concludes that the pricing method that it is adopting does not contravene the provisions of PURA that specifically relate to transmission service, for the reasons set forth previously. At the same time, the pricing method does not contravene the general ratemaking principles in PURA.

The problem that utilities face with respect to the adoption of a rule on open-access transmission service and the hybrid pricing method that the commission is adopting is that a utility's transmission costs may increase or revenues may be reduced. This is the kind of event that affects utilities regularly, either as a consequence of regulatory changes or external events. Events other than the changes that result from this rule may also affect utilities' costs and revenues, and the increasingly competitive wholesale market may also affect their costs and revenues. Where a utility's revenues are inadequate to permit it to cover its reasonable costs and earn a reasonable return, the remedy permitted in the regulatory scheme under PURA is for the utility to file a rate case. The commission's decision to adopt a pricing method that has adverse consequences for some utilities is not a violation of the commission's duty to set just and reasonable rates. If as a result of this rule and the other events that affect a utility's revenues and cost of providing service, its current rates are inadequate to permit it to cover its reasonable expenses and earn a reasonable return, it has the option of filing a request for higher rates. The commission has also decided to implement a rate moderation mechanism which will mitigate the rate impacts of the new rule on a utility or its customers.

Houston Lighting & Power has argued that the hybrid pricing method is inconsistent with PURA 95, §2.203. This section provides that a utility's revenues shall be fixed at a level which will permit it a reasonable opportunity to earn a reasonable return on its invested capital over and above its reasonable and necessary operating expenses. The argument that HL&P advances appears to be that the rates of a utility must be based solely on its own costs and may not take into account, as the ERCOT-wide postage stamp does, the costs of other utilities. It is the commission's view that this argument is not supported by the facts or the law. As is noted previously, the transmission systems of the utilities are interconnected and provide support to each other in several ways. Thus, as a factual matter, a utility like HL&P uses the transmission systems of other utilities and can be expected to pay for this use. HL&P also is advancing a reading of §2.203 that is inconsistent with its plain language. HL&P's rates, even with the adoption of this rule, will be based primarily on its own costs. The statute does not require that they be based solely on the utility's own costs. Finally, the commission will conduct rate proceedings in which the utilities that own transmission facilities will be required to provide information concerning the costs of these facilities, to permit the commission to set transmission rates. It is the commission's view that such rate proceedings will lead to the setting of rates that are consistent with §2.203.

The commission has decided in this case how transmission service for all customers should be priced. The consequences of this pricing method for particular utilities cannot be judged until the commission sets transmission rates. At that point, affected utilities will have to assess whether the cost impacts of this rule and other events warrant the filing of a rate case. The commission's response to such a request is the appropriate forum for considering whether the rates of the utility are just and reasonable.

A number of parties commented on the issue of whether radial transmission lines and other facilities should be included in the transmission cost of service. Some parties took the position that these facilities are not part of the network for transmission of bulk power among utilities but, rather, are essentially local distribution facilities. TIEC, for example, recommended that only "network" transmission facilities be included in the "eligible" cost to be recovered on an ERCOT-wide basis. According to TIEC, "network" facilities are limited to the specific facilities designed exclusively to accommodate bulk power transmission. "Non-network" facilities are those which serve either a production function such as a step-up substation at a power plant, or a distribution function.

On the other hand, parties such as STEC commented that there are public policy reasons why radial lines, substation facilities on the high side of the transformer, and communication facilities related to transmission service should be included in the statewide costs: their inclusion will foster a competitive market by eliminating the need for multiple tariffs. STEC also asserted that including radial lines in the transmission cost of service will encourage utilities to contain costs by not unnecessarily looping lines. Cap Rock and the LCRA supported the inclusion of radial lines in the transmission cost of service. A similar issue was posed over the treatment of the costs of the high-voltage direct current interconnections between ERCOT and the Southwest Power Pool. On this issue, the owners of the DC ties argued in favor of including these cost in the transmission cost of service, and many of the other parties argued against including them.

The commission has concluded that the facilities to be included in the transmission cost of service are all transmission facilities at a voltage of 60 kilovolts or higher, including radial lines, and substation facilities (in a substation where power is transformed to or from a voltage lower than 60kv) on the high side of the transformer. Again, this question involves the balancing of the competing interests identified by the parties, and the commission concludes that this decision achieves an appropriate balance. The commission has concluded that the ERCOT portion of the cost of the DC ties should be included in the cost of service, when the owners of the ties amend the FERC tariffs for the use of the ties to provide equal access to other utilities. When this is done the commission agrees that the cost of the ties should be included in the transmission cost of service, to the degree that they are used to import power into ERCOT. To the degree that they are used to export power, the costs should be borne by the owners or the parties actually using them for exports. These transmission facility costs will be included in the ERCOT-wide transmission cost of service because the commission believes that their inclusion will facilitate the Legislature's stated goal of promoting wholesale competition by bringing as many ERCOT transmission facilities as possible under one transmission pricing scheme and one set of regulations.

The East Texas G&Ts commented that the rule needs clarification concerning the proper costs that are includable in the transmission cost of service. They asserted that the rule should deal with the costs of transmission, where power is imported into or exported from ERCOT. According to these cooperatives, costs incurred by a utility for transmission service outside of ERCOT, whether in connection with a purchase or sale of power, must be excluded from the cost of service.

The commission agrees that the transmission service expenses paid by a utility for transmission service outside of ERCOT should not be included in the transmission cost of service under this rule, and subsection (g)(2) of the rule has been modified accordingly.

The East Texas G&Ts, the LCRA, and Power Marketers commented that §23. 67(e)(2) appears to be intended to sever out from the calculation of the transmission cost of service the cost of providing transmission pursuant to existing contracts. According to these parties, the commission's intent is correct, but the rule contains an error. A utility should subtract from its transmission costs its receipts from contractual transmission service and add, not subtract, its payments for contractual transmission service. The LCRA also recommended that the rule be amended to make it clear that a utility that makes a contribution in aid of construction for transmission facilities pursuant to this rule may include the amount of the contribution in its costs of service. HL&P commented, on the other hand, that the treatment of costs and revenues of existing contracts that is proposed in the rule is correct, arguing that the LCRA proposal would dilute the rates in existing contracts.

The commission agrees with the comments of HL&P that the appropriate treatment of the inter-utility payments for transmission service is in accordance with the text of the proposed rule. This treatment results in the inclusion in the cost of service of only direct transmission costs. Amounts paid by one utility to another are simply a reimbursement of a part of the direct costs by a utility that is receiving transmission service. These costs, and the transmission billing determinants associated with them, must be removed to avoid an inequity. The proposal advanced by a number of the parties, that contractual costs be added to the annual transmission cost of the utility that pays such costs, would result in a payment that offsets the contractual payments. The commission is concerned that such offsetting payments might be regarded as abrogating the contracts by rule, rather than on a case-by-case basis. The commission believes that existing transmission service that is being provided by contract should be converted to service under this rule, but it will not order that conversion in the rule. As transmission service is converted from contractual service to service under this rule, the costs of transmission service will be determined under the rule. Since the commission believes that the contracts will be converted in short order, it determines that it is not necessary to include the cost of such contracts in the initial cost of service. The commission will consider such contracts in determining the appropriate transition mechanisms.

Some parties have argued that the adoption of the rule will affect the quality of service under existing transmission contracts, resulting in a reduction in the value of that service. These parties argue that the commission's alternatives are to permit the value of contractual service to be reduced or to establish a payment scheme that results in payments that offset the contractual payments for transmission service. According to these parties, the result in either case is an impairment of the value of the contract to either the service provider or the customer. The commission is not convinced that this argument is correct. The creation of new categories of transmission service does not necessarily impair existing service under contracts. Moreover, the new service categories are not directly tied to existing contracts, while the payment mechanism that results in an offset for contractual payments is directly tied to contractual payments. In any event, the commission believes that most of the existing contractual service can and should be converted to service under this rule in a swift and orderly fashion, without the commission mandating the conversion in the rule.

Even if the adoption of this rule does in some manner affect the level of service that parties have contracted for, the commission considers that such a change is appropriate and necessary, to effectuate the commission's mandate under the statute. The statute directed the commission to adopt rules on open-access, comparable transmission service within 180 days of the effective date of the new statute. This statutory directive represents a policy determination by the legislature that existing arrangements must change. Nevertheless, the introduction of comparable transmission service in an environment in which there were numerous existing arrangements of different kinds by which transmission owners were providing transmission service to other utilities and qualifying facilities necessarily has raised difficult transition issues. The commission is committed to phasing out existing transmission arrangements that are not consistent with the rule that it is adopting, but it believes that it is appropriate to first give the parties to existing contracts an opportunity to modify their contracts to conform with the new rules. If there remain contracts for transmission service that are inconsistent with this rule, six months after its adoption, the commission intends to conduct an investigation into those contracts and determine the appropriate manner for modifying them to conform to this rule.

The commission agrees with the LCRA that contributions in aid of construction should be included in the transmission cost of service, both as an asset or credit for the utility making the payment and as a liability or debit for the utility receiving the payment. The rule has been modified accordingly.

In the preamble, the commission posed the following question: Are there means, other than subsection (e)(3), that would achieve the commission's objectives to set transmission rates that reflect current costs in an expeditious manner, such as generic rates of return?

A number of parties commented on the method for determining rate of return or coverage. Austin and GVEC commented that different utilities have different capital requirements and borrowing sources, and that the use of a generic rate of return or coverage ratio is not appropriate. Austin also opposed any rate calculation that would result in an understatement of its actual capital cost, because this would result in its native-load customers subsidizing transmission customers. Brownsville also opposed generic coverage ratios for municipal utilities. TU Electric opposed generic rates of return, arguing that even under a postage-stamp pricing approach, utilities face different risks and costs associated with constructing and owning transmission facilities. Brazos recommended that the rate of return for a cooperative utility recognize that members of the cooperative make equity contributions to the cooperative, which has a cost. GVEC suggested that the transmission function has a different degree of risk associated with it than the overall operation of an integrated utility, and that in setting transmission rates, the commission should consider the rate of return that would be appropriate for a transmission utility.

The commission has concluded that the transmission rates should be based on current costs. The preamble to the proposed rule suggested the use of a generic rate of return or generic coverage ratio to expedite the determination of transmission rates. The commission still believes that it is important to resolve these cases expeditiously. To this end, the participants in one of the working groups have developed a set of rate-filing requirements that would describe the cost information that a utility must file in connection with the determination of transmission rates. This rate-filing package includes other features that are intended to help expedite transmission rate proceedings, including allocation factors to allocate common costs among transmission and other functions and a generic formula for calculating a utility's rate of return from information concerning its actual debt costs. The commission is separately seeking comments from interested parties concerning the rate-filing package.

In the preamble, the commission posed the following question: Are there other ways of determining the load-ratio shares, such as using non-coincident peak demands, that would be more appropriate?

The East Texas G&Ts commented that the proposed rule correctly selects a load-based allocation of transmission costs based on the transmission customer's proportionate share of the ERCOT coincident peak load. However, according to these cooperatives, the use of a customer's historic peak load for current transmission billing is problematic. The rule should instead require that billing be based on a customer's anticipated load at the time of the ERCOT peak, with a true up for actual peak at the end of the year.

Destec commented that the load ratio share for each utility within ERCOT should be determined by "dividing the utility's system demand at the time of the most recent ERCOT system coincident peak demand by the coincident peak demand of the ERCOT system." Destec sought a clarification of the rule concerning what is included in a utility's "load." According to Destec, industrial load that is primarily served by a "behind the fence" cogeneration unit should not be included as load for the interconnected utility and should not be included in any load ratio calculations.

Cap Rock commented that basing load ratio share on a single, coincident peak demand is arbitrary. This party recommended using a blend of a single coincident peak demand and total energy. For example, the load ratio share could be based 50% on the system coincident peak and 50% on the system annual energy sales.

Public Counsel, EDF, and the TU Electric Cities recommended that the rule not focus on utility demand at the time of the ERCOT peak. According to these parties, transmission costs are incurred in order to move energy throughout the year, and they recommended that the load-ratio share for a utility should be determined using 12 monthly peaks. The LCRA recommended that this subsection be amended to use the peak demand of the four summer months and to account for losses in determining a utility's peak demand. Brazos suggested that it may be more appropriate to use a non-coincident peak demand methodology to calculate the load-ratio share, to the extent that load-ratio shares are used in calculating transmission costs.

Subsection (g)(4) of the rule provides that costs will be allocated among utilities on the basis of the most recent ERCOT peak. In assessing the utility's peak, load served by "behind the fence" cogeneration would be ignored, unless the utility is serving the load at the time of the peak. The commission in most of the recent rate cases has concluded that summer peak load conditions are a major factor that affects the configuration and costs of transmission facilities. In these cases, the commission has typically allocated transmission cost on the basis of demand in the summer months. The commission concludes that for the same reasons, an allocation factor based on the ERCOT coincident peak demand in the months of June, July, August, and September is the appropriate means of allocating transmission costs among utilities, for the postage stamp portion of the transmission rate. For the megawatt-mile portion of the rate, the transmission costs of each utility will be allocated to itself and other utilities on the basis of the megawatt-mile impacts.

One of the major issues addressed by the parties was whether losses caused by the operations of a neighboring utility's operations within its own control area, should require compensation from the utility causing the losses. This dispute is highlighted in the report of the working group on operational issues. According to this report, the existing practice within ERCOT is for each control-area utility to make up the losses within its own control area, except that compensation is required for losses caused by wheeling power from a remote source. HL&P submitted a recommendation to the working group to continue this practice, and the CPSB, in its comments, proposed to continue the existing practice. The LCRA, on the other hand, proposed that a utility causing losses outside of its control area be required to compensate the affected utilities, even if the losses are caused by the use of resources in the utility's control area to meet its load. According to the LCRA, such a policy would represent consistent treatment of all loads, so that all users of transmission are faced with the same costs and responsibilities. CSW proposed a third alternative, the use of its efficient pricing proposal to assign losses to loads and resources.

Another issue that parties have raised is whether losses should be calculated on an average or incremental basis. Brownsville recommended that if the commission allows incremental losses, the incremental loss methodology should be properly implemented by including credit for transactions that result in reduced losses.

Power Marketers commented that to encourage a robust generation market, the commission should facilitate the development of "one stop shopping" for transmission services. To further this goal the commission should consider making compensation for losses an administrative responsibility of the independent system operator. Destec proposed that the commission ensure that distance sensitivity be adequately built in to the pricing system by means of the loss matrix. LP&L recommended that losses be determined separately for each voltage level, rather than by using system average losses.

The proposed rule called for the development of a loss matrix that would provide clear and immediately available information on losses. It is the commission's belief that this satisfies the Power Marketers' concerns. The rule neither precludes nor requires differentiation of losses by voltage level.

TU Electric expressed the view that the commission need not address the issue of losses, because the interested parties are likely to be able to reach a consensus on the mechanisms for loss compensation.

The commission encourages the parties to attempt to develop an equitable method for dealing with losses. The commission is adopting a requirement that loss compensation matrices be developed. The treatment of losses is a matter that can be addressed in connection with the approval of transmission rates and tariffs.

The East Texas G&Ts commented that §23.67(g) was ambiguous on the question of whether the division of the transmission revenues should be proportional to transmission costs before or after severing out the cost of transmission for existing contracts. According to the Cooperatives, for the rule to work properly, the revenue division must be on basis of transmission cost before severing out the costs of contractual transmission service. Brazos commented that the receipt of transmission revenue from utilities that are not its member-owners could be sufficient to require it to pay income taxes. Brazos pointed out that if a cooperative utility in any year receives more that 15% of its revenues from non-members, it loses its tax-exempt status for that

year. Brazos asserted that non-member transmission customers of a cooperative should be responsible for income taxes, if it loses its tax-exempt status as a result of revenue from transmission service.

The rule being adopted requires that revenue be allocated on the basis of transmission cost of service. There is not any ambiguity in this, because transmission costs, as set out in subsection (g), do not include contractual wheeling costs. The commission's reasons for this treatment are discussed previously, in connection with the issue of the treatment of contractual wheeling costs. The commission does not agree with the comments of Brazos. Brazos is the only party that has expressed a concern about this issue, and it appears that one of the reasons for its concern is that it receives revenue from non-members that are its wholesale customers. It seems likely that if the utility is required to pay taxes, the revenue it receives for transmission service will not be the only reason.

Brazos also raised several questions about how the amounts paid by transmission customers for transmission service would be paid to the transmission-owning utilities. The cooperative was concerned that if a new entity is created to receive and disburse these revenues, a new administrative cost may be created, and transmission owners will lose the use of these revenues during the time that the disbursing agent holds the money. Brazos recommended that only the net amount owed to transmission-owning utilities be charged to the transmission users, and that the users pay this amount directly to the transmission owners on a monthly basis.

The commission agrees that it would not be desirable to require an entity such as the ISO to deal with this matter. For the bulk of the payments among utilities for transmission service, utilities should compensate each other directly. There may be some instances, such as short-term service to the DC ties that will involve an administrator to receive and redistribute transmission revenue.

In the preamble, the commission posed the following question: How should costs for certain ancillary services be separated out and what form of cost allocation should be employed for this purpose?

The report of the ancillary services working group recommended that utilities that provide ancillary services be allowed to price the services flexibly with a cap equal to the provider's embedded cost and a floor equal to the provider's marginal cost. The report also noted that, in some instances, such as new capacity additions, the marginal cost may exceed the embedded cost; therefore, in these instances the marginal cost would be the ceiling. The report also suggested that if multiple ancillary services are provided to a customer using a common block of generating capacity, the total capacity-related charges should not exceed the embedded cost cap nor should they be below the marginal cost floor. The LCRA supported the working group report. STEC and Destec agreed with the last point, concerning non-duplication of capacity-related charges. Destec also recommended that the services provided by the incumbent monopoly utility providers be capped at embedded cost.

The members of the working group were not able to reach an agreement on what the embedded cost cap and marginal cost floor should be. Some parties suggested that the cost cap may be best represented as the utility's average cost of generation, while others suggested that the cap be determined by the state-wide weighted average cost of generation. The members of the working group could not agree on whether an ancillary service using existing rate-based capacity only (no energy involved) would have a floor of $0 or whether the provisions of PURA relating to flexible pricing would mandate a positive marginal cost.

One of the issues that has been raised in connection with ancillary services is the treatment of inadvertent energy flows between control areas. The working group on operational issues proposed that a new subsection be added to the rule that would require that inadvertent energy be dealt with in accordance with the relevant ERCOT guides.

STEC recommended that the revenues a utility receives from ancillary services be credited to the ratepayers, since they are currently paying for the cost of the services through their rates. STEC also commented that ERCOT utilities should be able obtain emergency service at the cost of production.

Brazos commented that utilities should offer ancillary services at the embedded cost of such services, and the services should be unbundled, discretely priced, and provided on a non-discriminatory basis. TNP agreed that ancillary services must separately priced, to ensure the same prices are charged in all cases.

HL&P commented that the standard for pricing ancillary services above the marginal costs is inconsistent with the pricing directives expressly set forth in PURA 2.001 and is antithetical with the principle that utilities should be afforded the opportunity to meaningfully participate in future competitive wholesale bulk power markets. TU Electric supported the idea of flexible pricing for ancillary services.

The East Texas G&Ts did not support the report of the ancillary services working group concerning flexible pricing for services. They endorsed the principles for the pricing of ancillary services included in proposed §23.67: prices should be based on the average embedded costs and must not overlap with the cost of generation or transmission services. According to the cooperatives, the FERC pricing for ancillary services is worthy of consideration by the commission.

As is noted previously the commission has concluded that utilities should be permitted to provide ancillary services at market-based rates. The commission agrees with the comments that recommended a floor and ceiling price. The floor and ceiling will protect native-load customers from subsidizing sales of ancillary services to other utilities and will prevent utilities from over-charging for a service for which there may be few sellers. The commission concludes that the price ceiling on generation-related ancillary services should be based on the average cost of the utility's generating capacity, and that the floor should be consistent with PURA 95, §2.001(c).

The commission also agrees that the revenue from the sales of ancillary services should be fully credited to customers, because they are paying for the generating facilities that utilities will use to provide ancillary services. Energy costs and revenues will be accounted for in utilities' fuel accounting and the fuel reconciliation process, and capacity-related revenues will be reflected as base-rate revenue. The commission agrees with the comments of the LCRA, STEC and Destec that where multiple ancillary services are provided from the same generating capacity, the utility should not be permitted to charge multiple capacity-related fees. In each of these areas, the rule has been modified to reflect the commission's conclusions.

The commission has adopted subsection (l) in response to the comments concerning inadvertent energy flows. This subsection provides that inadvertent energy flows will be dealt with in accordance with ERCOT procedures.

In the preamble, the commission posed the following questions: Would the rule permit the development of a secondary market for transmission service and is it desirable to encourage the development of such a market? How should the rule be amended to encourage such a market?

A number of parties, including Power Marketers, Cap Rock, TNP, and APSI commented that allowing the resale of transmission rights in a secondary market is a necessary part of this rule. Since transmission capacity will be purchased by loads on the basis of the annual ERCOT system peak, according to these parties, the load should have excess "planned" capacity in off-peak periods that would be available for sale in a secondary market. The ability for marketers or generators to purchase such capacity, especially to export power out of ERCOT, is important and should be retained in the rule as finally adopted.

To the extent that a secondary market develops, STEC suggested that the commission invoke the "use it or lose it" doctrine to discourage entities from attempting to corner the market on transmission rights.

A number of other parties concluded that a secondary market is either unnecessary or unworkable under the pricing mechanism proposed in the rule. According to Destec, Brownsville, and the LCRA, under a statewide postage stamp pricing mechanism, no need exists for active development of a secondary market for transmission service. Planned transactions will take place pursuant to load-ratio share allocations of the transmission network, and unplanned transactions will be allowed to the extent that the network can accommodate such transactions.

TU Electric commented that the development of a secondary market will be a key element of increased competition in the wholesale market for transmission and sales of electric energy but noted that it is impossible to have a secondary market with the proposed statewide postage stamp methodology. Brazos also concluded that a secondary market is inconsistent with the postage stamp pricing method.

CPSB commented that a secondary market for transmission access should not be permitted, because such a market is inconsistent with the concept of regulated transmission service.

The commission concludes that there may be benefits from the development of a secondary market, but that these benefits are secondary in importance to the objectives of opening the transmission system to access by utilities and wholesale power sellers and to stimulating more competition at the wholesale level. A number of parties have expressed skepticism about the viability of a secondary market, where transmission pricing is based on load-ratio shares. The commission does not intend to obstruct the development of a secondary market, if conditions will permit it to develop. Accordingly, subsection (i) has not been modified.

In the preamble, the commission posed the following question: What is the most appropriate method for allocating redispatch costs among transmission users?

A number of parties, including the Public Counsel and the CPSB, commented that redispatch costs should be borne by the beneficiary of the redispatch. According to the CPSB, benefits can be determined only with pricing based on priority service elements. The CPSB also commented that it was confused by the use of the phrase "binding advance bids" in §23.67(j) of the proposed rule. HL&P argued that it is inappropriate and illegal to impose redispatch costs on parties that do not benefit from the redispatch.

TU Electric commented that the costs of redispatch should be borne by the party that causes the redispatch to occur. According to TU Electric, constrained transmission capacity should be allocated on the basis of the load-ratio share of the affected utilities, if the constraint is the result of an unexpected event, such as an outage of a nearby transmission line. According to TU Electric, where the constraint is the result of increased usage of a transmission line over time, the capacity should be allocated on a first-come, first-served basis.

The City of Austin recommended that the redispatch costs associated with a planned transaction should be allocated on the basis of the megawatt-mile use of the system under the revised dispatch and that the redispatch costs of unplanned transactions be borne by the parties requesting the redispatch. Brazos made a recommendation similar to Austin's. The working group on operational issues also made a similar recommendation: redispatch costs for planned transactions would be included in the transmission cost of service for the subsequent year and assessed to all transmission users, and redispatch costs for unplanned transactions would be borne by the parties to the unplanned transaction.

Brownsville and Destec commented that the commission's proposal on redispatch costs should be adopted: redispatch costs should be borne by all utilities on a load-ratio share basis. According to Brownsville, assigning redispatch costs to the last user is arbitrary and fails to recognize that all users of the system create the constraint that requires redispatch. Destec recommended that the rule be modified to make it clear that in a redispatch situation, a utility is bound by the provisions of any contract for the purchase of power.

GCPC commented that in assessing the costs of transmission upgrades to alleviate transmission constraints, competitive solicitations should be used to determine the reasonable cost of the facilities.

The City of Weatherford commented that redispatch costs may produce an inefficient generation mix, and that redispatch should be regarded as a short-term solution to constraints to the transmission system. The City also commented that redispatch requirements should be monitored by the independent system operator, in order to identify transmission system enhancements that would eliminate constraints.

The commission concludes that the recommendations in the report of the working group on operating issues have merit, but that other interested parties should have an opportunity to comment on the redispatch rules that the working group proposes. The main points of the group's recommendation are that the independent system operator supervise redispatch decisions, that the cost of redispatch for planned transactions be included in the transmission cost of service, which will result in the sharing of costs among all customers, and that the cost of redispatch for unplanned transactions be borne by the parties that benefit from the redispatch. One additional point that the commission seeks comment on is the need to report cost information to the ISO, in connection with a redispatch for a planned transaction. The commission believes that a redispatch must be made on a least-cost basis and, that in the absence of a standard such as least cost, there will not be a rule for deciding whether resources must be redispatched to permit a transmission transaction to take place. The commission is publishing a separate rule on transmission terms and conditions, §23.70, and has decided to republish proposed rules on redispatch in §23.70. This proposed rule includes the recommendations of the working group and the least-cost standard for redispatch in connection with planned transactions, and it would require the ISO to apply this standard.

CPSB commented that ERCOT-wide uniformity in terms and conditions of service, which §23.67(k) of the proposed rule requires, is not necessary. According to the City, uniformity is necessary only within a utility system.

The commission concludes that it is important that uniform rules apply to transmission service in ERCOT. One of the means by which transmission owners might obstruct transmission service is to establish separate and inconsistent requirements for the use of different utility transmission systems and to require the negotiation of individual contracts for service with each customer. The approach taken in the rule is to facilitate transactions by adopting a uniform pricing method, uniform terms and conditions, and a uniform definition of ancillary services. The commission concludes that this approach is essential to make transmission access in ERCOT a reality.

The working group report on ancillary services recommended that if a new ancillary service is required by a customer, the utility should be permitted to supply that service, if feasible. The definition and price could be determined by negotiation between the service provider and the customer, and service should be permitted immediately upon the execution of a contract between the parties, subject to subsequent approval by the commission. Brazos commented that, for those ancillary services not prescribed in subsection 23. 67(d) and for which the parties have entered into an agreement, the agreement should be filed and a tariff should not be required. TU Electric commented that the commission should not impose a moratorium on offering new services. As is noted previously, the East Texas G&T Cooperatives opposed the provision that permitted additional ancillary services to be created.

The commission concludes that customers' needs should shape the market for ancillary services. Accordingly, the commission has retained the provision that would permit additional services, but has modified it to make it clear that additional services are permitted where a customer requests the service.

The East Texas G&Ts commented that the proposed rule correctly requires utilities to build new facilities at their expenses with the exception of facilities that would impair their tax exempt status or transmission facilities that should be directly assigned. According to these cooperatives, direct assignment of facilities should be an extraordinary event, since nearly all facilities benefit the grid. FERC, which has considered the issue in great detail, strongly favors the roll-in of transmission facilities.

TNP and Weatherford recommended that where a utility makes a contribution in aid of construction for a new transmission facility, it would acquire an ownership interest in the new facility, to the extent of its contribution. Such a provision would permit the utility to recover its investment in the facility, through the statewide postage stamp rate.

GCPC commented that the rule should require competitive requests for proposals for transmission construction, new interconnections or other alternative solutions to transmission constraints.

Denton and Weatherford expressed their concern about the possibility of inconsistent interpretations of the criterion for direct assignment: whether a facility is "primarily for the benefit" of a transmission customer. In an effort to encourage, rather than discourage, necessary growth, they recommend that the normal load growth of a utility not be considered a matter that would require the direct assignment of a facility. They also recommend that the independent system operator review all direct assignment requests, to ensure consistency in the application of this provision.

The CPSB commented that where the costs of transmission facilities are to be placed in a state-wide transmission cost pool that will be used as a basis for allocating costs throughout ERCOT, some mechanisms

must be established to ensure that these costs are prudently and efficiently incurred, with opportunity for examination and testing of these costs by other ERCOT members who will share in bearing them.

Brazos recommended that where a request is made to a utility that is an RE Act beneficiary to construct additional transmission facilities, the determination of whether the additional facilities are primarily for the benefit of the transmission customer should be made by the Rural Utilities Service. If the RUS declines to approve a loan for the project under the RE Act, the transmission customer would be required to make a contribution in aid of construction.

The rule, as proposed, would require utilities to construct new transmission facilities but provided that in certain instances the utility that was building the new facilities could require a transmission customer to pay a contribution in aid of construction to finance the new facilities. The provision that several parties commented on was the provision that permitted a contribution where the new facility was primarily for the benefit of the transmission customer. The East Texas G&Ts, for example, asserted that the FERC has used rolled-in pricing, rather than direct assignment of costs to transmission customers. The commission's rule will require that all transmission costs be included in the ERCOT transmission cost of service, but the commission believes that it is appropriate to require a transmission customer to shoulder some of the risk of the construction of new facilities, where they are being built to serve the customer's needs. The use of a contribution in aid of construction will permit risks to be apportioned appropriately. The party whose growth or change in generation source requires a transmission upgrade should initially bear the costs of the upgrade.

In many instances, where additional transmission facilities are needed, either the transmission provider or customer could build the new facilities. If the customer has a desire to own the facilities, it can plan them in accordance with the planning procedures prescribed in proposed §23.70 and then build and own them. In other instances, a new facility that is needed to eliminate a bottleneck may have to be built in the middle of another utility's transmission system. In these circumstances, the transmission provider should build and own the new facilities, but a contribution in aid of construction may be required from a transmission customer, if the customer's growth or decision concerning a source of generation results in the need for the new facility. The commission thus disagrees with TNP and Weatherford that the utility that pays a contribution should always have an option to own the new facility. The scope of subsection (n) has been expanded to cover ancillary services, in response to the comments of CSW.

The determination of the RUS concerning the approval of a loan for a project to construct additional transmission facilities might be a factor that should be considered in determining whether a cooperative utility should be required to build additional facilities, but it is not appropriate that the determination of the RUS would be determinative. There may be other reasons for the denial of a loan by the RUS, such as limitations on its ability to fund a loan. In addition, the RUS is an interested party, because it provides financing to cooperatives.

In the preamble, the commission posed the following question: Are additional unbundling requirements or competitive safeguards needed to foster competition in the wholesale market?

A number of parties expressed the view that functional unbundling for a small utility is not workable and is unnecessary, including Bryan, Garland, and Weatherford. In addition, Garland commented that the proposed rule would decrease efficiency and create increased costs to ratepayers for small municipal systems. It recommended that small municipal systems be exempted from the requirement of functional unbundling. Greenville and EPEC also asserted that the unbundling requirement would increase costs.

A number of parties suggested provisions for exempting small utilities from the requirement to establish separate operating units for the generation, transmission, and distribution functions. Weatherford suggested that municipal utilities with a peak demand less than 500 Mw be permitted to file for an exception from the requirements to unbundle functions and physically separate personnel upon showing that unnecessary costs and inefficiencies would be incurred and that the utility did not participate in sufficient wheeling to represent a potential impediment to competition. Weatherford also proposed that municipal utilities with a peak demand less than 100 Mw be exempt from the requirement to physically separate personnel. LP&L also proposed an exception to the operational unbundling and physical separation requirements for utilities of less than 500 megawatts.

Brownsville and Medina also commented that physical unbundling will be expensive and will not yield corresponding benefits to their ratepayers. The commission's proposal would force utilities to hire new employees and purchase unnecessary and expensive capital equipment. Brownsville commented that requiring the allocation of costs to each function on a structured pro-rata share method would be a better alternative. Brazos and the TPPA expressed similar views and also asserted that the separation of functions required by the rule would impair the reliability of service. EPEC also suggested that the unbundling requirements would impair reliability. STEC favored exceptions to the unbundling requirements for small utilities, on a showing of good cause. Cap Rock and TPPA also commented that smaller cooperatives should be exempt from the unbundling requirement. Medina also suggested that small cooperatives that must comply with the cost-separation requirements should be given additional time to do so.

Brazos commented that the prohibition against exchange of information is vague, overboard and unenforceable, urging the commission to be more precise in describing the type of information that can not be exchanged.

The East Texas G&Ts commented that the requirement that "each utility functionally unbundle its operations by establishing separate organizational units with the utility to operate its generation, transmission, and distribution facilities" inadvertently bars voluntary corporate unbundling into independent corporations. The Cooperatives also recommended that utilities that are not in ERCOT and utilities that do not own transmission not be required to unbundle.

The Texas Electric Cooperative Association urged the commission to exempt all transmission-owning utilities whose transmission facilities consist only of radial transmission lines from the unbundling requirement. Other small utilities should be permitted to request an exemption based upon a showing that the associated cost of compliance exceeds the expected benefit to the bulk power market. Medina recommended a similar provision: an exemption for utilities that do not operate a control area.

TU Electric recommended that the commission delete the requirement for functional unbundling of generation and distribution operations, as it is irrelevant to this proceeding. TU Electric, HL&P, and EPEC questioned whether the commission has the authority under PURA to mandate the internal organizational structure of the utilities that it regulates. According to TU Electric, the proposed provisions relating to the exchange of information are both too prescriptive and too vague. The rule should better define what constitutes the information that cannot be shared between separate business organizations within the utility. In particular, the proposed provision relating to what data must be provided to all parties is too broad. HL&P shared these concerns. TU Electric submitted that the commission should adopt a three-part policy: (1) data that does not relate to transmission service operation should be excluded from the scope of the rule; (2) commercial information concerning the purchase, sale, or transmission of electricity, regardless of the source, should be kept confidential by the transmission business entity; (3) contemporaneous communication to all customers should be made of information relating to transmission capacity, pricing, and terms and conditions of service. According to HL&P, the commission should limit 23.67(n) to unbundling of transmission rates and services.

EPEC made a broad argument, apparently directed at the unbundling requirements, taking issue with the speed at which it believes the commission is requiring changes in the operation of electric utilities. EPEC recommended that the commission adopt and promote a measured, incremental approach to competitive reform of the electric power industry. It concluded that the commission's proposed rule would affect utilities beyond ERCOT and require an unprecedented internal reorganization of utility functions that is neither necessary nor called for by PURA.

The City of Austin commented that requiring functional unbundling to increase competition is not needed to the degree described in the proposed rule. Austin supports the functional unbundling of costs for the purpose of pricing transmission services and ancillary services and the full disclosure of market information. However, Austin believes that the commission's authority does not extend to ordering separate orga-

nizational units within the City to operate its generation, transmission, and distribution facilities and requiring that those organizations be physically separated.

Entergy commented that it does not oppose functional unbundling in concept, but does not believe that this commission has authority to order it for non-ERCOT utilities. Entergy is concerned that a conflict might arise, if the PUCT imposed functional unbundling rules on utilities that the FERC requires to unbundle transmission from generation under a different set of rules. The PUCT should modify its proposed rule so as not to impose functional unbundling requirement on FERC-jurisdictional public utilities. SPS and EPEC raised a similar question. In particular, they commented that the FERC, in its proposed transmission access rule, has not required the separation of employees. SPS also commented that it is not clear whether subsection (n) applies only to wholesale rates or also to retail rates.

EDF supported the proposed unbundling requirements, concluding that significant regulatory oversight will be required to ensure the fair treatment of competitors. According to EDF, competitive safeguards such as regular proceedings and audits are needed to assure compliance with the rules, and the commission should advocate legislation which would require structural/legal unbundling. The TRA also supported the proposed unbundling requirements.

Destec supported the proposed requirement for functional unbundling and suggested that actual separation of the separate functions of the existing vertically integrated utility might be required to ensure fairness in the generation marketplace. Destec commented that the requirement of total unbundling of all transmission, distribution and related services at wholesale and at retail is necessary to eliminate undue discrimination. Only if such unbundling is required will there be assurances that the regulated utilities' customers do not subsidize the competitive business enterprises of the utility. Cap Rock also supported structural or corporate unbundling.

CSW supported the concept of functional unbundling and offered a proposal on how functional unbundling should occur. The existing corporate structure of jurisdictional utilities would remains in place, but the components of the utility would be organized into separate business units or division that have most of the characteristics of separate affiliated corporations. These characteristics would include: (1) The utility would create separate generation, transmission, and distribution functions, and one or more support divisions. (2) Each division would provide services to the other divisions, or facilities for the use of the other divisions and charge those divisions for the services or facilities. (3) Separate financial accounting for the functional divisions would reflect the assets assigned to each division, the costs incurred by the division, and the internal cost assignment among the divisions. (4) The transmission division would operate a transmission dispatch center and maintain the SCADA system. (5) Control area operations would become part of the generation division, which would be responsible for the energy management system and the dynamic dispatch of native load and the provision of all data required by the regional information network. (6) A new entity, Energy Operations, would be established as part of the generation division at a separate location. It would be responsible for off-system marketing activities, scheduling transaction through control area operations like any other participant in the ERCOT bulk power market. (7) An independent entity should operate a regional information system which collects and conveys relevant information concerning the transmission system to all parties simultaneously.

CSW recommended that the requirement in §23.67(n) that refers to the "physical separation of personnel" be deleted.

Consumers Union commented that rules must be developed for ensuring that no unbundled service or function is cross-subsidized by captive retail customers or priced in a fashion that unfairly disadvantages competitors. According to CU, the unbundling of the vertically integrated electric system will require careful cost analysis, done in an objective manner, relying on sworn evidence, with the full participation of all interested parties. The commission must use a market power test, not agreement of parties, to determine which functions or services are suitable to be market priced.

The commission concludes that the unbundling that is necessary to foster a vigorous wholesale market is the separation of the utilities' power marketing function and the operation of their transmission systems. The potential for anti-competitive conduct on the part of transmission owning utilities in the wholesale market exists in large part because the utility personnel who operate the transmission system and control access to it are typically located in close proximity and have frequent contact with the utility personnel that buy and sell wholesale power for the utility. Open access comparability in wholesale transmission service can only be achieved when the utility's transmission personnel interact with the utility's power marketing personnel in the same manner as they interact with any third-party competitor to the utility in the wholesale market. Accordingly, the functional unbundling requirement is being restated in terms of separating a utility's transmission operations and its wholesale power purchase and sale operations, rather than in terms of unbundling generation, transmission, and distribution.

The FERC has proposed a similar separation of functions in its standards of conduct that were published for comment in December. Under PURA §2.057, the commission is required to implement a degree of comparability which is no less than the comparability that FERC might require under similar circumstances. Therefore, the commission's mandate under §2.057 requires it, at a minimum, to functionally separate these two aspects of utility operations. Under PURA §2.216, the commission is required to insure that utilities do not engage in anti-competitive conduct. In the commission's judgment, the functional separation requirements contained in this rule are the minimum requirements necessary to guard against anti-competitive conduct on the part of utilities in the wholesale power market.

The commission concludes that there are a number of small utilities that would have been affected by the operational unbundling requirements in the proposed rule that are not significant market forces, because they do not control significant transmission or generation assets. While the commission believes that unbundling the rates of all ERCOT utilities is appropriate, it has concluded that there is little benefit to be gained by requiring small utilities to carry out the operational unbundling required by the rule. Accordingly, the commission has modified the rule to apply the operational unbundling requirement, which has been revised as described previously, only to utilities that own generating capacity in excess of 100 megawatts.

The commission also agrees that the provisions of the proposed rule that would have limited the exchange of information between the operational units of a utility were overly vague. The commission concludes that standards of conduct are important to prevent anti-competitive behavior and notes that the FERC has recently proposed standards that would limit the flow of information, for this reason. The commission believes that the rules should be modified to conform closely to the proposed FERC standards of conduct. Because FERC published its proposed standards of conduct after this proposed rule was published, parties did not have an opportunity to consider the FERC standards of conduct in preparing their comments on this proposed rule. Accordingly, the commission is deleting the rules relating to the exchange of information from this rule and is proposing rules patterned on the FERC standards of conduct in §23.70, which the commission is publishing for comment.

The commission does not agree with the commenters who argued that the commission does not have the authority to require utilities (or, particularly, municipal utilities) to unbundle their operations. The unbundling requirement is directly related to the commission's responsibilities to promulgate transmission rules, and is the minimum requirement necessary to insure compliance with PURA §2.057 and §2.216. Now that the FERC has proposed similar rules in its standards of conduct, the question of unbundling may be regarded as essential in ensuring that transmission service under this rule is no less than the transmission service that will be available under the FERC's rules, as required by PURA §2.057.

With respect to the comments of Entergy, SPS, and EPEC, the commission has decided to defer the question of the application of the unbundling requirements to the non-ERCOT utilities to Project Number 15000.

In the preamble, the commission posed the following question: What are the most appropriate structure, governance, and functions of an ISO?

APSI, TRA, GCPC, Weatherford, and Denton supported the proposal to create an independent system administrator, with equal rights for all parties to participate in its formation and administration. The Cities

insisted that equal participation must encompass sufficient voting power by transmission-dependent utilities, power marketers, and power producers. The ISO and ERCOT (if still in place) must be accountable to this commission. The commission should have staff on each committee of these organizations, and should conduct periodic audits of their operations, inviting comments from all market participants. STEC, Cap Rock, and Brownsville made similar recommendations. STEC and Cap Rock commented that they could support the ISO being a part of ERCOT, if ERCOT changes its governance rules so that all stakeholder groups have an equal voice.

EDF supported the idea that the ISO have responsibility for some activity in local transmission and distribution operations and the ultimate authority over the initiation and curtailment of specific transactions. GCPC, on the other hand, expressed the view that the ISO must not actually dispatch resources but would coordinate desired transactions pursuant to operating and scheduling guidelines that apply to all parties. GCPC also commented that the ISO must not have an economic interest in the transactions it coordinates.

TIEC agreed in concept that an ISO is essential to ensuring equal dispatch and equal access privileges to the transmission grid, but it concluded that issues related to the identity, structure and funding of the ISO must be resolved. TIEC also insisted that the interest of retail consumers and the public interest must be represented on the ISO to prevent the possibility of collusion by all suppliers of electricity.

CSW commented that the ISO could perform some of the regional functions, including operating a regional information network, region-wide security centers, regional trading hubs, administering open access tariffs, acting as a dispute resolution forum, and coordinating more extensive regional coordination of transmission planning. It insisted, however, that the individual control areas in ERCOT must retain the responsibility to dynamically dispatch the generators under their control. The ISO would intervene in the dispatch only when the ERCOT transmission system is faced with constraints, emergencies, or curtailments, and when redispatch procedures may be appropriate. The ISO would determine how the dispatch would be accomplished, the cost, and who bears the redispatch cost responsibility.

TU Electric and Brazos commented that an ERCOT ISO is not needed. What is needed is an independent regional security center, which is being evaluated by ERCOT. For such a security center, according to Brazos, all loads should pay a share of the costs on a load-ratio basis. Brazos strongly disagreed with the list of ISO responsibilities contained in §23.67(o). TU Electric and Brazos suggested that the regional security center have responsibilities similar to those proposed by CSW, except that TU did not support centralized system planning. Brazos also commented that the governance provision of the rule should require that the ISO's procedures be "fair and non-discriminatory" with "equitable" participation rather than "equal" participation by all wholesale participants.

HL&P expressed the view that consensus in this area can be achieved. It commented, however, that the commission lacks authority to empower an ISO with authority to manage the generation portion of a utility's business. According to HL&P, the commission should adopt a policy statement encouraging interested parties to continue in their efforts to reform ERCOT into an ISO. The proposed rule regarding facilities charges, utility restructuring and an ISO are legally defective, because they should be adopted in a contested case rulemaking proceeding.

Cap Rock commented that the ISO should be substantially in place at the time the rule goes into effect and suggested that the LCRA could perform the ISO functions until a permanent ISO is created.

The East Texas G&Ts raised a number of issues about the administrative aspects of an ISO, including the question of who will pay to support the operation of the ISO and how real independence will be assured.

The commission believes that the creation of an independent system operator is particularly important for ensuring access by non-utilities and transmission-dependent utilities to the transmission network and is pleased that some of the large integrated utilities have presented their ideas on how an ISO might work. The commission concludes that it has the authority to direct the utilities that participate in the wholesale market to develop an ISO, because the requirement is directly related to the commission's responsibilities to promulgate transmission rules and to ensure that such service are provided on a non-discriminatory basis. The commission notes that the FERC has begun discussion of an ISO in connection with its transmission access rules, and that the California PUC has proposed an ISO as a part of its effort to create a more competitive electric utility market in that state.

Comparable service and non-discrimination are explicit requirements that the commission is to observe in its transmission service rules. Section 2. 057(a) of PURA directs utilities to provide service that is comparable to the utility's use of the transmission system, and directs the commission to ensure non-discriminatory access to transmission service. Section 2.216 reinforces these requirements. This section provides that a utility may not discriminate against competitors or engage in anti-competitive practices. If access to the transmission network is left in the hands of utilities, they have the potential to delay or deny access to their competitors. Competition has emerged in the generation market, but large vertically-integrated utilities have a tremendous customer base and financial resources, which give them significant advantages in competing with non-utility providers of generation. In order to foster competition in this market, it is essential that the terms of transmission access not be in doubt. Rather, non-utility service providers and transmission-dependent utilities need to have the assurance that a neutral third party controls the gateway to the transmission network.

The comments that were filed on this subject should be helpful in developing a consensus on the structure, governance, and functions of the ISO. The proposed rule included broad guidelines for the development of an ISO. These guidelines have been modified somewhat in response to comments from the parties. Two of the issues that parties focused on were the functions of the ISO and whether ERCOT should have a role in the development or operation of the ISO. On the first issue, the commission does not believe that it is appropriate to create an ISO with direct responsibility for dispatching the generating resources of the utilities. It is the commission's view that the creation of an ISO is essential for reliable transmission service in a network setting. The parties to this proceeding have asserted that ERCOT is operated as a system, in which interconnections between utilities perform important functions in the provision of reliable cost-effective electric service. Continuing to operate in this manner, while assuring that transmission service is provided on an equitable basis to utilities that do not own substantial transmission systems and to nonutilities operating in the wholesale power market, as required by PURA, requires a neutral arbiter with the responsibility of ensuring that the open-access rules are carried out and maintaining the reliability of the network. In response to the comments it received, the commission has modified its list of ISO responsibilities to clarify that the ISO shall have the authority to direct the curtailment and redispatch of resources by control areas under specified circumstances, to ensure that ERCOT control areas instantaneously balance generation and load, and to serve as a single point of contact for the initiation of transmission transactions.

The commission does not express an opinion on the role of ERCOT in an ISO. This issue is primarily one of gaining a consensus that the proposed organization of the ISO meets the standard in the rule: equal participation by all wholesale market participants. The commission concludes that the parties should continue discussing this matter, in order to propose an ISO within the time permitted in the rule.

The commission also concludes that the policies and procedures of the ISO should be subject to commission review. The rules of governance are important in ensuring that all parties are heard with respect to matters that affect reliability or the open-access rules. At the same time, the commission has the ultimate responsibility for ensuring equitable transmission access and thus should review the ISO's policies and procedures.

Brazos commented that rather than prohibiting the exchange of information, the rule should make the necessary information available to all market participants who request it, who can use their own engineering and their expertise to study the system for their own purposes. According to Brazos, the phrase "electronic transmission information network", instead of "electronic transmission information system" should be used in the rule. Information on the ETIN ought not to be in the same form as required by FERC, and only transmission information should be on the network, not generation-related information. In a competitive market, information on generation is often highly propriety, sensitive and confidential.

TU Electric commented that the proposed rule is too specific and goes too far, requiring that the ETIN to provide information that does not exist and enormous amounts of data. The requirement to provide "available transmission capacity and total transmission capacity at all ERCOT transmission interfaces" is unclear, according to TU Electric. Proposed paragraph 23.67(o)(2) also would have required that this information be provided on a real time basis for all transmission lines in ERCOT. This is impractical and unnecessary and involves an enormous amount of data. TU Electric also commented that the commission must recognize that the real-time capacity data that will be provided will be estimates, and that the estimates made on a real-time basis will be different from the real time capacity data for the system that are calculated after the fact. The commission should modify the rule to delete the requirement of the provision of the supporting data on a real-time basis.

The commission agrees that the information requirements in subsection (o) were somewhat broad and has revised them to track the information requirements that the FERC has proposed for the electronic information networks that it is considering. The commission considers that the electronic information network will be an important means of assuring that all wholesale market participants have equal access to transmission services. Without the creation of an electronic information network with the capability of providing non-utilities and transmission dependent utilities extensive information concerning the transmission system, transmission owning utilities would have a substantial advantage over non-utilities in this market.

Brazos commented that customers that have paid for the transmission system should receive priority over other users of the system. The users that are non-ERCOT members should be required to comply with the ERCOT guides or they should not receive the same priority on the use of the system. Since capacity on the Brazos system was obtained with RUS funds, for the benefits of its member RE Act beneficiaries, such members should have a higher priority than other transmission customers who are not RE Act beneficiaries.

The issue of priority of service for RE Act beneficiaries is addressed previously.

In the preamble, the commission posed the following question: Is there another set of arbitration rules that would be more appropriate for resolving disputes?

The working group on operational issues proposed a detailed provision on alternative dispute resolution that would replace the ADR provisions of the proposed rule. APSI and Power Marketers commented that alternative dispute resolution procedures should not be mandatory, because they can be a means for parties with greater resources to erect barriers to the expeditious resolution of disputes, particularly for new market entrants. The East Texas G&Ts also objected to mandatory ADR, for similar reasons. The Cooperatives were also concerned that ADR would undermine the commission's ability to regulate transmission service. APSI also urged the commission to permit the parties to a dispute to agree on the rules of procedure to govern any arbitration.

Brownsville expressed several concerns about the alternative dispute resolution provisions of the rule. It suggested that mediation would be an appropriate ADR mechanism, and that if arbitration is used, the arbitrator's decision should be final, with limited exceptions. Brownsville was concerned about having to bear the costs of an arbitration proceeding and then a complaint case at the commission for the same dispute. Brownsville was also concerned that arbitration awards might deviate from the policies of the commission.

Cap Rock commented that an alternative dispute resolution process is desirable, but that the right to appeal to the commission is essential. Mr. Will C. Jones commented that the commission should include legal counsel in the dispute resolution process, that structured mediation be required, that the parties to an arbitration be permitted to introduce in evidence in a commission complaint proceeding the results of the arbitration of the same dispute, and that the time for the issuance of an award by an arbitrator run from the date that parties submit legal memoranda or other documents that are permitted to be submitted to the arbitrator after the arbitration proceedings. TNP commented that the ADR provisions should be binding on the participants, and that arbitrators should be required to render an award within 60, rather than 90, days.

The commission has adopted the arbitration procedure proposed by the working group, with several modifications. First, the procedure has been modified to make it clear that the parties may use either arbitration or mediation, but that if they use mediation, they must employ someone who has training or experience in mediation. Mr. Jones' recommendations concerning the admissibility of arbitration awards and computing the time for rendering an award were also incorporated in the rule. In addition, the time for rendering an award was changed to 30 calendar days. This appears to be a more practical requirement than the ten working days suggested by the working group.

Senator Armbrister, Austin, Denton, Garland and Weatherford, the CPSB, and TPPA commented that the commission does not have the authority to review wholesale power contracts that a municipally-owned utility enters. Austin, Denton, Weatherford, and the CPSB suggested that the provision for review of contracts be amended to exclude contracts entered into by a municipally-owned utility. TNP commented that this provision should be revised to require commission review of contracts with a duration of two years or more, rather than one year or more, as proposed in the rule. TNP argues that such a modification would eliminate an inconsistency with the resource planning provisions of PURA. The LCRA commented that the requirement for the approval of power sales contracts is inconsistent with the development of a competitive market and would extend the commission's authority to matters over which it has no authority by statute, in particular the terms of the LCRA's sales to its customers.

The East Texas G&Ts urged that the provision for review of power sales contracts be expanded to include commission review of transmission, interchange, and interconnection agreements and to require review of power sales agreements, whatever the term of an agreement. The working group on operational issues also recommended that the commission review interconnection agreements.

LP&L commented that the provision concerning contract approval should be modified to exclude sales that are subject to the jurisdiction of the FERC. Brazos recommended that this provision be modified to exclude contracts that are subject to review by a federal agency that has jurisdiction to approve such contracts. Apparently, this modification is intended to preclude commission review of contracts that are subject to review by the Rural Utilities Service.

The commission agrees with the recommendation that interconnection agreements be filed for commission review and approval, when one of the parties to the agreement requests such a review. The commission concludes that it has the power to require the filing of all existing and future interconnection agreements and agreements governing the purchase or sale of generation, transmission, or ancillary services at wholesale, pursuant to its authority to regulate transmission service. To facilitate the proper imputation of transmission revenues derived from existing bundled wholesale power contracts, the commission is also requiring that utilities file with the commission a statement of the unbundled generation and transmission rates which apply to each of their existing bundled wholesale power contracts. The commission is deferring the question of whether power sales contracts should be filed for its review and approval. Contracts that result from solicitations in the integrated resource planning process will be filed for commission review, and the commission will have the opportunity for considering whether other contracts should also be filed for its review, as a part of its deliberations in that project.

Quality of Service

• 16 TAC 23.66

The amendment is adopted under the Public Utility Regulatory Act, 1995, §§1.101, 2.056, 2.057, and 2.216; Texas Civil Statutes, Article 1446c-0, §§1.101, 2.0572.216. Section 1.101 provides the Public Utility Commission of Texas with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, §2.056 authorizes it to require utilities to provide transmission service, §2.057 directs it to adopt rules relating to transmission service, and §2.216 prohibits public utilities from engaging in anti-competitive conduct.

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

Issued in Austin, Texas, on February 12, 1996.

TRD-9601999 Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas

Effective date: March 4, 1996

Proposal publication date: November 17, 1995

For further information, please call: (512) 458-0100

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The repeal is adopted under the Public Utility Regulatory Act, 1995, §§1.101, 2.056, 2.057, and 2.216, Texas Civil Statutes, Article 1446c-0, §§1.101, 2.0572.216. Section 1.101 provides the Public Utility Commission of Texas with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, §2.056 authorizes it to require utilities to provide transmission service, §2.057 directs it to adopt rules relating to transmission service, and §2.216 prohibits public utilities from engaging in anti-competitive conduct.

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

Issued in Austin, Texas, on February 12, 1996.

TRD-9602007 Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas

Effective date: March 4, 1996

Proposal publication date: November 17, 1995

For further information, please call: (512) 458-0100

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• 16 TAC 23.66

The new section is adopted under the Public Utility Regulatory Act, 1995, §§1.101, 2.056, 2.057, and 2.216, Texas Civil Statutes, Article 1446c-0, §§1.101, 2.0572.216. Section 1.101 provides the Public Utility Commission of Texas with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, §2.056 authorizes it to require utilities to provide transmission service, §2.057 directs it to adopt rules relating to transmission service, and §2.216 prohibits public utilities from engaging in anti-competitive conduct.

§23.67. Open-access Comparable Transmission Service.

(a) Purpose; application. The purpose of this section is to increase competition in the sale of electric energy at wholesale within the Texas intrastate utility network, to preserve the reliability of electric service, and to enhance economic efficiency in the production and consumption of electricity. Unless otherwise explicitly provided, this section applies to utilities in ERCOT. Non-ERCOT transmission owning utilities shall be deemed to be in compliance with the requirements of PURA §2.057 at such time as they receive approval from the Federal Energy Regulatory Commission of a tariff for open-access, comparable wholesale transmission service. Non-ERCOT utilities shall file such approved tariffs, and any approved modifications thereto, with the commission within thirty days of the approval of these tariffs or tariff amendments by the Federal Energy Regulatory Commission.

(b) Definitions. As used in this section, the following terms have the following meanings:

(1) Ancillary Services are those services necessary to support the transmission of energy from resources to loads while maintaining reliable operation of transmission providers' transmission systems in accordance with good utility practice.

(2) ERCOT is the Electric Reliability Council of Texas and, in a geographic sense, refers to the area served by electric utilities that are not synchronously interconnected with electric utilities outside of the State of Texas.

(3) Existing transmission contract means any contract for transmission or wheeling services that takes effect prior to the effective date of this rule.

(4) Good Utility Practice means the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at the lowest reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act, to the exclusion of all others, but rather to be practices, methods, or acts that are generally accepted in ERCOT and consistently adhered to by the transmission providers. Good Utility Practice shall not be used as a basis to unreasonably withhold access to transmission service.

(5) An interconnection agreement is an agreement that sets forth requirements for physical connection between an eligible transmission customer and transmission providers. Transmission providers must have such an agreement with all transmission providers to whom they are physically interconnected.

(6) Planned service is the use by a transmission customer of the transmission provider's transmission system for the delivery of power from planned resources to the customer's loads. The designation of resources as planned resources is governed by §23.70 of this title (relating to terms and conditions of comparable open-access transmission service).

(7) Transmission losses are energy losses resulting from the transmission of power over the interconnected transmission network. Generators providing power to the network must generate sufficient energy to offset such losses on an instantaneous basis, and this rule prescribes the compensation for persons that generate the energy to offset such losses.

(8) Transmission service is a service that allows a utility, qualifying facility, power marketer, or exempt wholesale generator to use the transmission and distribution facilities of other utilities to efficiently and economically utilize generation resources to reliably serve its loads and to deliver power to another utility, a qualifying facility, a power marketer, or an exempt wholesale generator. Transmission service provided pursuant to this section may include the use of the transmission systems of all of the utilities in ERCOT that own transmission facilities, including transmission to, from, and over the direct current interconnections between ERCOT and the Southwest Power Pool.

(9) Unplanned service is the use by a transmission customer of the transmission provider's transmission system for the delivery of power from resources that the customer has not designated as planned resources to the customer's loads.

(10) Utility is defined in accordance with the Act, §2.0011, except that it includes municipal corporations and river authorities that are not otherwise subject to the commission's ratesetting authority.

(c) Obligation to provide transmission service. Each electric utility in ERCOT that owns transmission facilities shall provide wholesale transmission service to other electric utilities, power marketers, exempt wholesale generators, and qualifying facilities, in accordance with the provisions of this section. Each electric utility that owns transmission facilities shall file a tariff for such transmission service and shall take transmission service for all of its uses of its own transmission facilities in accordance with the terms of its tariff for transmission service.

(1) Each utility that owns transmission facilities shall provide transmission service to other utilities, power marketers,

exempt wholesale generators, and qualifying facilities on the same terms and conditions that it provides transmission service to itself. Where a utility has contracted for another person with which it is not affiliated to operate its transmission facilities, the person assigned to operate the facilities shall carry out the operating responsibilities of the utility under this section.

(2) The obligation to provide comparable wholesale transmission service applies to a utility, even if the utility's interconnection with the customer is through distribution, rather than transmission facilities. In such cases, utilities that own facilities for the delivery of electricity to an electric utility purchasing electricity at wholesale using facilities rated at less than 60 kilovolts shall provide to other utilities, power marketers, exempt wholesale generators and qualifying facilities access to the delivery points of the purchasing utility on the same pricing, terms and conditions used by the transmission service provider in serving similar primary metered distribution level customers. If applicable, electric utilities shall file tariffs for such service for commission review and approval within 60 days of the adoption of this rule.

(3) The obligation to provide transmission service includes the obligation to provide var support.

(d) Obligation to provide ancillary services. Each electric utility in ERCOT that owns 100 megawatts or more of generation facilities shall provide ancillary services that are related to the provision of transmission service on a non-discriminatory and comparable basis. A utility that owns less than 100 megawatts of generation may file a tariff to provide ancillary services. A utility may request limitations on its obligation to provide such services, based on the size of the utility and the cost of acquiring the equipment necessary to provide a service, based on its use of tax-exempt financing instruments, or for other good cause. The utility has the burden of establishing that any such limitation is reasonable and shall include the limitation in its tariffs. Any generator may compete to provide ancillary services to transmission customers. Each electric utility that provides ancillary services shall file a tariff for such services and shall take such services for its own wholesale and retail operations, in accordance with the terms of its tariff for ancillary services. Ancillary services shall be discretely priced and separately provided on a non-discriminatory basis to all wholesale market participants. At a minimum, the following services shall be unbundled:

(1) Responsive reserve consists of the daily operating reserves that are intended to help restore the frequency of the interconnected transmission system within the first few minutes of an event that causes a significant deviation from the standard frequency. Responsive reserves may be provided by unloaded generation facilities that are on line, interruptible load controlled by high set under-frequency relays, or from DC tie response that stops frequency decay.

(2) Spinning reserve consists of the net generation capability on line that is not loaded, but could be loaded, and capability of a DC tie that can be utilized in a specified time.

(3) Static scheduling is a service that establishes specific hourly schedules for the transmission of power, by coordinating the event among the affected control areas.

(4) Dynamic scheduling is the provision of the remote load regulation for a load.

(5) Load following service provides hour-to-hour changes in the output of generating unit to match changes in the load being served.

(6) Load regulation service provides intra-hour changes in the output of generating units to match changes in the load being served.

(7) Generation-schedule imbalance service compensates for energy mismatches between the scheduled and actual transmission of power between the seller of power and a provider of transmission service in the generation host's control area.

(8) Load-schedule imbalance service compensates for energy mismatches between the scheduled and actual transmission of power between the seller of power and a provider of transmission service in the load host's control area.

(9) Schedule backup service consists of scheduling services, capacity and energy required to replace a capacity resource on a planned or scheduled basis.

(10) Automatic backup service consists of scheduling services, capacity and energy required to replace a capacity resource on an unscheduled basis.

(11) Emergency energy service consists of scheduling services, capacity and energy required to replace a capacity resource in an emergency, where a customer makes prior arrangements for such services.

(e) Additional ancillary services. If an ancillary service not listed in this section is required by a customer, the utility may supply the service, if feasible. The definition and price may be determined by negotiations between the service provider and the customer. The service may be provided immediately upon the execution of a contract between the parties, but the service will be subject to approval by the commission. A utility that provides an additional ancillary service not specified in its tariff shall file a modification to its tariff within thirty days that makes this service available to all wholesale market participants on a non-discriminatory basis. Any offer of a new ancillary service shall be posted on the ERCOT electronic transmission information network.

(f) Charges for ancillary services. A utility may offer ancillary services at rates that are negotiated with the customer, subject to a price floor and ceiling and subject to the non-discrimination requirements in this section. For services that are related to the production of electricity, the price ceiling shall be based on the utility's average embedded cost of generating capacity, and the price floor will be calculated using the methodology prescribed in the Act, §2.001(c). Revenues from ancillary services shall be credited to native-load customers. Any ancillary service discounts must be made available to all wholesale market participants on a non-discriminatory basis; in particular, if a utility offers an ancillary service associated with a transaction, it must make that same offer of service available to all parties interested in that transaction on a non-discriminatory basis. A utility may not require the purchase of generation services from it as a condition for the provision of ancillary transmission services or for discounts on such services. A utility may not impose more than one capacity charge for capacity-related ancillary services associated with a single transaction, if the services may be provided by the same generating capacity.

(g) Facilities charges for transmission service. Each electric utility in ERCOT shall pay a facilities charge for transmission services. Transmission customers shall specify the planned resources to serve their load and reserve requirements, in accordance with §23.70 of this title, and shall incur both facilities charges and loss compensation charges for planned service. Customers may use unplanned service and shall not incur any additional facilities charges for such service but shall incur loss compensation charges.

(1) The facilities charge shall consist of an access fee and an impact fee. The costs included in the access fee will be seven-tenths of the annual cost of transmission service for transmission-owning utilities in ERCOT. Each utility will pay a share of these costs, based on its share of the total load in ERCOT. The costs included in the impact fee will be three-tenths of each transmission-owning utility's annual cost of transmission service. Each utility will pay an impact fee to the utilities that own transmis-

sion facilities, based on the impact of transmitting its resources to its loads, calculated using the vector-absolute megawatt-mile method and assessing impacts using each utility's transmission costs. Payments shall be made by means of monthly facilities charges, which shall be determined in transmission ratemaking proceedings conducted periodically, at such intervals as the commission determines is appropriate.

(2) The annual cost of transmission service for each utility shall be based on the annual expenses in FERC expense accounts 560-573 (or accounts with similar contents) plus the depreciation, federal income tax, and other associated taxes, and the commission-allowed rate of return based on FERC plant accounts 350-359 (or accounts with similar contents), less accumulated depreciation and accumulated deferred Federal income taxes. To the extent that the FERC system of accounts does not establish a clear distinction between transmission and distribution facilities or between generation and transmission facilities, the following facilities are deemed to be transmission facilities:

(A) power lines, substations, and associated facilities, operated at 60 kilovolts or above, including radial lines operated at or above 60 kilovolts;

(B) substation facilities on the high side of the transformer, in a substation where power is transformed from a voltage higher than 60 kilovolts to a voltage lower than 60 kilovolts or is transformed from a voltage lower than 60 kilovolts to a voltage higher than 60 kilovolts; and

(C) the cost of the DC interconnections with the Southwest Power Pool that the commission determines is properly allocable to ERCOT customers, to the extent that the rules or tariffs governing them permit non-discriminatory access by all wholesale market participants and to the extent that the DC interconnections are actually used to import power into ERCOT.

(3) In determining the annual transmission cost under paragraph (1) of this subsection, the following expenses shall not be included:

(A) expenses of a utility that are otherwise included in its annual transmission cost for service under any existing transmission contract (including the value of goods and services exchanged for transmission service);

(B) transmission expenses paid to another utility in accordance with this section; and

(C) expenses for transmission service outside of ERCOT.

(4) For utilities whose rates are not otherwise subject to the commission's ratesetting authority, the rate of return shall be the utility's actual cost of capital plus a margin to provide a reasonable coverage ratio. In a transmission ratemaking proceeding, the commission may approve a current rate of return for a utility or a reasonable coverage ratio.

(5) Each time ERCOT transmission rates are established by the commission, the load-ratio share for a utility shall be determined by dividing the utility's system demand at the time of the most recent ERCOT system coincident peak demand by the coincident peak demand of the ERCOT system. As used in this section, utility system demand is the average of the demand of the utility's retail and wholesale customers for hours that are coincident with the most recent ERCOT system coincident peak demand. In determining utility demand and ERCOT system coincident peak demand, the actual demand on utility systems shall be considered, and the ERCOT system coincident peak demand shall be an average of the highest aggregate demand in each of the months of June, July, August, and September of the relevant period. Actual utility demand shall be calculated based on the utility's net hourly generation, plus wholesale purchases, minus wholesale sales.

(6) The megawatt-mile impact of transmitting resources to load shall be calculated using the loads and resources at the ERCOT peak and shall be calculated by the independent system operator or by an independent consultant. Megawatt-mile rates and impacts shall be calculated in the manner prescribed in §23.70 of this title.

(7) The commission may adopt rate-filing requirements that provide additional details concerning the costs that may be included in the annual transmission cost and how such costs should be reported in a proceeding to establish transmission rates.

(8) In adopting facilities charges under this section, the commission shall apply a transition mechanism for a period of three years to reduce the impact of the charges under this section on a utility or its customers. In applying this transition mechanism, the commission shall calculate the "unadjusted rate impact" for each utility, which shall be the difference between the facilities charge and the transmission revenues a utility would receive under this section, both calculated at the time rates are first determined under this section and without regard to any adjustment under this paragraph. An adjustment shall be made to the facilities charge, such that the difference between the facilities charge incurred by a utility and its annual transmission cost:

(A) for the first twelve months that the facilities charge applies, does not exceed ten percent of the unadjusted rate impact;

(B) for the next twelve months that the facilities charge applies, does not exceed 20% of the unadjusted rate impact; and

(C) for the next twelve months that the facilities charge applies, does not exceed 30% of the unadjusted rate impact.

(9) The commission may prescribe facilities charges that exceed the limitations in paragraph (8) of this subsection to account for any transmission revenues that a utility receives under an existing transmission contract.

(h) Compensation for losses. In addition to the facilities charge prescribed in subsection (g) of this section, a utility, exempt wholesale generator, qualifying facility, or power marketer that uses transmission service to transmit power to its loads shall compensate affected control-area utilities for energy losses resulting from such transmission service. Losses shall be calculated by the independent system operator established under subsection (p) of this section under a method approved by the commission.

(1) A matrix of losses for the transmission of power shall be developed and, upon approval by the commission, shall govern the calculation of losses for transmission service. Until the commission approves a loss matrix, ERCOT loss matrices may be used for determining the losses. Utilities relying on existing ERCOT loss matrices as an interim measure shall file copies of the matrices with the commission filing clerk.

(2) Matters that require commission approval under this subsection shall be submitted for approval with the filing of a transmission cost of service, in accordance with subsection (m) of this section.

(i) Inadvertent energy. The treatment of and compensation for inadvertent energy flows shall be in accordance with the relevant ERCOT guides.

(j) Transmission revenue. The access-fee component of revenues from the transmission facilities charges prescribed in subsection (g) of this section shall be divided among the utilities that own transmission facilities on the basis of their transmission cost.

(1) Each utility's share of the revenue shall be calculated by multiplying seven-tenths of the total transmission revenue by the ratio of the utility's annual transmission cost to the annual transmission cost for all of the utilities in ERCOT.

(2) Transmission revenues from transmission of electric energy out of ERCOT over the DC ties shall, to the extent that the costs of the DC ties are included in the transmission costs prescribed in subsection (g) of this section, be credited to all utilities that have incurred a transmission facilities charge under this section for the period in which the service takes place. The revenues shall be allocated among these utilities in the manner prescribed above.

(k) Resale of transmission rights. ERCOT utilities shall permit owners of transmission and ancillary transmission service rights to resell those rights to other wholesale market participants.

(l) Redispatch. ERCOT utilities shall provide redispatch services in accordance with §23.70 of this title.

(m) Procedures for establishing rates and terms and conditions. Not later than 60 days after the effective date of this rule, all utilities in ERCOT that are required to provide transmission service or ancillary services under this section shall file proposed tariffs for such services. The proposed tariffs shall comply with the provisions of this rule and §23.70 of this title. The commission may consolidate these proceedings to determine transmission rates and revenue allocations under subsections (g) and (j) of this section or to consider common issues of fact, law, or policy. Utilities that operate a control area shall also file information that will permit the commission to determine loss factors for transmission service. The filings under this subsection shall include supporting information showing the basis for the calculation of the floor and ceiling prices for ancillary services and proposed factors or methods for determining transmission losses.

(1) Utilities shall file modifications to their tariffs for transmission service, if the commission makes substantial revisions in the rates or terms or conditions for transmission service. The commission may revise the transmission rates and revenue allocations under subsections (g) and (j) of this section, without reviewing the transmission cost of service, for events that affect only the allocation of costs and revenues among utilities, such as the conversion of a customer from bundled wholesale service to transmission service under this section. Transmission tariffs, transmission rates, and load ratio share allocations may be modified only upon issuance of an order by the commission.

(2) A utility may request other modifications to its tariffs for transmission or ancillary services only after notifying affected persons of the proposed changes, soliciting their views, and attempting to resolve any disagreement over the changes through the informal dispute resolution process established under subsection (s) of this section.

(n) Construction of new facilities. If additional transmission facilities or interconnections between utilities are needed to provide transmission service pursuant to a request for such service, the utility or utilities where the constraint exists shall acquire the facilities necessary to permit the transmission service to be provided, unless the utility can use redispatch or other more economical means of making transmission capacity available for the requested transmission service. If additional facilities are needed to provide ancillary services to a customer requesting such service, the utility shall acquire the facilities necessary to permit the ancillary service to be provided.

(1) If, in order to provide ancillary services, a utility must construct new facilities, the ancillary services customer may be required to enter a long-term contract for ancillary service or make a contribution in aid of construction to cover all or a part of the cost of acquiring the new facilities, to the extent that the acquisition of the additional facilities is for the customer's benefit.

(2) A utility, qualifying facility, exempt wholesale generator, or power marketer, that is requesting transmission service may be required to make a contribution in aid of construction to cover all or a part of the cost of acquiring the facilities, if:

(A) the acquisition of the additional facilities would impair the tax- exempt status of obligations issued by the control-area utility, or

(B) if the acquisition of the additional facilities is primarily for the benefit of the utility, qualifying facility, exempt wholesale generator, or power marketer requesting the transmission service.

(o) Functional unbundling and cost separation. Within 60 days of the adoption of these amendments, each utility in ERCOT shall make a filing with the commission to separate its costs and rates, based on the costs associated with the utility's generation, transmission, and distribution operations. The cost and rate separation requirements prescribed in this section shall not require the statement of unbundled generation, transmission, and distribution rates on all customer bills.

(1) Each utility subject to this rule that owns 100 megawatts or more of generating capacity shall functionally separate the operation of its transmission facilities and the operation of its wholesale power purchase and sale activities. Any information exchanges between these units and other utility personnel shall be governed by the information exchange standards contained in §23.70 of this title.

(2) Utility personnel shall be physically separated to the maximum extent practicable and necessary to accomplish the purposes of this section. Each utility subject to this rule that owns 100 megawatts or more of generating capacity shall make a filing to implement the requirements of this subsection, including written procedures governing the exchange of information and physical separation of personnel among its functionally separated organizational units. This filing shall be submitted in accordance with the timeframe specified in §23.70 of this title.

(3) Utilities may request limitations on the requirement to separate their personnel, based on a showing that complete physical separation would impair the reliability of electric service. The utility bears the burden of demonstrating that the separation of personnel requirements contained in this rule would impair system reliability.

(p) ERCOT independent system operator and electronic transmission information network. As of the effective date of this rule, transmission owning utilities shall make available to potential transmission customers information in their control concerning the capability of transmission facilities to provide transmission service. Within 120 days after the adoption of this rule, the utilities in ERCOT, in collaboration with other wholesale market participants, shall make a joint filing with the commission to establish an ERCOT independent system operator and an integrated ERCOT electronic transmission information network.

(1) The ERCOT independent system operator shall be formed and administered through procedures that allow equal participation by all wholesale market participants. The independent system

operator's responsibilities shall include, but not be limited to the following:

(A) the daily administration of the ERCOT transmission tariffs, including alternative dispute resolution procedures and implementation of the loss compensation mechanism approved by the commission;

(B) ensuring that control areas perform the instantaneous balancing of ERCOT generation and load;

(C) coordinating the scheduling of ERCOT generation and transmission transactions;

(D) directing the curtailment and redispatch of ERCOT generation and transmission transactions on a non-discriminatory basis to preserve system reliability in emergencies, including determining how any curtailment or redispatch would be accomplished, the cost of the redispatch, and the assignment of redispatch cost responsibility, subject to the relevant provisions of this section and §23.70 of this title;

(E) analyzing, coordinating, and directing the redispatch of ERCOT generation transactions on a non-discriminatory basis for economic purposes to free up transmission capacity, including determining how any curtailment or redispatch would be accomplished, the cost of the redispatch, and the assignment of redispatch cost responsibility, subject to the relevant provisions of this section and §23.70 of this title;

(F) the administration of the ERCOT electronic transmission information network;

(G) the administration of transaction accounting among market participants; and

(H) serving as a single point of contact for the initiation of transmission transactions.

(2) The ERCOT independent system operator shall not purchase or sell bulk electricity. The ERCOT independent system operator shall not dispatch generation facilities, but shall have full authority to direct the redispatch of generation facilities under the circumstances specified in this section. Parties shall not be required to disclose to the ERCOT independent system operator the prices for which they have agreed to buy or sell electricity. The ERCOT independent system operator shall have a fiduciary responsibility to maintain the confidentiality of the information with which it is entrusted. Any disputes regarding the administration, procedures, and conduct of the ERCOT independent system operator may be submitted to the commission for resolution after completion of the alternative dispute resolution procedures described in this section

(3) To the extent that this section or §23.70 of this title assign a responsibility to another person or entity in conjunction with or in lieu of the ERCOT independent system operator, the independent system operator shall exclusively assume those specified responsibilities at such time as the formation of the independent system operator is approved by the commission.

(4) The ERCOT electronic transmission information network shall permit utilities, qualifying facilities, power marketers, and exempt wholesale generators to have contemporaneous, real-time access to information concerning the availability of transmission service and the availability and cost of ancillary services on a non-discriminatory basis. Transmission owning utilities in ERCOT shall rely upon this information network to obtain contemporaneous access to information about the ERCOT transmission system, and shall not have access to any transmission information not available on the network.

(5) The ERCOT electronic transmission information network will, at a minimum, provide all information required under any FERC regulations governing electronic transmission information networks which apply to utilities under FERC jurisdiction. Information that a utility is required to make available to market participants in accordance with subsection (o) of this section shall be posted on the information network. The information on the network shall include, but not be limited to:

(A) total and available transfer capability for transmission of energy between ERCOT control areas and to, from, and over the DC interconnections with the Southwest Power Pool;

(B) ERCOT transmission prices;

(C) ancillary service prices, including any pricing discounts for such services;

(D) requests and offers for transmission service and ancillary transmission services on the primary and secondary transmission markets;

(E) transmission scheduling data;

(F) transmission service curtailment and interruption data; and

(G) information necessary to verify redispatch cost calculations.

(6) The methodology used and data required to independently reproduce information related to the total and available transfer capability for the transmission of energy between ERCOT control areas and to, from, and over the DC ties shall be provided upon request to any transmission customer.

(7) The electronic information system shall also be capable of accommodating generation bids and offers.

(8) The use of the electronic information network is required for utilities for offering ancillary services, requesting transmission service, and responding to requests for transmission service. Market participants other than utilities may post offers to sell ancillary services on the information network.

(q) Scheduling. Control area utilities shall schedule a transmission customer's resources and accommodate changes to schedules requested by transmission customers. Control area utilities shall implement requested schedules and changes to schedules for third party transmission customers upon the same terms and conditions and within the same time frames applied by control area utilities in scheduling resources to serve their native load customers.

(r) Curtailment of service. In an emergency situation, control-area utilities may interrupt transmission service, if necessary, to preserve the stability of the transmission network and service to customers. Any interruption shall be based on operational factors and shall not accord a higher priority to the utility's retail and wholesale customers than to its customers taking transmission service. Priority shall be accorded to planned transmission events over unplanned events. Service to all customers shall be restored as quickly as possible. The control-area utility shall provide notice of any such interruption to affected wholesale and transmission cus-

tomers and remote suppliers of generation. The control-area utility shall also report the interruption to the commission, together with a description of the events leading to the interruption, the services interrupted, the duration of the interruption, and the steps taken to restore service.

(s) Alternative dispute resolution. In the event that a dispute arises over the provision of transmission service or ancillary services or the pricing or other terms or conditions of such services, the parties to the dispute shall engage in mediation or other alternative means for resolving the dispute, prior to filing a complaint with the commission.

(1) Such disputes shall be referred for resolution to a designated senior representative of each of the parties to the dispute. Such representatives shall make a good faith effort to resolve the dispute on an informal basis as promptly as practicable. In the event parties are unable to resolve the dispute within a mutually agreeable time period, they shall either refer the matter to arbitration in accordance with the procedures in this subsection or shall engage in mediation with the assistance of a neutral third party of their choice who has training or experience in mediation.

(A) The secretary of the commission shall administer the arbitration. The secretary shall maintain a commission-approved list of qualified persons available to serve on arbitration panels who are knowledgeable in electric utility matters, including electricity transmission and bulk power issues, to be selected from a list of persons proposed by owners and users of the transmission system wishing to participate in the development of the list. The commission shall select at least one name submitted by each stakeholder for the list. The secretary shall also maintain a separate list of attorneys experienced in arbitration who may be available to chair the arbitration panels. The commission shall approve the fee schedule to be charged by all panel members.

(B) A party shall initiate arbitration by filing a letter with the secretary of the commission requesting that arbitration be scheduled. A copy of the letter shall be served upon the other party to the dispute at the same time the letter is filed with the secretary. The secretary shall make all necessary arrangements for arbitration to commence within ten working days of receipt of the letter.

(C) Only parties to the dispute may participate in the arbitration.

(2) Any arbitration initiated under this subsection shall be conducted before a three-member arbitration panel. Each party shall choose one arbitrator from the approved list of panel members. In the even there are more than two parties to the dispute, the parties shall jointly select the two arbitrators. The two arbitrators chosen by the parties shall choose the Chairman of the arbitration panel. If the two arbitrators chosen by the parties are unable to agree on the selection of a Chairman, they will be dismissed and the parties shall select two different arbitrators from the approved list. The arbitrators are not required to choose the Chairman from the names of persons on the commission's list so long as the person chosen is an attorney who is qualified as an arbitrator. Panel members chosen shall not have any current or past substantial business or financial relationships with any party to the arbitration (other than previous arbitration experience).

(3) The arbitrators shall provide each of the parties an opportunity to be heard and, except as otherwise provided herein, shall generally conduct the arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association and any applicable commission or Regional Transmission Group rules. The panel may request that the parties provide additional technical information relevant to the dispute. The Arbitration Panel shall render a decision within 30 calendar days from the closing of the evidentiary record of the Arbitration and shall notify the parties in writing of such decision and the reasons therefor. The decision shall not be considered precedent in any future proceeding.

(4) The arbitrators shall be authorized only to interpret and apply the provisions of the commission's rules relating to transmission and ancillary services, the utility's transmission tariff, and any service agreement entered into under that tariff and shall have no power to modify or change any of the above in any manner. The arbitrators may agree with the positions of one or more of the parties, or may recommend a compromise position. The final decision of the Arbitration Panel shall be filed in Central Records and shall be considered by the Office of Policy Development in preparing the Preliminary Order, should either party ask that the complaint be docketed and referred to the State Office of Administrative Hearings. The decision may be admitted in evidence in any such complaint proceeding.

(5) At such time as an ERCOT independent system operator is established and approved by the commission, the independent system operator shall be responsible for the administration of the dispute resolution procedures described in this subsection.

(6) Each party shall be responsible for the following costs, if applicable:

(A) its own costs incurred during the arbitration process;

(B) its pro rata share of the costs of the three arbitrators, pooled and shared evenly among the parties.

(7) The transaction which is the subject of the dispute shall be allowed to go forward pending the resolution of the dispute to the extent verifiable system reliability is not affected.

(8) Nothing in this section shall restrict the rights of any party to file a complaint with the commission under relevant provisions of the Public Utility Regulatory Act of 1995 or with the Federal Energy Regulatory Commission under the Federal Power Act or the right of a utility to seek changes in the rates or terms for transmission or ancillary services, following the completion of the informal dispute resolution procedures in this subsection. In addition, use or application of the arbitration provisions in this subsection does not affect the jurisdiction of the commission over any matters arising under this rule.

(t) Filing of contracts. Within 30 days of the effective date of this rule, utilities shall file with the commission all existing agreements, including interconnection agreements, governing the sale or purchase of generation, transmission, or ancillary services at wholesale. Utilities shall file all future interconnection agreements and agreements involving the sale or purchase of utility generation, transmission, or ancillary services at wholesale within 30 days of their execution. Within 60 days of the adoption of this rule, utilities shall file with the commission a statement of the unbundled generation and transmission rates which apply to each of their existing bundled wholesale power contracts. Upon a showing of good cause, appropriate portions of the filings required under this subsection may be subject to provisions of confidentiality to protect competitively sensitive information. Interconnection agreements are subject to commission review and approval upon request by any party to the agreement.

(u) Summary of required filings. This rule prescribes the filings that are set out below. The applicability and deadline for each filing are detailed in the relevant subsections of the rule:

(1) Tariff for wholesale transmission service, including ancillary transmission services, which complies with this rule and §23.70 of this title.

(2) Tariff for distribution level wholesale transmission service.

(3) Method for calculating the floor and ceiling prices for ancillary services.

(4) Currently used ERCOT loss compensation matrices.

(5) Proposed factors or methods for determining transmission losses.

(6) Information that permits the commission to determine loss compensation factors.

(7) Filing to separate costs and rates.

(8) Functional unbundling filing, including written procedures governing the exchange of information and physical separation of personnel among functionally unbundled organizational units.

(9) Filing to establish an ERCOT independent system operator.

(10) Filing to establish an ERCOT electronic transmission information network.

(11) Filing of all existing agreements, including interconnection agreements, governing the sale or purchase of generation, transmission, or ancillary services at wholesale.

(12) Filing to unbundle the generation and transmission rates contained in existing bundled wholesale contracts.

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

Issued in Austin, Texas, on February 12, 1996.

TRD-9602000 Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas

Effective date: March 4, 1996

Proposal publication date: November 17, 1995

For further information, please call: (512) 458-0100

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Telephone

• 16 TAC §23.92

The Public Utility Commission of Texas adopts an amendment to §23.92, concerning expanded interconnection, with changes to the proposed text as published in the October 6, 1995, issue of the *Texas Register* (20 TexReg 8130). The amendment concerns the provision of expanded interconnection between an incumbent local exchange carrier and another local exchange carrier and are added pursuant to the provisions of the Public Utility Regulatory Act of 1995, §3.456. The amendment requires an incumbent local exchange carrier to provide expanded interconnection to another local exchange carrier only if the second local exchange carrier agrees to provide expanded interconnection, in a like manner, to the incumbent local exchange carrier. The amendment establishes deadlines for filing tariff changes required by the rule.

The public benefit anticipated from enforcing this section is enhanced competition in the special access, private line and local transport markets which should increase incentives for efficiency, foster rapid deployment of advanced technologies that facilitate new and innovative services, and bring prices of the affected services closer to costs. It also provides additional service choices to customers who value redundancy and route diversity.

Initial comments on the proposed rule published in the *Texas Register* on October 6, 1995 were filed by AT&T Communications of the Southwest, Inc. (AT&T) and Southwestern Bell Telephone Company (SWBT). There were no reply comments on the proposed rule. None of the parties who attended the December 5, 1995 public hearing on the proposed rule offered any oral comments.

AT&T and SWBT concurred with the proposed amendment with one exception. Both AT&T and SWBT objected to the use of the term "dominant certificated telecommunications utility" on the grounds that such a term has not been defined in PURA 1995 and therefore use of the term could create confusion and ambiguity in the application of the rule. AT&T proposed revisions to the language in the section on applicability such that, first, the term "each dominant certified telecommunications utility (DCTU)" would be replaced with the term "each incumbent local exchange carrier (ILEC)" and, second, language would be added to require the application of the section to any LEC declared to be a dominant carrier. AT&T also suggested deleting all remaining references to DCTU in the proposed amendments in favor of retaining the language in the existing rule on expanded interconnection.

The Commission declines to adopt AT&T and SWBT's recommendation regarding the term "DCTU" and notes that in Project Number 14372 where the Commission adopted changes to substantive rules, the use of the term "DCTU" was considered appropriate. However, the term "DCTU" was used in Project Number 14372 to refer to dominant carriers providing local exchange telephone service. In recognition of the fact that special access and private line services are not considered part of local exchange telephone service according to PURA 1995, the Commission finds that it is preferable to use the term "dominant carrier" instead of the term "DCTU" since the term "dominant carrier" is broader and would include DCTUs as well as any other utility declared to be dominant by the Commission. All remaining references to DCTU in the rule have accordingly been replaced with the term "dominant carrier".

All comments, including any not specifically referenced herein, were fully considered by the Commission.

The amendment is adopted under Texas Civil Statutes, Article 1446c-0, §1. 101, which provide the Public Utility Commission of Texas with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §3.051, which authorizes the Commission to adopt rules, policies and procedures to protect the public interest and to provide equal opportunity to all telecommunications utilities in a competitive marketplace; and §3.456, which directs the commission to adopt rules for expanded interconnection.

Cross Index to Statutes: Texas Civil Statutes, Article 1446c-0.

§23.92. Expanded Interconnection.

(a) Applicability. Unless the context clearly indicates otherwise, the provisions relating to expanded interconnection for special access and/or private line services in this section apply to each carrier that is dominant with respect to special access services and that has interstate tariffs in effect that provide for expanded interconnection for special access services. Similarly, unless the context clearly indicates otherwise, the provisions relating to expanded interconnection for switched transport services in this section apply to each carrier that is dominant with respect to switched transport services and that has interstate tariffs in effect that provide for expanded interconnection for switched transport services. A carrier that is dominant with respect to local exchange telephone service is, by definition, also dominant with respect to switched transport services.

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

(1) Central Office–The location of the central switching unit of a dominant carrier where customer lines and trunks terminate and are interconnected with the rest of the network.

(2) Interconnection–The point in a network where a customer's transmission facilities interface with the dominant carrier's network under the provisions of this section.

(3) Interconnector–A customer that interfaces with the dominant carrier's network under the provisions of this section.

(4) Special Access–A transmission path connecting customer designated premises to each other either directly or through a hub or hubs where bridging, multiplexing or network reconfiguration

service functions are performed and includes all exchange access not requiring switching performed by the dominant carrier's end office switches.

(5) Switched Transport–Transmission between a dominant carrier's central office (including tandem-switching offices) and an interexchange carrier's point of presence.

(c) Expanded Interconnection for Special Access and Private Line Services.

(1) Expanded interconnection for DS1 and DS3 Special Access Services, and Special Access Services for which interstate expanded interconnection has been granted. Each dominant carrier that is subject to this section shall offer expanded interconnection as specified in this subsection for the services listed in subparagraphs (A)-(C) of this paragraph. The dominant carrier shall offer expanded interconnection for these services at the same locations, in the same manner, and, except for price, under the same terms and conditions as it offers expanded interconnection for interstate special access services, unless ordered otherwise by the commission. This paragraph applies to the following intrastate special access services:

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

(2) Expanded interconnection for all Special Access and Private Line Services. Each dominant carrier that is subject to this section shall offer expanded interconnection as specified in this subsection for the services listed in subparagraphs (A)-(B) of this paragraph. The dominant carrier shall offer expanded interconnection for these services at the same locations, in the same manner, and, except for price, under the same terms and conditions as it offers expanded interconnection for interstate special access services, unless ordered otherwise by the commission. This paragraph applies to the following intrastate services:

(A) all private line services, as that term is defined in §23.3 of this title (relating to Definitions); and

(B) (No change.)

(3) Tariff Provisions.

(A) Each dominant carrier that is subject to this section shall file tariff revisions to unbundle each service for which expanded interconnection shall be offered and to remove any resale or sharing restrictions for each such service. As used in this subparagraph, to unbundle means to make available, on an unrestricted basis, the individual rate elements necessary to provide a special access service or a private line service.

(B) Each dominant carrier that is subject to this section shall file tariffs to establish connection charges for the use of equipment and facilities that are associated with offerings of expanded interconnection under this subsection. Unless ordered otherwise by the commission, the definitions of such connection charges and the regulations governing their application shall be the same as those contained in the carrier's interstate expanded interconnection tariffs. The dominant carrier shall not impose a separate charge or rate element that is not included in its interstate tariffs for interconnection for special access services. The dominant carrier shall not impose a separate charge or rate element for interconnection for private line services that is not included in its tariffs for interconnection for special access services.

(4) Implementation. All dominant carriers subject to this section shall file tariff amendments in compliance with paragraph (3) of this subsection.

(A) Initial filing to implement paragraph (1) of this subsection. The dominant carrier shall file initial tariff amendments to implement the provisions of paragraph (1) of this subsection not later than 30 days after February 22, 1994, or within 60 days of being declared a dominant carrier.

(B) Initial filing to implement paragraph (2) of this subsection. The dominant carrier shall file initial tariff amendments to implement the provisions of paragraph (2) of this subsection not later than March 1, 1995 to be effective not later than May 1, 1995, unless suspended, or within 60 days of being declared a dominant carrier.

(C) Initial filings in compliance with this subsection shall be filed pursuant to §23.26 of this title (relating to New and Experimental Services). Initial tariff amendments filed in compliance with this subsection shall be filed pursuant to §23.26; provided, however, the provisions of §23.26(c)(6) shall not apply with respect to rates proposed in compliance with paragraph (3)(A) or (B) of this subsection if the dominant carrier proposes rates that are the same as the rates in effect for the carrier's interstate provision of the same, equivalent or substitutable service. Tariff revisions filed pursuant to this subsection shall not be combined in a single application with any other tariff revision.

(D) Additional filings. A dominant carrier shall make, within 15 days of the effective date of an interstate tariff providing for expanded interconnection, such additional tariff filings as are required to remain in compliance with this subsection. The proposed effective date of such additional tariff filings shall be not later than 60 days after the filing date, unless suspended.

(5) (No change.)

(d) Expanded Interconnection for Switched Transport Services.

(1) Expanded Interconnection for all Switched Transport Services. Each dominant carrier that is subject to this section shall offer expanded interconnection as specified in this subsection for all switched transport services at the same locations, in the same manner, and except for price, under the same terms and conditions as it offers expanded interconnection for interstate switched transport services, unless ordered otherwise by the commission.

(2) Tariff Provisions and Implementation. Each dominant carrier that is subject to this section shall file tariffs to establish connection charges for the use of equipment and facilities that are associated with offerings of expanded interconnection under this subsection.

(A) (No change.)

(B) Absent additional costs, the dominant carrier shall impose a single charge when the same facilities are used to provide expanded interconnection for both special access and switched transport services. If additional facilities are used, the dominant carrier may assess additional cost-based connection charge subelements for the use of such additional facilities.

(C) The dominant carrier shall not impose a separate charge or rate element that is not included in its interstate tariffs for interconnection for switched transport services.

(D) A dominant carrier shall apply nonrecurring reconfiguration charges in a neutral manner to customers of either the interconnector or dominant carrier unless justified by specific

February - December 1996 Publication Schedule

The following is the February-December 1996 Publication Schedule for the *Texas Register*. Listed below are the deadline dates for these issues of the *Texas Register*. Because of printing schedules, material received after the deadline for an issue cannot be published until the next issue. Generally, deadlines for a Tuesday edition of the *Texas Register* are Monday and Wednesday of the previous week, and deadlines for a Friday edition are Wednesday of the previous week and Monday of the week of publication. No issues will be published on February 23, March 15, November 8, December 3, and December 31. An asterisk beside a publication date indicates that the deadlines have been moved because of state holidays.

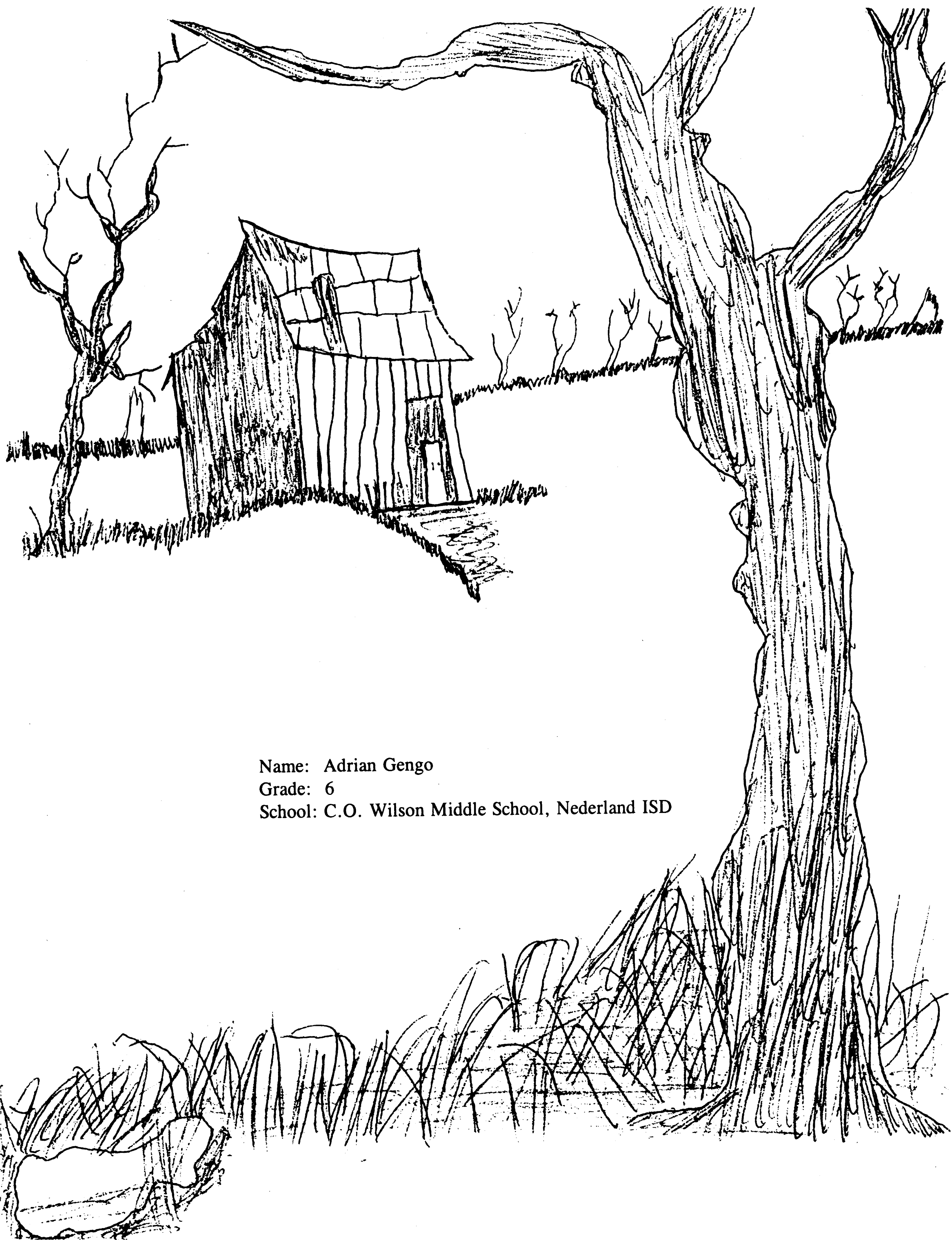
FOR ISSUE PUBLISHED ON:	DEADLINES FOR RULES BY 10 A.M.	DEADLINES FOR MISCELLANEOUS DOCUMENTS BY 10 A.M.	DEADLINES FOR OPEN MEETINGS BY 10 A.M.
9 Friday, February 2	Wednesday, January 24	Monday, January 29	Monday, January 29
10 Tuesday, February 6	Monday, January 29	Wednesday, January 31	Wednesday, January 31
11 Friday, February 9	Wednesday, January 31	Monday, February 5	Monday, February 5
12 Tuesday, February 13	Monday, February 5	Wednesday, February 7	Wednesday, February 7
13 Friday, February 16	Wednesday, February 7	Monday, February 12	Monday, February 12
14 Tuesday, February 20	Monday, February 12	Wednesday, February 14	Wednesday, February 14
Friday, February 23	*No Issue Published*		
15 Tuesday, February 27	*Tuesday, February 20	Wednesday, February 21	Wednesday, February 21
16 Friday, March 1	Wednesday, February 21	Monday, February 26	Monday, February 26
17 Tuesday, March 5	Monday, February 26	Wednesday, February 28	Wednesday, February 28
18 Friday, March 8	Wednesday, February 28	Monday, March 4	Monday, March 4
19 Tuesday, March 12	Monday, March 4	Wednesday, March 6	Wednesday, March 6
Friday, March 15	*No Issue Published*		
20 Tuesday, March 19	Monday, March 11	Wednesday, March 13	Wednesday, March 13
21 Friday, March 22	Wednesday, March 13	Monday, March 18	Monday, March 18

22 Tuesday, March 26	Monday, March 18	Wednesday, March 20	Wednesday, March 20
23 Friday, March 29	Wednesday, March 20	Monday, March 25	Monday, March 25
24 Tuesday, April 2	Monday, March 25	Wednesday, March 27	Wednesday, March 27
25 Friday, April 5	Wednesday, March 27	Monday, April 1	Monday, April 1
Tuesday, April 9	*First Quarterly Index*		
26 Friday, April 12	Wednesday, April 3	Monday, April 8	Monday, April 8
27 Tuesday, April 16	Monday, April 8	Wednesday, April 10	Wednesday, April 10
28 Friday, April 19	Wednesday, April 10	Monday, April 15	Monday, April 15
29 Tuesday, April 23	Monday, April 15	Wednesday, April 17	Wednesday, April 17
30 Friday, April 26	Wednesday, April 17	Monday, April 22	Monday, April 22
31 Tuesday, April 30	Monday, April 22	Wednesday, April 24	Wednesday, April 24
32 Friday, May 3	Wednesday, April 24	Monday, April 29	Monday, April 29
33 Tuesday, May 7	Monday, April 29	Wednesday, May 1	Wednesday, May 1
34 Friday, May 10	Wednesday, May 1	Monday, May 6	Monday, May 6
35 Tuesday, May 14	Monday, May 6	Wednesday, May 8	Wednesday, May 8
36 Friday, May 17	Wednesday, May 8	Monday, May 13	Monday, May 13
37 Tuesday, May 21	Monday, May 13	Wednesday, May 15	Wednesday, May 15
38 Friday, May 24	Wednesday, May 15	Monday, May 20	Monday, May 20
39 Tuesday, May 28	Monday, May 20	Wednesday, May 22	Wednesday, May 22
40 Friday, May 31	Wednesday, May 22	*Friday, May 24	*Friday, May 24
41 Tuesday, June 4	*Tuesday, May 28	Wednesday, May 29	Wednesday, May 29
42 Friday, June 7	Wednesday, May 29	Monday, June 3	Monday, June 3
43 Tuesday, June 11	Monday, June 3	Wednesday, June 5	Wednesday, June 5
44 Friday, June 14	Wednesday, June 5	Monday, June 10	Monday, June 10
45 Tuesday, June 18	Monday, June 10	Wednesday, June 12	Wednesday, June 12
46 Friday, June 21	Wednesday, June 12	Monday, June 17	Monday, June 17

47 Tuesday, June 25	Monday, June 17	Wednesday, June 19	Wednesday, June 19
48 Friday, June 28	Monday, June 19	Wednesday, June 24	Wednesday, June 24
49 Tuesday, July 2	Wednesday, June 24	Wednesday, June 26	Wednesday, June 26
50 Friday, July 5	Wednesday, June 26	Monday, July 1	Monday, July 1
51 Tuesday, July 9	Monday, July 1	Wednesday, July 3	Wednesday, July 3
Friday, July 12	*2nd Quarterly Index*		
52 Tuesday, July 16	Monday, July 8	Wednesday, July 10	Wednesday, July 10
53 Friday, July 19	Wednesday, July 10	Monday, July 15	Monday, July 15
54 Tuesday, July 23	Monday, July 15	Wednesday, July 17	Wednesday, July 17
55 Friday, July 26	Wednesday, July 17	Monday, July 22	Monday, July 22
56 Tuesday, July 30	Monday, July 22	Wednesday, July 24	Wednesday, July 24
57 Friday, August 2	Wednesday, July 24	Monday, July 29	Monday, July 29
58 Tuesday, August 6	Monday, July 29	Wednesday, July 31	Wednesday, July 31
59 Friday, August 9	Wednesday, July 31	Monday, August 5	Monday, August 5
60 Tuesday, August 13	Monday, August 5	Wednesday, August 7	Wednesday, August 7
61 Friday, August 16	Wednesday, August 7	Monday, August 12	Monday, August 12
62 Tuesday, August 20	Monday, August 12	Wednesday, August 14	Wednesday, August 14
63 Friday, August 23	Wednesday, August 14	Monday, August 19	Monday, August 19
64 Tuesday, August 27	Monday, August 19	Wednesday, August 21	Wednesday, August 21
65 Friday, August 30	Wednesday, August 21	Monday, August 26	Monday, August 26
66 Tuesday, September 3	Monday, August 26	Wednesday, August 28	Wednesday, August 28
67 Friday, September 6	Wednesday, August 28	*Friday, August 30	*Friday, August 30
68 Tuesday, September 10	*Tuesday, September 3	Wednesday, September 4	Wednesday, September 4
69 Friday, September 13	Wednesday, September 4	Monday, September 9	Monday, September 9
70 Tuesday, September 17	Monday, September 9	Wednesday, September 11	Wednesday, September 11
71 Friday, September 20	Wednesday, September 11	Monday, September 16	Monday, September 16

72 Tuesday, September 24	Monday, September 16	Wednesday, September 18	Wednesday, September 18
73 Friday, September 27	Wednesday, September 18	Monday, September 23	Monday, September 23
74 Tuesday, October 1	Monday, September 23	Wednesday, September 25	Wednesday, September 25
75 Friday, October 4	Wednesday, September 25	Monday, September 30	Monday, September 30
Tuesday, October 8	*Third Quarterly Index*		
76 Friday, October 11	Wednesday, October 2	Monday, October 7	Monday, October 7
77 Tuesday, October 15	Monday, October 7	Wednesday, October 9	Wednesday, October 9
78 Friday, October 18	Wednesday, October 9	Monday, October 14	Monday, October 14
79 Tuesday, October 22	Monday, October 14	Wednesday, October 16	Wednesday, October 16
80 Friday, October 25	Wednesday, October 16	Monday, October 21	Monday, October 21
81 Tuesday, October 29	Monday, October 21	Wednesday, October 23	Wednesday, October 23
82 Friday, November 1	Wednesday, October 23	Monday, October 28	Monday, October 28
83 Tuesday, November 5	Monday, October 28	Wednesday, October 30	Wednesday, October 30
Friday, November 8	*No Issue Published*		
84 Tuesday, November 12	Monday, November 4	Wednesday, November 6	Wednesday, November 6
85 Friday, November 15	Wednesday, November 6	*Friday, November 8	*Friday, November 8
86 Tuesday, November 19	*Tuesday, November 12	Wednesday, November 13	Wednesday, November 13
87 Friday, November 22	Wednesday, November 13	Monday, November 18	Monday, November 18
88 Tuesday, November 26	Monday, November 18	Wednesday, November 20	Wednesday, November 20
89 Friday, November 29	Wednesday, November 20	Monday, November 25	Monday, November 25
Tuesday, December 3	*No Issue Published*		
90 Friday, December 6	Wednesday, November 27	Monday, December 2	Monday, December 2
91 Tuesday, December 10	Monday, December 2	Wednesday, December 4	Wednesday, December 4
92 Friday, December 13	Wednesday, December 4	Monday, December 9	Monday, December 9
93 Tuesday, December 17	Monday, December 9	Wednesday, December 11	Wednesday, December 11
94 Friday, December 20	Wednesday, December 11	Monday, December 16	Monday, December 16

95 Tuesday, December 24	Monday, December 16	Wednesday, December 18	Wednesday, December 18
96 Friday, December 27	Wednesday, December 18	Monday, December 23	Monday, December 23
Tuesday, December 31	*No Issue Published*		



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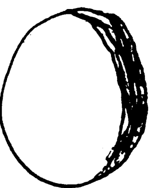
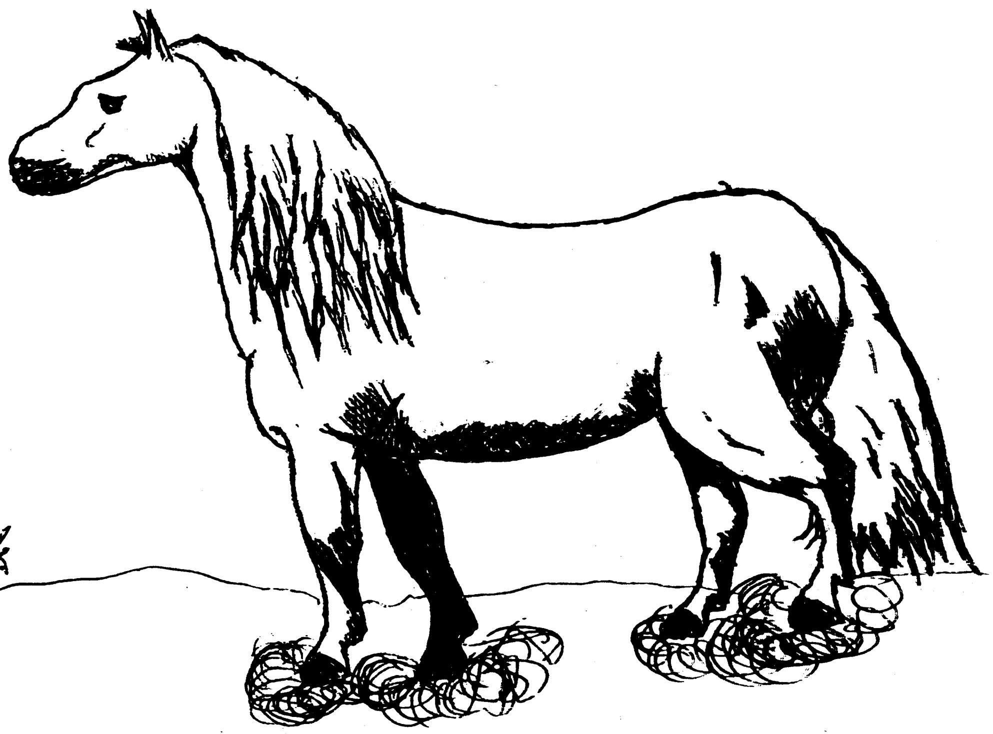
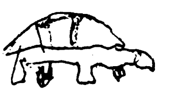
Grade: 6
School: C.O. Wilson Middle School, Nederland ISD

Name: Goilly Thibeault
Grade: 6
School: C.O. Wilson Middle School, Nederland ISD



Name: Gilbert Cavazos
Grade: 11
School: Harlandale High School, Harlandale ISD





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