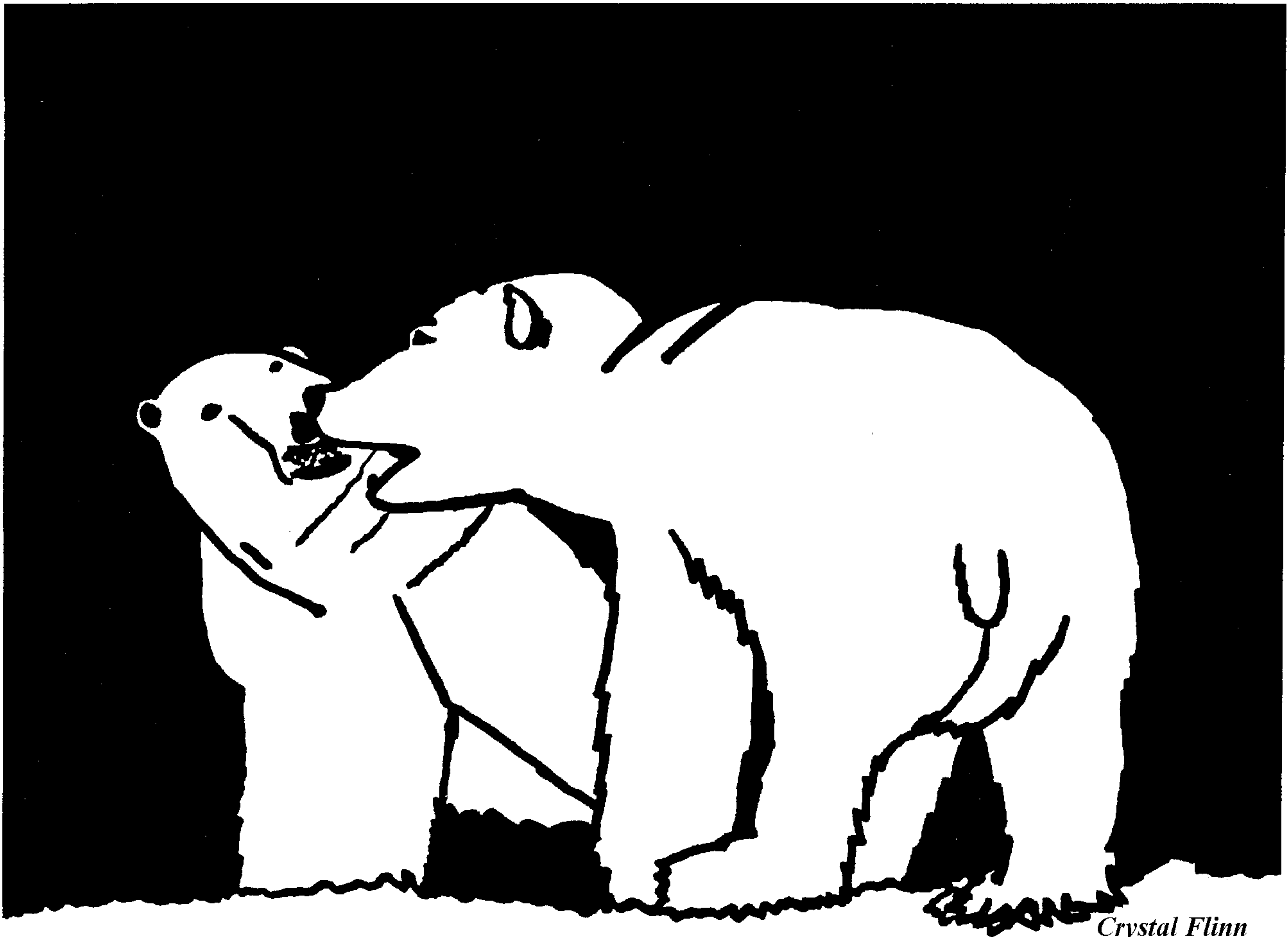
Texas Register

Volume 28 Number 2 January 10, 2003 Pages 407-522



Crystal Flinn
6th Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

***Texas Register*, (ISSN 0362-4781),** is published weekly, 52 times a year. Issues will be published by the Office of the Secretary of State, 1019 Brazos, Austin, Texas 78701. Subscription costs: printed, one year $200. First Class mail subscriptions are available at a cost of $300 per year. Single copies of most issues for the current year are available at $10 per copy in printed format.

Material in the ***Texas Register*** is the property of the State of Texas. However, it may be copied, reproduced, or republished by any person without permission of the ***Texas Register*** Director, provided no such republication shall bear the legend ***Texas Register*** or "Official" without the written permission of the director.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Austin, Texas and additional mailing offices.

POSTMASTER: Send address changes to the ***Texas Register*,** P.O. Box 13824, Austin, TX 78711-3824.

TEXAS REGISTER

a section of the
Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(800) 226-7199
(512) 463-5561
FAX (512) 463-5569
http://www.sos.state.tx.us
subadmin@sos.state.tx.us

Secretary of State - Gwyn Shea
Director - Dan Procter

Staff
Dana Blanton
Leti Benavides
Carla Carter
Melissa Dix
Kris Hogan
Roberta Knight
Jill Ledbetter
Diana Muniz-Franklin
Luis Sanchez
LaKiza Fowler-Sibley

GOVERNOR

Executive Order 411

ATTORNEY GENERAL

Opinions....413

Request for Opinions 413

PROPOSED RULES

OFFICE OF THE SECRETARY OF STATE

STATUTORY DOCUMENTS

1 TAC §73.43, §73.44 415

TEXAS BUILDING AND PROCUREMENT COMMISSION

PROCUREMENT DIVISION

1 TAC §113.18 415

TEXAS STATE BOARD OF MEDICAL EXAMINERS

ACUPUNCTURE

22 TAC §§183.1 - 183.4, 183.6....417

22 TAC §§183.7 - 183.18....425

22 TAC §§183.7 - 183.18....425

TEXAS DEPARTMENT OF INSURANCE

TRADE PRACTICES

28 TAC §§21.2601, 21.2602, 21.2604, 21.2606 430

28 TAC §21.2607 434

PRIVACY

28 TAC §§22.51, 22.58, 22.59 435

WITHDRAWN RULES

TEXAS ANIMAL HEALTH COMMISSION

RIDING STABLE REGISTRATION PROGRAM

4 TAC §48.2, §48.7 437

RAILROAD COMMISSION OF TEXAS

GAS UTILITIES DIVISION

16 TAC §7.45 437

16 TAC §§7.401, 7.405, 7.410, 7.415, 7.420, 7.425, 7.430, 7.435, 7.440, 7.445, 7.470, 7.475, 7.480, 7.485....437

TEXAS STATE BOARD OF MEDICAL EXAMINERS

STANDING DELEGATION ORDERS

22 TAC §193.11, §193.12 437

ADOPTED RULES

TEXAS BUILDING AND PROCUREMENT COMMISSION

EXECUTIVE ADMINISTRATION DIVISION

1 TAC §§111.61 - 111.64, 111.68, 111.70, 111.71....439

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

COORDINATED PLANNING AND DELIVERY OF HEALTH AND HUMAN SERVICES

1 TAC §§351.501, 351.503, 351.505 439

TEXAS DEPARTMENT OF AGRICULTURE

PERISHABLE COMMODITIES HANDLING AND MARKETING PROGRAM

4 TAC §14.1 445

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

ADMINISTRATION

10 TAC §§1.31 - 1.35....445

PUBLIC UTILITY COMMISSION OF TEXAS

SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

16 TAC §25.113 469

SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

16 TAC §26.403 475

GENERAL LAND OFFICE

EXECUTIVE ADMINISTRATION

31 TAC §1.4 478

31 TAC §1.51, §1.52 479

31 TAC §§1.61 - 1.79....479

RULES OF PRACTICE AND PROCEDURE

31 TAC §§2.1 - 2.28....479

RULES OF PRACTICE AND PROCEDURE

31 TAC §§2.1 - 2.28....480

31 TAC §§2.31 - 2.36....481

31 TAC §§2.40 - 2.50....481

GENERAL PROVISIONS

31 TAC §3.50 481

GENERAL RULES OF PRACTICE AND PROCEDURE

31 TAC §§4.11 - 4.16....482

31 TAC §§4.21 - 4.25....482

31 TAC §§4.41 - 4.43....483

31 TAC §§4.51 - 4.55....483

31 TAC §§4.61 - 4.69....483

31 TAC §§4.81 - 4.83....483

31 TAC §§4.91 - 4.99....484
31 TAC §§4.111 - 4.120....484
31 TAC §§4.130 - 4.137....484
31 TAC §§4.151 - 4.153....485
31 TAC §§4.161 - 4.166....485
31 TAC §§4.171 - 4.175....485

LAND RESOURCES

31 TAC §§13.30 - 13.40....486
31 TAC §§13.51 - 13.54....486
31 TAC §§13.60 - 13.67....486

RULE REVIEW

Proposed Rule Reviews

Texas Commission on Environmental Quality 487

TABLES AND GRAPHICS

....489

IN ADDITION

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program....497

Office of Consumer Credit Commissioner

Notice of Rate Ceilings....498
Notice of Rate Ceilings....498

Texas Department of Criminal Justice

Corrected Notice to Bidders....499

East Texas Council of Governments

Request for Qualifications on Legal Counsel 499

Texas Education Agency

Request for Applications Concerning Texas 21st Century Community Learning Centers Cycle 1 Grant Program....499

Texas Commission on Environmental Quality

Notice of Availability and Requests for Comments....500
Notice of Comment Period and Announcement of Public Meeting on Draft Standard Permit for Hot Mix Asphalt Plants....501
Notice of Intent to Take No Further Action at the Barlow's Wills Point Proposed State Superfund Site and to Delete the Site from the State Registry....501
Notice of Opportunity to Comment on a Default Order of Administrative Enforcement Actions....502
Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions 503

Office of the Governor

Request for Grant Applications (RFA) for Rural Domestic Violence and Child Victimization Enforcement Grant Program....504

Texas Groundwater Protection Committee

Correction of Error....504

Texas Department of Health

Correction of Error....504

Houston-Galveston Area Council

Public Notice....512

Texas Department of Insurance

Notice....512
Notice....512
Notice....512
Notice....512
Notice....513

Texas Department of Mental Health and Mental Retardation

Notice Announcing Pre-Application Orientation (PAO) for Enrollment of Medicaid Waiver Program Providers....513

Public Utility Commission of Texas

Notice of Amendment to Interconnection Agreement 513
Notice of Application for Certificate of Convenience and Necessity 514
Notice of Application for Certificate of Convenience and Necessity 514
Notice of Application for Certificate of Convenience and Necessity 515
Public Notice of Amendment to Interconnection Agreement....515
Public Notice of Amendment to Interconnection Agreement 516
Public Notice of Interconnection Agreement 516
Public Notice of Interconnection Agreement 517
Public Notice of Interconnection Agreement 517
Public Notice of Interconnection Agreement 518
Public Notice of Interconnection Agreement 518
Public Notice of Request for Comments on Strawman Rule Regarding Competitive Energy Services....519
Public Notice of Workshop on Wholesale Market Design Issues in the Electric Reliability Council of Texas 519

South East Texas Regional Planning Commission

Request for Qualifications for Regional Hazard Mitigation Plan....519

Texas Department of Transportation

Public Notice - Draft Environmental Impact Statement for State Highway 121T 521

Texas Workers' Compensation Commission

Correction of Error....522

Open Meetings

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

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

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

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

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

•••

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

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Executive Order

RP 21

Relating to the Creation of the Governor's Clean Coal Technology Council.

WHEREAS, the continued strength of the Texas economy is highly dependent upon the availability of reliable, low-cost electric power; and

WHEREAS, the diversity of fuel used to generate electricity is a significant factor in providing reliable and affordable energy to residents of this state; and

WHEREAS, coal is an important fuel source for keeping the price of electricity low in this state and the price of electricity generated with coal has remained relatively unchanged over the past 20 years; and

WHEREAS, evaluation of the environmental effectiveness and economic viability of new emissions reduction technologies that protect or improve air quality is necessary to protect the environment and the public health, safety, and welfare of all Texans; and

WHEREAS, the continued recovery and use of coal resources are important to the economy of this state; and

WHEREAS, advancements in clean coal technology may demonstrate that electricity from coal can be produced in a more efficient, economical, and environmentally friendly manner;

NOW, THEREFORE, I, Rick Perry, Governor of the State of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following:

1. Creation and Duties. The Governor's Clean Coal Technology Council, ("the Council"), is hereby created. The Council shall advise the Governor concerning the feasibility of developing clean coal technologies in Texas, including their potential to:

a. Preserve fuel diversity and maintain reliable, low-cost sources of electric power;

b. Reduce the emissions from existing coal-fired electric generation; and

c. Increase the efficiency of coal-fired electric generation. The Council shall study these matters and seek to identify new, cleaner coal-fired electric generation technologies that may be used to provide new generation capacity. The Council's study and evaluation of clean coal technologies in Texas may include assessment pilot projects as a means to evaluate such technologies, appraise their economics, assess the environmental benefits, or determine the importance of clean coal technologies to energy policy.

2. Composition and Terms. The Council will consists of members appointed by the Governor, who will designate one member to serve as chair and one member to serve as vice-chair.

The Governor may fill any vacancy that may occur and may appoint other voting or ex-officio, non-voting members as needed.

Any state or local officers or employees appointed to serve on the Council shall do so in addition to the regular duties of their respective office or position.

All appointees serve at the pleasure of the Governor.

3. Coordination. The Council shall take into consideration any clean coal technology efforts by public and private entities. The Council shall stay apprised of emissions reduction technology efforts conducted by state agencies and universities.

4. Meetings. Subject to approval of the Governor, the Council shall meet at times and locations determined by the chair.

5. Administrative Support. The Office of the Governor and other appropriate state agencies and state universities shall provide administrative support for the Council.

6. Report. The Council shall make regular reports to the Governor.

7. Other Provisions. The Council shall adhere to guidelines and procedures provided by the Office of the Governor. All members of the Council shall serve without compensation. Necessary expenses may be reimbursed when such expenses are in direct performance of official duties of the Council.

This executive order supersedes all previous orders and shall remain in effect and in full force until modified, amended, rescinded, or superseded by me or by a succeeding Governor.

Given under my hand this the 19th day of December, 2002.

Rick Perry, Governor

TRD-200208572

THE ATTORNEY GENERAL

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

Opinions

Opinion No. GA-0003

The Honorable Robert Duncan, Interim Chair, Natural Resources Committee, Texas State Senate, P. O. Box 12068, Austin, Texas 78711

Re: Authority of the Texas Department of Transportation over construction and maintenance of utility lines along a controlled-access highway (RQ-0563-JC)

S U M M A R Y

The Texas Department of Transportation's Utility Accommodation Policy, *see* 43 Tex. Admin. Code §§ 21.31-.56 (2002), does not impermissibly burden statutory rights-of- way granted to utilities for gas and electric lines pursuant to sections 181.022 and 181.042 of the Utilities Code. To the extent that it is inconsistent with this opinion, Attorney General Opinion C-139 (1963) is overruled.

Opinion No. GA-0004

The Honorable Jane Nelson, Chair, Nominations Committee, Texas State Senate, P.O. Box 12068, Austin, Texas 78711

Re: Whether the Euless Economic Development Corporation is "a governmental entity that has the power of eminent domain" under section 272.001(b)(5) of the Local Government Code (RQ-0568-JC)

S U M M A R Y Section 272.001(b)(5) of the Local Government Code exempts "a real property interest conveyed to a governmental entity that has the power of eminent domain" from the public notice and bidding requirements generally applicable to the sale or exchange of land owned by a political subdivision. The Euless Economic Development Corporation, a nonprofit industrial development corporation created under the Development Corporation Act of 1979, article 5190.6 of the Revised Civil Statutes, is not a "governmental entity" for the purposes of section 272.001(b)(5) of the Local Government Code. Furthermore, section 272.001(b)(5) does not authorize a political subdivision to transfer land to a private party by using a "governmental entity" as a pass-through.

Opinion No. GA-0005

The Honorable Sky Sudderth, District Attorney, 35th Judicial District, Brown County Courthouse, 200 South Broadway, Brownwood, Texas 76801

Re: Authority of a district attorney pro tem to modify a standing local agreement between a district attorney's office and a law enforcement agency regarding the distribution of forfeited funds (RQ-0569-JC)

S U M M A R Y

A district attorney pro tem appointed under the terms of article 2.07 of the Code of Criminal Procedure for a specific case does not have the authority to alter the terms of disposition of a local agreement on forfeited property under chapter 59 of the Code of Criminal Procedure.

Opinion No. GA-0006

The Honorable Jane Nelson, Chair, Senate Committee on Nominations, Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068

Re: Whether a member of the legislature who resigns his or her legislative office may, during the term for which he or she was elected, be appointed to a position or office that requires senate confirmation. (RQ-0574-JC)

S U M M A R Y

By virtue of article III, section 18 of the Texas Constitution, a member of the Texas Senate who was elected to that position in the general election of November 2000 is not eligible during his or her term of office to be appointed by the governor to an office or position that requires senate confirmation, regardless of whether he or she resigns his or her legislative position shortly before any prospective appointment. On the other hand, a member of the Texas House of Representatives or a member of the Texas Senate elected at the general election of November 2002 is eligible to be appointed by the governor to an office or position that requires senate confirmation during a "window of opportunity" between January 1, 2003, and January 14, 2003, the date on which the Seventy-eighth Legislature convenes, provided that person resign his or her office during that window.

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

TRD-200208533
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: December 23, 2002

Request for Opinions

RQ-0005-GA

Mr. Edward A. Dion, El Paso County Auditor, 500 East San Antonio Street, Room 406, El Paso, Texas 79901-2407

Re: Authority of a bail bond board to hire legal counsel, and related questions (Request No. 0005-GA)

Briefs requested by January 19, 2003

RQ-0006-GA

The Honorable C.E. "Mike" Thomas, III, Howard County Attorney, P.O. Box 2096, Big Spring, Texas 79721

Re: Whether a commissioners court may provide free online legal research to the public with fees collected under section 323.023 of the Local Government Code (Request No. 0006-GA)

Briefs requested by January 19, 2003

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

TRD-200208532
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: December 23, 2002

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 73. STATUTORY DOCUMENTS

SUBCHAPTER D. STATEMENT OF OFFICER FORMS

1 TAC §73.43, §73.44

The Office of the Secretary of State proposes amendments to Subchapter D concerning Statement of Officer Forms by amending §73.43 and §73.44. The purpose of the amendments is to conform the procedure for executing the Statement of Officer ("Statement") to the requirements of Section 1, Article XVI of the Texas Constitution. The amendments also update the language in §73.43 and §73.44 to indicate that, pursuant to amendments to Section 1 of Article XVI, there is only one Statement form.

The referenced Section 1 of Article XVI simply requires that an elected or appointed state officer "subscribe" to the Statement, and file the signed Statement with the Secretary of State. The language in Section 1 does not require that the Statement be subscribed to before a person authorized to administer oaths. An advisory opinion letter, dated September 18, 2002, from the Office of the Texas Attorney General agrees that there is no requirement that the Statement be subscribed to before a person authorized to administer oaths.

Guy Joyner, Chief, Legal Support Unit, Statutory Documents Section has determined that for the first five year period that the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment. There is no effect on large businesses, small businesses or micro-businesses. There is no anticipated additional economic cost to individuals who are required to comply with the amendment as proposed. There is no anticipated impact on local employment.

Mr. Joyner also has determined that for each year of the first five years that the amendments are in effect the public benefit anticipated as a result of enforcing the amendment will be to make the procedure for subscribing to the Statement consistent with the procedure required by the Constitution. It will also simplify the process for the filing of the Statement.

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

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

The amendment affects the Texas Constitution, Section 1, Article XVI.

§73.43. Facsimile Transmission of a Statement of Officer Form.

The Office of the Secretary of State will accept a properly executed legible facsimile (FAX) copy of the [~~appropriate~~] signed statement of officer form required by Vernon's Annotated Texas Constitution, Article 16, §1(b) [~~or (d)~~]. The facsimile copy eliminates the requirement to file the original [~~originally~~] signed instrument with this office.

§73.44. Statement of Officer Form[~~Forms~~].

(a) The Office of the Secretary of State hereby adopts by reference the statement of [~~elected~~] officer [~~and the statement of appointed officer~~] form [~~forms~~]. A [~~Blank~~] sample copy [~~copies of each~~]of theform [~~forms~~] may be obtained from the Office of the Secretary of State, Statutory Documents Section, P.O. Box 12887, Austin, Texas 78711-2887. A copy of the form is also available on the Secretary of State's Internet site.

(b) All persons required to file the [~~either of these~~] statement [~~statements~~] shall use the [~~appropriate~~] form or a document which shall contain the following information: the [~~applicable~~] constitutionally required language with the person's [~~affiant's~~] typed or printed name, the person's [~~affiant's~~] signature, the specific office elected or appointed to, and the city and county where the office is located.

[~~(c) The statement of officer form will be executed before an officer authorized to administer oaths.~~]

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208479
Geoffrey S. Connor
Assistant Secretary of State
Office of the Secretary of State
Earliest possible date of adoption: February 9, 2003
For further information, please call: (512) 475-0775

PART 5. TEXAS BUILDING AND PROCUREMENT COMMISSION

CHAPTER 113. PROCUREMENT DIVISION

SUBCHAPTER A. PURCHASING

1 TAC §113.18

The Texas Building and Procurement Commission proposes amendments to the Texas Administrative Code, Title 1, Part 5, Chapter 113, Subchapter A, §113.18 (relating to the Auditing of Purchase Documents and Payment Vouchers). The proposed amendments will clarify the commission's audit parameters and sample selection methods relating to purchase payment vouchers. In addition, this amendment will allow TBPC the flexibility to utilize the most effective and efficient sample methods available.

Janet Hasty, Procurement Programs Manager, has determined for the first five year period the rule is in effect, there will be no adverse effect to state or local government as a result of enforcing the rule. However, a cost savings will be realized as a result of this rule change. By utilization of new and improved sampling methods, agencies will be able to submit significantly fewer documents for a post payment audit while still maintaining the validity of the sample.

Ms. Hasty, further determines that for each year of the first five-year period the amendments are in effect, the public benefit anticipated as a result of enforcing the rule will be clarity and consistency. There will be no effect on small, large or micro businesses and/or persons.

Comments on the proposal may be submitted to William F. Warnick, General Counsel, Texas Building and Procurement Commission, P.O. Box 13047, Austin, Texas 78711-3047. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The amendments to 1 TAC §113.18 are proposed under the authority of the Texas Government Code, Title 10, Subtitle D, §2152.003 which provides the Texas Building and Procurement Commission with the authority to promulgate rules necessary to implement the sections.

The are no other codes that are affected by the rule.

§113.18. Auditing of Purchase Documents and Payment Vouchers.

(a) General. The commission audits payment vouchers and the associated purchasing documents which established the basis for the claim for payment from state appropriated funds in accordance with Government Code, Title 10, Subtitle D, §2155.324.

(b) Auditing procedure. The commission audits purchasing data for compliance with applicable statutes and rules of the commission. The commission may audit either 100% of State of Texas purchase vouchers and associated purchase documentation of any agency, a sampling of all documents, or may audit only specific types of purchases. The commission may determine the extent and method of audits to be performed. [~~The commission may perform audits at the 100% level or may use a statistical random sample and the samples may be stratified. The sampling selection process may be stratified by dollar amounts or other parameters. These random sample audits may be performed prior to (pre-payment audits) or after (post-payment audits) the vouchers are paid by the Comptroller of Public Accounts.~~] Each agency will be audited at least once in each state fiscal biennium. Agencies will be required to furnish copies of purchase documents to the commission for these audits as needed. Audits may be performed at the agency site or remotely.

(c) Auditing parameters.

[~~(1)~~] For 100% audits or random sample audits of delegated and non-delegated purchases, the results must be at or above the 90% compliance level for each agency.

[~~(2) For the random sample audits, delegated and non-delegated purchases, the results must be within the following parameters:~~]

[~~(A) minimum confidence level--90%;~~]

[~~(B) maximum error level--10%;~~]

[~~(C) minimum sample size--10 per agency and 10 per Purchase Category Code;~~]

[~~(D) period of time--monthly, quarterly, semiannual, annual, or biennial; and~~]

[~~(E) selection of sample--may be by table of random numbers or any other interval method.~~]

(d) Agency notification. The commission will send results of these audits to the agency head, agency's directors of purchasing, and fiscal and/or business manager. If the results are not within the established parameters, the agency will be offered support and assistance to maintain an acceptable level of compliance. Agencies will be given a period of six months to bring their purchasing compliance within the established parameters. If the results of a second (follow-up) audit still do not meet the parameters, then delegation of authority for some or all purchase categories may be suspended.

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

Filed with the Office of the Secretary of State on December 23, 2002.

TRD-200208514
William F. Warnick
General Counsel
Texas Building and Procurement Commission
Earliest possible date of adoption: February 9, 2003
For further information, please call: (512) 463-3583

TITLE 22. EXAMINING BOARDS

PART 9. TEXAS STATE BOARD OF MEDICAL EXAMINERS

CHAPTER 183. ACUPUNCTURE

The Texas State Board of Medical Examiners proposes amendments to §§183.1-183.4, 183.6 and the repeal and replacement of §§183.7-183.18, concerning Acupuncture. The proposal is necessary for a general clean-up of the chapter.

The Texas State Board of Medical Examiners previously proposed an amendment to §183.13 in the November 1, 2002, issue of the *Texas Register* (27 TexReg 10287). That amendment was withdrawn in the January 3, 2003, issue of the *Texas Register*. The section is re-proposed in this issue to incorporate all amendments at one time.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the proposed rules are in effect there will be no fiscal implications to state or local government as a result of enforcing the rules as proposed.

Ms. Shackelford also has determined that for each year of the first five years the rules as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be updated rules. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

22 TAC §§183.1 - 183.4, 183.6

The amendments are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The following are affected by the proposed rules: Texas Occupations Code Annotated, Chapter 205.

§183.1. Purpose.

These rules are promulgated under the authority of the Medical Practice Act, Title 3 Subtitle B Tex. Occ. Code and the Acupuncture Act, Chapter 205 Tex. Occ.Code [~~Article 4495b~~], to establish procedures and standards for the training, education, licensing, and discipline of persons performing acupuncture in this State so as to establish an orderly system of regulating the practice of acupuncture in a manner which protects the health, safety, and welfare of the public.

§183.2. Definitions.

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

(1) Ability to communicate in the English language - An applicant who has met the requirements set out in §183.4(a)(7) of this title (relating to Licensure).

(2) Acceptable approved acupuncture school - Effective January 1, 1996, and in addition to and consistent with the requirements of §205.206 of the Tex. Occ. Code and with the exception of the provisions outlined in §183.4(h) of this title (relating to Exceptions),

(A) a school of acupuncture located in the United States or Canada which, at the time of the applicant's graduation, was a candidate for accreditation by the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM), offered no more than a certificate upon graduation, and had a curriculum of 1,800 hours with at least 450 hours of herbal studies which at a minimum included the following:

(i) basic herbology including recognition, nomenclature, functions, temperature, taste, contraindications, and therapeutic combinations of herbs;

(ii) herbal formulas including traditional herbal formulas and their modifications or [~~modification/~~] variations based on traditional methods of herbal therapy;

(iii) patent herbs including the names of the more common patent herbal medications and their uses; and

(iv) clinical training emphasizing herbal uses; or

(B) a school of acupuncture located in the United States or Canada which, at the time of the applicant's graduation, was accredited by ACAOM, offered a masters degree upon graduation, and had a curriculum of 1,800 hours with at least 450 hours of herbal studies which at a minimum included the following:

(i) basic herbology including recognition, nomenclature, functions, temperature, taste, contraindications, and therapeutic combinations of herbs;

(ii) herbal formulas including traditional herbal formulas and their modifications or variations based on traditional methods of herbal therapy;

(iii) patent herbs including the names of the more common patent herbal medications and their uses; and

(iv) clinical training emphasizing herbal uses; or

(C) a school of acupuncture located outside the United States or Canada that is determined by the board to be substantially equivalent to Texas acupuncture school or a school defined in subparagraph (B) of this paragraph through an evaluation by the American Association of Collegiate Registrars and Admissions Officers (AACRAO) a board-approved credential evaluation service[~~; and~~]

[~~(D) the requirements of this section shall be in addition to the requirements of the Medical Practice Act, '6.07, subsection (c), and shall be construed and applied so as to be consistent with the Act.~~]

(3) Acupuncture Act or "the Act" - Chapter 205 of the Texas Occupations Code.

[~~(3) Acceptable unapproved acupuncture school - A school or college located outside the United States or Canada that was not approved by the board at the time the degree was conferred but whose curriculum meets the requirements for an unapproved medical school as determined by a committee of experts selected by the Texas State Board of Acupuncture Examiners, subject to approval by the Texas State Board of Medical Examiners.~~]

(4) Acupuncture -

(A) The insertion of an acupuncture needle and the application of moxibustion to specific areas of the human body as a primary mode of therapy to treat and mitigate a human condition, including the evaluation and assessment of the condition; and

(B) the administration of[~~or~~] thermal or[~~and~~] electrical treatments or the recommendation[~~recommendations~~] of dietary guidelines, energy flow exercise, or dietary or herbal supplements in conjunction with the treatment described by subparagraph (A) of this paragraph.

(5) Acupuncture board or "board" - The Texas State Board of Acupuncture Examiners.

(6) Acupuncturist - A licensee of the [~~Texas State Board of Acupuncture Examiners~~] acupuncture board who directly or indirectly charges a fee for the performance of acupuncture services.

(7) Agency - the divisions, departments, and employees of the Texas State Board of Medical Examiners, the Texas State Board of Physician Assistant Examiners, and the Texas State Board of Acupuncture Examiners.

(8) [~~(7)~~] APA - The Administrative Procedure Act, Government Code, §2001.001 et seq.

(9) [~~(8)~~] Applicant [~~or petitioner~~] - A party seeking a license [~~or rule~~] from the board.

(10) [~~(9)~~] Application - An application is all documents and information necessary to complete an applicant's request for licensure including the following:

(A) forms furnished by the board, completed by the applicant:

(i) all forms and addenda requiring a written response must be printed in ink or typed;

(ii) photographs must meet United States Government passport standards;

(B) a fingerprint card, furnished by the acupuncture board, completed by the applicant, that must be readable by the Texas Department of Public Safety;

(C) all documents required under §183.4(c) of this title (relating to Licensure Documentation); and

(D) the required fee, payable by check through a United States bank.

(11) [~~(10)~~] Assistant Presiding Officer - A member of the acupuncture board elected by the acupuncture board to fulfill the duties of the presiding officer in the event the presiding officer is incapacitated or absent, or the presiding officer's duly qualified successor under Robert's Rules of Order Newly Revised or board rules.

[~~(11) Board - The Texas State Board of Acupuncture Examiners.~~]

(12) Board member - One of the members of the acupuncture board, appointed and qualified pursuant to §§205.051-.053 of the Act.

(13) Chiropractor - A licensee of the Texas State Board of Chiropractic Examiners.

(14) Contested case - A proceeding, including but not restricted to, licensing, in which the legal rights, duties, or privileges of a party are to be determined by the board after an opportunity for adjudicative hearing.

(15) Documents - Applications, petitions, complaints, motions, protests, replies, exceptions, answers, notices, or other written instruments filed with the medical board or acupuncture board in a licensure proceeding or by a party in a contested case.

(16) Eligible for legal practice and/or licensure in country of graduation - An applicant who has completed all requirements for legal practice of acupuncture and/or licensure in the country in which the school is located except for any citizenship requirements.

(17) Executive Director -The executive director of the agency or the authorized designee of the executive director. [~~Texas State Board of Medical Examiners.~~]

(18) Full force - Applicants for licensure who possess a license in another jurisdiction must have it in full force and not restricted [~~for cause~~], canceled [~~for cause~~], suspended [~~for cause~~] or revoked. An acupuncturist with a license in full force may include an acupuncturist who does not have a current, active, valid annual permit in another jurisdiction because that jurisdiction requires the acupuncturist to practice in the jurisdiction before the annual permit is current.

(19) Full NCCAOM examination - The National Certification Commission for Acupuncture and Oriental Medicine examination, consisting of the Comprehensive Written Exam (CWE), the Clean Needle Technique Portion (CNTP), [~~and~~] the Practical Examination of Point Location Skills (PEPLS), and[~~, effective January 1, 1998,~~] the Chinese Herbology Exam.

(20) Good professional character - An applicant for licensure must not be in violation of or have committed any act described in the Act, §205.351.

(21) Administative Law Judge (ALJ) [~~Hearings Examiner, Examiner, Administrative Law Judge, or ALJ~~] - An individual appointed to preside over administrative hearings pursuant to the APA [~~administrative law judge, duly employed by the State Office of Administrative Hearings~~].

(22) License - Includes the whole or part of any board permit, certificate, approval, registration, or similar form of permission required by law; specifically, a license and a registration.

(23) Licensing - Includes the medical board's and acupuncture board's process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(24) Medical board - The Texas State Board of Medical Examiners.

(25) Misdemeanors involving moral turpitude - Any misdemeanor of which fraud, dishonesty, or deceit is an essential element; burglary; robbery; sexual offense; theft; child molesting; substance diversion or substance abuse; an offense involving baseness, vileness, or depravity in the private social duties one owes to others or to society in general; or an offense committed with knowing disregard for justice or honesty.

(26) Party - The acupuncture board and each person named or admitted as a party in a SOAH hearing or contested case before the acupuncture board [~~Each person named or admitted as a party whether an applicant, protestant, petitioner, complainant, respondent or intervenor, and the board~~].

(27) Person - Any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character.

(28) Physician - A licensee of the medical board [~~Texas State Board of Medical Examiners~~].

(29) Pleading - Written documents filed by parties concerning their respective claims.

(30) Presiding officer - The member of the acupuncture board appointed by the governor to preside over acupuncture board proceedings or the presiding officer's duly qualified successor in accordance with Robert's Rules of Order Newly Revised or board rules[~~, a hearings examiner, administrative law judge, or other person presiding over the board~~].

(31) Register - The Texas Register.

(32) Rule - Any agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedures or practice requirements of this board. The term includes the amendment or repeal of a prior section but does not include statements concerning only the internal management or organization of any agency and not affecting private rights or procedures. This definition includes substantive regulations.

(33) Secretary - The secretary-treasurer of the acupuncture board [~~Texas State Board of Acupuncture Examiners~~].

(34) Substantially equivalent to a Texas acupuncture school - A school or college of acupuncture [~~located outside the United States or Canada must be~~] that is an institution of higher learning designed to select and educate acupuncture students; provide students with the opportunity to acquire a sound basic acupuncture education through training; to develop programs of acupuncture education to produce practitioners, teachers, and researchers; and to afford opportunity for postgraduate and continuing medical education. The school must provide resources, including faculty and facilities, sufficient to support a curriculum offered in an intellectual and practical environment that enables the program to meet these standards. The faculty of the school shall actively contribute to the development and transmission of new knowledge. The school of acupuncture shall contribute to the advancement of knowledge and to the intellectual growth of its students and faculty through scholarly activity, including research. The school of

acupuncture shall include, but not be limited to, the following characteristics:

(A) the facilities for didactic and clinical training (i.e., laboratories, hospitals, library, etc.) shall be adequate to ensure opportunity for proper education.

(B) the admissions standards shall be substantially equivalent to a Texas school of acupuncture.

(C) the basic curriculum shall include courses substantially equivalent to those delineated in the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM) core curriculum at the time of applicant's graduation.

(D) the curriculum shall be of at least 1800 hours in duration.

[~~(35) The Act -- Tex. Occ. Code Ann., Chapter 205.~~]

§183.3. Meetings.

(a) The acupuncture board shall meet at least four times a year to carry out the mandates of the Act.

(b) Special meetings may be called by the presiding officer of the acupuncture board, by resolution of the acupuncture board, or upon written request to the presiding officer of the acupuncture board signed by at least three members of the board.

(c) Acupuncture board and committee meetings shall, to the extent possible, be conducted pursuant to the provisions of Robert's Rules of Order Newly Revised unless, by rule, the acupuncture board adopts a different procedure.

(d) All elections and any other issues requiring a vote of the acupuncture board shall be decided by a simple majority of the members present. A quorum for transaction of any business by the acupuncture board shall be one more than half the acupuncture board's membership at the time of the meeting. If more than two candidates contest an election or if no candidate receives a majority of the votes cast on the first ballot, a second ballot shall be conducted between the two candidates receiving the highest number of votes.

(e) The acupuncture board, at a regular meeting or special meeting, may elect from its membership an assistant presiding officer and a secretary-treasurer to serve a term of one year or for a term of a set duration established by majority vote of the acupuncture board.

(f) The acupuncture board, at a regular meeting or special meeting, upon majority vote of the members present may remove the assistant presiding officer or secretary-treasurer from office.

(g) The following are standing and permanent committees of the acupuncture board. Each committee, with the exception of the Executive Committee, shall consist of at least one board member who is a licensed physician, one board member who is a licensed acupuncturist, and one public board member. In the event that a committee does not have a representative of one or more of these groups, the presiding officer shall appoint additional members as necessary to maintain this composition. The Executive Committee shall include the presiding officer, the assistant presiding officer, and the secretary-treasurer, plus additional members so that the committee consists of a minimum of two board members who are licensed acupuncturists, one board member who is a licensed physician, and one public board member. The responsibilities and authority of these committees shall include those duties and powers as set forth below and such other responsibilities and authority which the acupuncture board may from time to time delegate to these committees.

(1) Licensure Committee:

(A) draft and review proposed rules regarding licensure, and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(B) draft and review proposed application forms for licensure, and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(C) oversee the application process for licensure;

(D) receive and review applications for licensure [~~in the event the eligibility for licensure of an applicant is in question~~];

(E) present the results of reviews of applications for licensure and make recommendations to the acupuncture board regarding licensure of applicants [~~whose eligibility is in question~~];

(F) oversee and make recommendations to the acupuncture board regarding any aspect of the examination process including the approval of an appropriate licensure examination and the administration of such an examination;

(G) draft and review proposed rules regarding any aspect of the examination;

(H) make recommendations to the acupuncture board regarding matters brought to the attention of the Licensure Committee.

(2) Discipline and Ethics Committee:

(A) draft and review proposed rules regarding the discipline of acupuncturists and enforcement of Subchapter H of the Act;

(B) oversee the disciplinary process and give guidance to the acupuncture board and staff regarding methods to improve the disciplinary process and more effectively enforce Subchapter H [~~Subchapter F~~] of the Act;

(C) monitor the effectiveness, appropriateness, and timeliness of the disciplinary process;

(D) make recommendations regarding resolution and disposition of specific cases and approve, adopt, modify, or reject recommendations from staff or representatives of the acupuncture board regarding actions to be taken on pending cases. Approve dismissals of complaints and closure of investigations;

(E) draft and review proposed ethics guidelines and rules for the practice of acupuncture, and make recommendations to the acupuncture board regarding the adoption of such ethics guidelines and rules;

(F) make recommendations to the acupuncture board and staff regarding policies, priorities, budget, and any other matters related to the disciplinary process and enforcement of Subchapter H [~~Subchapter F~~] of the Act; and

(G) make recommendations to the acupuncture board regarding matters brought to the attention of the Discipline and Ethics Committee.

(3) Education Committee:

(A) draft and propose rules regarding educational requirements for licensure in Texas and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(B) draft and propose rules regarding training required for licensure in Texas and make recommendations to the acupuncture board regarding changes or implementation of such rules;

[~~(C) draft and propose rules regarding tutorial program requirements for licensure in Texas and make recommendations to the acupuncture board regarding changes or implementation of such rules;~~]

(C) [~~(D)~~] draft and propose rules regarding continuing education requirements for renewal of a Texas license and make recommendations to the acupuncture board regarding changes or implementation of such rules;

[~~(E) draft and propose rules regarding educational requirements for degrees granted upon graduation in Texas and make recommendations to the acupuncture board regarding changes or implementation of such rules;~~]

(D) [~~(F)~~] consult with the Texas Higher Education Coordinating Board regarding educational requirements for schools of acupuncture, oversight responsibilities of each entity, degrees which may be offered by schools of acupuncture;

(E) [~~(G)~~] maintain communication with acupuncture schools;

(F) [~~(H)~~] plan and make visits to acupuncture schools at specified intervals, with the goal of promoting opportunities to meet with the students so they may become aware of the board and its functions;

(G) [~~(I)~~] develop information regarding foreign acupuncture schools in the areas of curriculum, faculty, facilities, academic resources, and performance of graduates;

(H) [~~(J)~~] draft and propose rules which would set the requirements for degree programs in acupuncture;

(I) [~~(K)~~] be available for assistance with problems relating to acupuncture school issues which may arise within the purview of the board;

(J) [~~(L)~~] offer assistance to the Licensure Committee in determining eligibility of graduates of foreign acupuncture schools for licensure;

(K) [~~(M)~~] study and make recommendations regarding documentation and verification of records from foreign acupuncture schools;

(L) [~~(N)~~] make recommendations to the acupuncture board regarding matters brought to the attention of the Education Committee;.

(4) Executive Committee:

(A) review agendum for board meetings;

(B) ensure records are maintained of all committee actions;

(C) review requests from the public to appear before the board and to speak regarding issues relating to acupuncture;

(D) review inquiries regarding policy or administrative procedures;

(E) delegate tasks to other committees;

(F) take action on matters of urgency that may arise between board meetings;

(G) assist the medical board in the organization, preparation, and delivery of information and testimony to the Legislature and committees of the Legislature;

(H) formulate and make recommendations to the board concerning future board goals and objectives and the establishment of priorities and methods for their accomplishment;

(I) study and make recommendations to the board regarding the role and responsibility of the board offices and committees;

(J) study and make recommendations to the board regarding ways to improve the efficiency and effectiveness of the administration of the board pursuant to the Occupations Code, §205.102(b);

(K) make recommendations to the board regarding matters brought to the attention of the executive committee.

(h) Meetings of the acupuncture board and of its committees are open to the public unless such meetings are conducted in executive session pursuant to the Open Meetings Act and the Act. In order that board meetings may be conducted safely, efficiently, and with decorum, members of the public shall refrain at all times from smoking or using tobacco products, eating, or reading newspapers and magazines. Members of the public may not engage in disruptive activity that interferes with board proceedings, including, but not limited to, excessive movement within the meeting room, noise or loud talking, and resting of feet on tables and chairs. The public shall remain within those areas of the board's offices designated as open to the public. Members of the public shall not address or question board members during meetings unless recognized by the board's presiding officer pursuant to a published agenda item.

(i) Journalists have the same right of access as other members of the public to acupuncture board meetings conducted in open session, and are also subject to the rules of conduct described in subsection (h) of this section. Observers of any board meeting may make audio or visual recordings of such proceedings conducted in open session subject to the following limitations: the acupuncture board's presiding officer may request periodically that camera operators extinguish their artificial lights to allow excessive heat to dissipate; camera operators may not assemble or disassemble their equipment while the board is in session and conducting business; persons seeking to position microphones for recording board proceedings may not disrupt the meeting or disturb participants; journalists may conduct interviews in the reception area of the board's offices or, at the discretion of the acupuncture board's presiding officer, in the meeting room after recess or adjournment; no interview may be conducted in the hallways of the board's offices; and the acupuncture board's presiding officer may exclude from a meeting any person who, after being duly warned, persists in conduct described in this subsection and subsection (h) of this section.

(j) The assistant presiding officer of the acupuncture board shall assume the duties of the presiding officer in the event of the presiding officer's absence or incapacity.

(k) In the absence or incapacity of both the presiding officer and the assistant presiding officer, the secretary-treasurer shall assume the duties of the presiding officer.

(l) In the event of the absence or incapacity of the presiding officer, the assistant presiding officer, and secretary-treasurer, the members of the acupuncture board may elect another member to act as the presiding officer of a board meeting or may elect an interim acting presiding officer for the duration of the absences or incapacity or until another presiding officer is appointed by the governor.

(m) Upon the death, resignation, or permanent incapacity of the assistant presiding officer or the secretary-treasurer, the acupuncture board shall elect from its membership an officer to fill the vacant position. Such an election shall be conducted as soon as practicable at a regular or special meeting of the acupuncture board.

§183.4. Licensure.

(a) Qualifications. An applicant must present satisfactory proof to the acupuncture board that the applicant:

(1) is at least 21 years of age;

(2) is of good professional character as defined in §183.2 of this title (relating to Definitions);

(3) has successfully completed 60 semester hours of general academic college level courses, other than in acupuncture school, that are not remedial and would be acceptable at the time they were completed for credit on an academic degree at a two or four year institution of higher education within the United States accredited by an agency recognized by the Higher Education Coordinating Board or its equivalent in other states as a regional accrediting body. Coursework completed as a part of a degree program in acupuncture or Oriental medicine may be accepted by the acupuncture board if, in the opinion of the acupuncture board, such coursework is substantially equivalent to the required hours of general academic college level coursework;

(4) is a graduate of an acceptable approved acupuncture school [~~a reputable acupuncture school that was a candidate for accreditation or had accreditation through the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM) at the time of applicant's graduation,~~] or received and completed training which, in the opinion of the acupuncture board, was substantially equivalent to training provided by such a school;

(5) has taken and passed, within three attempts, each component of the full National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM) examination;

(6) has taken and passed the CCAOM (Council of Colleges of Acupuncture and Oriental Medicine) Clean Needle Technique (CNT) course and practical examination; and

(7) is able to communicate in English as demonstrated by one of the following:

(A) passage of the NCCAOM examination taken in English;

(B) passage of the TOEFL (Test of English as a Foreign Language) with a score of 550 or higher on the paper based test or with a score of 213 or higher on the computer based test;

(C) passage of the TSE (Test of Spoken English) with a score of 45 or higher;

(D) passage of the TOEIC (Test of English for International Communication) with a score of 500 or higher; or

(E) at the discretion of the acupuncture board, passage of any other similar, validated exam testing English competency given by a testing service with results reported directly to the acupuncture board or with results otherwise subject to verification by direct contact between the testing service and the acupuncture board.

(b) Procedural rules for licensure applicants. The following provisions shall apply to all licensure applicants.

(1) Applicants for licensure:

(A) whose documentation indicates any name other than the name under which the applicant has applied must furnish proof of the name change;

(B) whose application for licensure which has been filed with the board office and which is in excess of two years old from the date of receipt shall be considered inactive. Any fee previously submitted with that application shall be forfeited. Any further application procedure for licensure will require submission of a new application and inclusion of the current licensure fee.

(C) will be allowed to sit for each component of the NCCAOM examination only three times;

(D) who in any way falsify the application may be required to appear before the acupuncture board. It will be at the discretion of the acupuncture board whether or not the applicant will be issued a Texas acupuncture license;

(E) on whom adverse information is received by the acupuncture board may be required to appear before the acupuncture board. It will be at the discretion of the acupuncture board whether or not the applicant will be issued a Texas license;

(F) shall be required to comply with the acupuncture board's rules and regulations which are in effect at the time the completed application form and fee are filed with the board;

(G) may be required to sit for additional oral, written, or practical examinations or demonstrations that, in the opinion of the acupuncture board, are necessary to determine competency of the applicant;

(H) must have the application for licensure completed and legible in every detail 60 days prior to the acupuncture board meeting in which they are to be considered for licensure unless otherwise determined by the acupuncture board based on good cause.

(2) Applicants for licensure who wish to request reasonable accommodation due to a disability must submit the request at the time of filing the application.

(3) Applicants who have been licensed in any other state, province, or country shall complete a notarized oath or other verified sworn statement in regard to the following:

(A) whether the license, certificate, or authority has been the subject of proceedings against the applicant for the restriction for cause, cancellation for cause, suspension for cause, or revocation of the license, certificate, or authority to practice in the state, province, or country, and if so, the status of such proceedings and any resulting action; and,

(B) whether an investigation in regard to the applicant is pending in any jurisdiction or a prosecution is pending against the applicant in any state, federal, national, local, or provincial court for any offense that under the laws of the state of Texas is a felony, and if so, the status of such prosecution or investigation.

(4) An applicant for a license to practice acupuncture may not be required to appear before the acupuncture board or any of its committees unless the application raises questions about the applicant's:

(A) physical or mental impairment;

(B) criminal conviction; or

(C) revocation of a professional license.

(c) Licensure documentation.

(1) Original documents/interview. An applicant must appear for a personal interview at the board offices and present original documents to a representative of the board for inspection. Original documents may include, but are not limited to, those listed in paragraph (2) of this subsection.

(2) Required documentation. Documentation required of all applicants for licensure shall include the following:

(A) Birth certificate/proof of age. Each applicant for licensure must provide a copy of either a birth certificate and translation, if necessary, to prove that the applicant is at least 21 years of age. In instances where a birth certificate is not available, the applicant must provide copies of a passport or other suitable alternate documentation.

(B) Name change. Any applicant who submits documentation showing a name other than the name under which the applicant has applied must present copies of marriage licenses, divorce decrees, or court orders stating the name change. In cases where the applicant's name has been changed by naturalization the applicant must submit the original naturalization certificate by hand delivery or by certified mail to the board office for inspection.

(C) Examination scores. Each applicant for licensure must have a certified transcript of grades submitted directly from the appropriate testing service to the acupuncture board for all examinations used in Texas for purposes of licensure in Texas.

(D) Dean's certification. Each applicant for licensure must have a certificate of graduation submitted directly from the school of acupuncture on a form provided by the acupuncture board. The applicant shall attach to the form a recent photograph, meeting United States Government passport standards, before submitting it to the school of acupuncture. The school shall have the Dean or the designated appointee sign the form attesting to the information on the form and placing the school seal over the photograph.

(E) Diploma or certificate. All applicants for licensure must submit a copy of their diploma or certificate of graduation.

(F) Evaluations. All applicants must provide, on a form furnished by the acupuncture board, evaluations of their professional affiliations for the past ten years or since graduation from acupuncture school, whichever is the shorter period.

(G) Preacupuncture school transcript. Each applicant must have the appropriate school or schools submit a copy of the record of their undergraduate education directly to the acupuncture board. Transcripts must show courses taken and grades obtained. If determined that the documentation submitted by the applicant is not sufficient to show proof of the completion of 60 semester hours of college courses other than in acupuncture school, the applicant must obtain coursework verification by submitting documentation to the acupuncture board for a determination as to the adequacy of such education or to a two or four year institution of higher education within the United States. The institution must be preapproved by the board's executive director and accredited by an agency recognized as a regional accrediting body by the Texas Higher Education Coordinating Board or its equivalent in another state.

(H) School of acupuncture transcript. Each applicant must have his or her acupuncture school submit a transcript of courses taken and grades obtained directly to the acupuncture board. Transcripts must clearly demonstrate completion of 1,800 instructional hours, with at least 450 hours of herbal studies.

(I) Fingerprint card. Each applicant must complete a fingerprint card for the Texas Department of Public Safety and return it to the acupuncture board as part of the application.

(J) Other verification. For good cause shown, with the approval of the acupuncture board, verification of any information required by this subsection may be made by a means not otherwise provided for in this subsection.

(3) Additional documentation. Applicants may be required to submit other documentation, including but not limited to the following:

(A) Translations. An accurate certified translation of any document that is in a language other than the English language along with the original document or a certified copy of the original document which has been translated.

(B) Arrest Records. If an applicant has ever been arrested, a copy of the arrest and arrest disposition from the arresting authority and submitted by that authority directly to the acupuncture board.

(C) Malpractice. If an applicant has ever been named in a malpractice claim filed with any liability carrier or if an applicant has ever been named in a malpractice suit, the applicant shall submit the following:

(i) a completed liability carrier form furnished by the acupuncture board regarding each claim filed against the applicant's insurance;

(ii) for each claim that becomes a malpractice suit, a letter from the attorney representing the applicant directly to this board explaining the allegation, dates of the allegation, and current status of the suit. If the suit has been closed, the attorney must state the disposition of the suit, and if any money was paid, the amount of the settlement, unless release of such information is prohibited by law or an order of a court with competent jurisdiction. If such letter is not available, the applicant will be required to furnish a notarized affidavit explaining why this letter cannot be provided; and

(iii) a statement, composed by the applicant, explaining the circumstances pertaining to patient care in defense of the allegations.

(D) Inpatient treatment for alcohol/substance abuse or mental illness. Each applicant that has been admitted to an inpatient facility within the last five years for the treatment of alcohol/substance abuse or mental illness must submit the following:

(i) an applicant's statement explaining the circumstances of the hospitalization;

(ii) an admitting summary and discharge summary, submitted directly from the inpatient facility;

(iii) a statement from the applicant's treating physician/psychotherapist as to diagnosis, prognosis, medications prescribed, and follow-up treatment recommended; and

(iv) a copy of any contracts or agreements signed with any licensing authority.

(E) Outpatient treatment for alcohol/substance abuse or mental illness. Each applicant that has been treated on an outpatient basis within the last five years for alcohol/substance abuse or mental illness must submit the following:

(i) an applicant's statement explaining the circumstances of the outpatient treatment;

(ii) a statement from the applicant's treating physician/psychotherapist as to diagnosis, prognosis, medications prescribed, and follow-up treatment recommended; and

(iii) a copy of any contracts or agreements signed with any licensing authority.

(F) Additional documentation. Additional documentation as is deemed necessary to facilitate the investigation of any application for licensure.

(G) DD214. A copy of the DD214 indicating separation from any branch of the United States military.

(H) Other verification. For good cause shown, with the approval of the acupuncture board, verification of any information required by this subsection may be made by a means not otherwise provided for in this subsection.

(I) False documentation. Falsification of any affidavit or submission of false information to obtain a license may subject an acupuncturist to denial of a license or to discipline pursuant to the Act, §205.351.

(4) Substitute documents/proof. The acupuncture board may, at its discretion, allow substitute documents where proof of exhaustive efforts on the applicant's part to secure the required documents is presented. These exceptions are reviewed by the acupuncture board, a board committee, or the board's executive director on an individual case-by-case basis.

(d) Temporary license.

(1) Issuance. The acupuncture board [~~Texas State Board of Acupuncture Examiners~~] may, through the executive director of the agency [~~Texas State Board of Medical Examiners~~], issue a temporary license to a licensure applicant who appears to meet all the qualifications for an acupuncture license under the Act, but is waiting for the next scheduled meeting of the acupuncture board [~~Texas State Board of Acupuncture Examiners~~] for review and for the license to be issued.

(2) Duration/renewal. A temporary license shall be valid for 100 days from the date issued and may be extended only for another 30 days after the date the initial temporary license expires. Issuance of a temporary license may be subject to restrictions at the discretion of the executive director and shall not be deemed dispositive in regard to the decision by the acupuncture board [~~Texas State Board of Acupuncture Examiners~~] to grant or deny an application for a permanent license.

(e) Distinguished professor temporary license.

(1) Issuance. The acupuncture board may issue a single distinguished professor temporary license to an acupuncturist who:

(A) holds a substantially equivalent license, certificate, or authority to practice acupuncture in another state, province, or country; and

(B) agrees to and limits any acupuncture practice in this state to acupuncture practice for demonstration or teaching purposes for acupuncture students and/or instructors, and in direct affiliation with an acupuncture school that is a candidate for accreditation or has accreditation through the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM) at which the students are trained and/or the instructors teach; and

(C) agrees to and limits practice to demonstrations or instruction under the direct supervision of a licensed Texas acupuncturist who holds an unrestricted license to practice acupuncture in this state; and

(D) pays any required fees for issuance or renewal of the distinguished professor temporary license.

(2) [~~Duration/renewal.~~] Duration. The distinguished professor temporary license shall be valid for a continuous one-year period; however, the permit is revocable at any time the board deems necessary. The distinguished professor temporary license shall automatically expire one year after the date of issuance. The distinguished professor temporary license may not be renewed or reissued. [~~Any such distinguished professor temporary license shall have a duration of no longer than 60 days and may be renewed no more than three consecutive times for a total of an additional 180 days.~~]

(3) Disciplinary action. [~~Termination. A distinguished professor temporary license shall automatically expire at the end of 60 days from issuance or 60 days from date of renewal unless otherwise renewed.~~] A distinguished professor temporary license or renewal may be denied, terminated, cancelled, suspended, or revoked for any violation of acupuncture board rules or the Act, Subchapter H.

(f) Relicensure.

[~~(1)~~] If an acupuncturist's license has been expired for one year, it is considered to have been canceled, and the acupuncturist may not renew the license. The acupuncturist may obtain a new license by [~~submitting to reexamination and~~] complying with the requirements and procedures for obtaining an original license. [~~The examination required by this section is the full NCCAOM examination.~~]

[~~(2) A person may qualify for renewal of his or her original license without reexamination if that person:~~]

[~~(A) held a license previously in this state;~~]

[~~(B) moved to another state, province, or country;~~]

[~~(C) legally practiced in the other state, province, or country for not more than two years since the expiration of his or her Texas license; and~~]

[~~(D) files an application for relicensure under subsections (a)-(c) of this section.~~]

(g) Approved schools. An [~~A~~] ACAOM approved acupuncture school may use the word "college" as a means of representation to the public as long as it maintains ACAOM accreditation. An approved school may not represent itself as a university.

(h) Exceptions. Before January 1, 2004, the acupuncture board may not adopt a rule under §205.101 of the Act, that requires a school of acupuncture operating in Texas on or before September 1, 1993, be accredited by, or a candidate for accreditation by, the ACAOM [~~Accreditation Commission for Acupuncture and Oriental Medicine.~~]

§183.6. Denial of License; Discipline of Licensee.

(a) An applicant for a license under the Act shall be subject to denial of the application pursuant to the provisions of §205.351 of the Act.

(b) An acupuncturist who holds a license issued under authority of the Act shall be subject to discipline, including revocation of license, pursuant to §205.351 of the Act.

(c) The denial of licensure or the imposition of disciplinary action by the acupuncture board pursuant to §205.351 of the Act shall be in accordance with the Act, the procedures set forth in Chapter 187 of this title (relating to Procedural Rules) [~~§183.8 of this title (relating to Procedure - General)~~], the Administrative Procedure Act, and the rules of the State Office of Administrative Hearings. If the provisions of Chapter 187 conflict with the Act or rules under this chapter, the Act and provisions of this chapter shall control.

(d) Disciplinary guidelines.

(1) Chapter 190 of this title (relating to Disciplinary Guidelines) shall apply to acupuncturists regulated under this chapter and be used as guidelines for the following areas as they relate to the denial of licensure or disciplinary action of a licensee:

(A) practice inconsistent with public health and welfare;

(B) unprofessional or dishonorable conduct;

(C) disciplinary actions by state boards and peer groups;

(D) repeated and recurring meritorious health care liability claims; and

(E) aggravating and mitigating factors.

(2) If the provisions of Chapter 190 conflict with the Act or rules under this chapter, the Act and provisions of this chapter shall control.

[(1) Purpose. This subsection will:]

[(A) provide guidance and a framework of analysis for administrative law judges in the making of recommendations in contested licensure and disciplinary matters;]

[(B) promote consistency in the exercise of sound discretion by board members in the imposition of sanctions in disciplinary matters; and,]

[(C) provide guidance for board members for the resolution of potentially contested matters.]

[(2) Limitations. This subsection shall be construed and applied so as to preserve board member discretion in the imposition of sanctions and remedial measures pursuant to §205.351 of the Act. This subsection shall be further construed and applied so as to be consistent with the Act, and shall be limited to the extent as otherwise proscribed by statute and board rule.]

[(3) Aggravation. The following subparagraphs (A)-(O) of this paragraph may be considered as aggravating factors so as to merit more severe or more restrictive action by the board.]

[(A) patient harm and the severity of patient harm;]

[(B) economic harm to any individual or entity and the severity of such harm;]

[(C) environmental harm and severity of such harm;]

[(D) increased potential for harm to the public;]

[(E) attempted concealment of misconduct;]

[(F) premeditated misconduct;]

[(G) intentional misconduct;]

[(H) motive;]

[(I) prior misconduct of a similar or related nature;]

[(J) disciplinary history;]

[(K) prior written warnings or written admonishments from any government agency or official regarding statutes or regulations pertaining to the misconduct;]

[(L) violation of a board order;]

[(M) failure to implement remedial measures to correct or mitigate harm from the misconduct;]

[(N) lack of rehabilitative potential or likelihood for future misconduct of a similar nature; and,]

[(O) relevant circumstances increasing the seriousness of the misconduct.]

[(4) Extenuation and Mitigation. The following subparagraphs (A)-(O) of this paragraph may be considered as extenuating and mitigating factors so as to merit less severe or less restrictive action by the board.]

[(A) absence of patient harm;]

[(B) absence of economic harm to any individual or entity;]

[(C) absence of environmental harm;]

[(D) absence of potential harm to the public;]

[(E) self-reported and voluntary admissions of misconduct;]

[(F) absence of premeditation to commit misconduct;]

[(G) absence of intent to commit misconduct;]

[(H) motive;]

[(I) absence of prior misconduct of a similar or related nature;]

[(J) absence of a disciplinary history;]

[(K) implementation of remedial measures to correct or mitigate harm from the misconduct;]

[(L) rehabilitative potential;]

[(M) prior community service and present value to the community;]

[(N) relevant circumstances reducing the seriousness of the misconduct; and,]

[(O) relevant circumstances lessening responsibility for the misconduct.]

[(e) Scope of Practice.]

[(1) An acupuncturist may perform acupuncture on a person who has been evaluated by a physician or dentist, as appropriate, for the condition being treated within twelve months before the date acupuncture was performed.]

[(2) The holder of a license may perform acupuncture on a person who was referred by a doctor licensed to practice chiropractic by the Texas Board of Chiropractic Examiners if the licensee commences the treatment within 30 days of the date of the referral. The licensee shall refer the person to a physician after performing acupuncture 30 times or for 120 days, whichever occurs first, if no substantial improvement occurs in the person's condition for which the referral was made.]

[(3) Notwithstanding paragraphs (1) and (2) of this subsection, an acupuncturist holding a current and valid license may without an evaluation or a referral from a physician, dentist, or chiropractor perform acupuncture on a person for smoking addiction, weight loss, alcoholism, chronic pain, or substance abuse.]

[(4) A licensed acupuncturist must recommend an evaluation by a licensed Texas physician or dentist, if after performing acupuncture 20 times or for two months, whichever occurs first, there is no substantial improvement of the patient's chronic pain.]

[(5) A licensed acupuncturist shall recommend an evaluation by a licensed Texas physician or dentist, as appropriate, if after performing acupuncture 20 times or for two months, whichever occurs first, there is no substantial improvement of the patient's alcoholism or substance abuse.]

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

Filed with the Office of the Secretary of State on December 23, 2002.

TRD-200208519

Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: February 9, 2003
For further information, please call: (512) 305-7016

22 TAC §§183.7 - 183.18

(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 State Board of Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The following are affected by the proposed rules: Texas Occupations Code Annotated, Chapter 205.

§183.7. Investigations.

§183.8. Procedure - General.

§183.9. Procedure - Prehearing.

§183.10. Procedure - Hearing.

§183.11. Procedure - Posthearing.

§183.12. Patient Records.

§183.13. Complaint Procedure Notification.

§183.14. Medical Board Review and Approval.

§183.15. Construction.

§183.16. Acudetox Specialist.

§183.17. Use of Professional Titles.

§183.18. Texas Acupuncture Schools.

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

Filed with the Office of the Secretary of State on December 23, 2002.

TRD-200208520
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: February 9, 2003
For further information, please call: (512) 305-7016

22 TAC §§183.7 - 183.18

The new rules are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The following are affected by the proposed rules: Texas Occupations Code Annotated, Chapter 205.

§183.7. Scope of Practice.

(a) An acupuncturist may perform acupuncture on a person who has been evaluated by a physician or dentist, as appropriate, for the condition being treated within twelve months before the date acupuncture was performed.

(b) The holder of a license may perform acupuncture on a person who was referred by a doctor licensed to practice chiropractic by the Texas Board of Chiropractic Examiners if the licensee commences the treatment within 30 days of the date of the referral. The licensee shall refer the person to a physician after performing acupuncture 20 times or for two months, whichever occurs first, if no substantial improvement occurs in the person's condition for which the referral was made.

(c) Notwithstanding subsections (a) and (b) of this section, an acupuncturist holding a current and valid license may without an evaluation or a referral from a physician, dentist, or chiropractor perform acupuncture on a person for smoking addiction, weight loss, alcoholism, chronic pain, or substance abuse.

(d) A licensed acupuncturist must recommend an evaluation by a licensed Texas physician or dentist, if after performing acupuncture 20 times or for two months, whichever occurs first, there is no substantial improvement of the patient's chronic pain.

(e) A licensed acupuncturist shall recommend an evaluation by a licensed Texas physician or dentist, as appropriate, if after performing acupuncture 20 times or for two months, whichever occurs first, there is no substantial improvement of the patient's alcoholism or substance abuse.

§183.8. Investigations.

(a) Confidentiality. All complaints, adverse reports, investigation files, other investigation reports, and other investigative information in the possession of, received, or gathered by the board shall be confidential and no employee, agent, or member of the board may disclose information contained in such files except in the following circumstances:

(1) to the appropriate licensing authorities in other states, the District of Columbia, or a territory or country in which the acupuncturist is licensed;

(2) to appropriate law enforcement agencies if the investigative information indicates a crime may have been committed;

(3) to a health care entity upon receipt of written request. Disclosures by the board to a health care entity shall include only information about a complaint filed against an acupuncturist that was resolved after investigation by a disciplinary order of the board or by an agreed settlement, and the basis of and current status of any complaint under active investigation; and

(4) to other persons if required during the conduct of the investigation.

(b) Request for Information and Records.

(1) Patient records. Upon the request of the board or board representatives, a licensee shall furnish to the board legible copies of patient records in English or the original records within 14 days of the date of the request.

(2) Renewal of licenses. A licensee shall furnish a written explanation of his or her answer to any question asked on the application for license renewal, if requested by the medical board or acupuncture board. This explanation shall include all details as the medical board or acupuncture board may request and shall be furnished within 14 days of the date of the medical or acupuncture board's request.

(c) Professional Liability Suits and Claims. Following receipt of a notice of claim letter or a complaint filed in court against a licensee

that is reported to the acupuncture board, the licensee shall furnish to the medical or acupuncture board the following information within 14 days of the date of receipt of the medical or acupuncture board's request for said information:

(1) a completed questionnaire to provide summary information concerning the suit or claim;

(2) a completed questionnaire to provide information deemed necessary in assessing the licensee's competency;

(3) true, legible, and complete copies of the licensee's office patient records and hospital records, if applicable, concerning the patient on whose behalf damages are sought; and

(4) current information on the status of any suit or claim previously reported to either board.

(d) Investigation of Professional Review Actions. A written report of a professional review action taken by a peer review committee or a health care entity provided to the acupuncture board must contain the results and circumstances of the professional review action. Such results and circumstances shall include:

(1) the specific basis for the professional review action, whether or not such action was directly related to care of individual patients; and

(2) the specific limitations imposed upon the acupuncturist's clinical privileges, upon membership in the professional society or association, and the duration of such limitations.

(e) Other Reports.

(1) Relevant information shall be reported to the acupuncture board indicating that an acupuncturist's practice poses a continuing threat to the public welfare shall include a narrative statement describing the time, date, and place of the acts or omissions on which the report is based.

(2) A report that an acupuncturist's practice constitutes a continuing threat to the public welfare shall be made to the acupuncture board as soon as possible after the peer review committee, licensed acupuncturist or acupuncture student involved reaches that conclusion and is able to assemble the relevant information.

(f) Reporting Professional Liability Claims.

(1) Reporting responsibilities. The reporting form must be completed and forwarded to the acupuncture board for each defendant acupuncturist against whom a professional liability claim or complaint has been filed. The information is to be reported by insurers or other entities providing professional liability insurance for an acupuncturist. If a nonadmitted insurance carrier does not report or if the acupuncturist has no insurance carrier, reporting shall be the responsibility of the acupuncturist.

(2) Separate reports required and identifying information. One separate report shall be filed for each defendant acupuncturist insured. When Part II is filed, it shall be accompanied by the completed Part I or other identifying information as described in paragraph (4)(A) of this subsection.

(3) Timeframes and attachments. The information in Part I of the form must be provided within 30 days of receipt of the claim or suit. A copy of the claim letter or petition must be attached. The information in Part II must be reported within 105 days after disposition of the claim. Disposed claims shall be defined as those claims where a court order has been entered, a settlement agreement has been reached, or the complaint has been dropped or dismissed.

(4) Alternate reporting formats. The information may be reported either on the form provided or in any other legible format which contains at least the requested data.

(A) If the reporter elects to use a reporting format other than the acupuncture board's form for data required in Part II, there must be enough identification data available to board staff to match the closure report to the original file. The data required to accomplish this include:

(i) name and license number of defendant acupuncturist(s); and

(ii) name of plaintiff.

(B) A court order or settlement agreement is an acceptable alternative submission for Part II. An order or settlement agreement should contain the necessary information to match the closure information to the original file. If the order or agreement is lacking some of the required data, the additional information may be legibly written on the order or agreement.

(5) Penalty. Failure by a licensed insurer to report under this section shall be referred to the State Board of Insurance. Sanctions under the Insurance Code, Article 1.10, section 7, may be imposed for failure to report.

(6) Definition. For the purposes of this subsection a professional liability claim or complaint shall be defined as a cause of action against an acupuncturist for treatment, lack of treatment, or other claimed departure from accepted standards of health care or safety which proximately results in injury to or death of the patient, whether the patient's claim or cause of action sounds in tort or contract.

(7) Claims not required to be reported. Examples of claims that are not required to be reported under this chapter but which may be reported include, but are not limited to, the following:

(A) product liability claims (i.e. where an acupuncturist invented a device which may have injured a patient but the acupuncturist has had no personal acupuncturist-patient relationship with the specific patient claiming injury by the device);

(B) antitrust allegations;

(C) allegations involving improper peer review activities;

(D) civil rights violations; or

(E) allegations of liability for injuries occurring on an acupuncturist's property, but not involving a breach of duty to the patient (i.e. slip and fall accidents).

(8) Claims that are not required to be reported under this chapter may, however, be voluntarily reported.

(9) The reporting form shall be as follows:
Figure: 22 TAC §183.8(f)(9)

§183.9. Impaired Acupuncturists.

(a) Mental or physical examination requirement.

(1) The board may require a licensee or applicant to submit to a mental and/or physical examination by a physician or physicians designated by the board if the board has probable cause to believe that the licensee or applicant is impaired. Impairment is present if one appears to be unable to practice with reasonable skill and safety to patients by reason of age, illness, drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material; or as a result of any mental or physical condition.

(2) Probable cause may include, but is not limited to, any one of the following:

(A) sworn statements from two people, willing to testify before the acupuncture board, or the State Office of Administrative Hearings that a certain licensee or applicant is impaired;

(B) a sworn statement from an official representative of the Texas Association of Acupuncturists or the Texas Association of Acupuncture and Oriental Medicine stating that the representative is willing to testify before the board that a certain licensee or applicant is impaired;

(C) evidence that a licensee or applicant left a treatment program for alcohol or chemical dependency before completion of that program;

(D) evidence that a licensee or applicant is guilty of intemperate use of drugs or alcohol;

(E) evidence of repeated arrests of a licensee or applicant for intoxication;

(F) evidence of recurring temporary commitments of a licensee or applicant to a mental institution; or

(G) medical records indicating that a licensee or applicant has an illness or condition which results in the inability to function properly in his or her practice.

(b) Rehabilitation Order. The board through an agreed order or after a contested proceeding, may impose a nondisciplinary rehabilitation order on any licensee, or as a prerequisite for licensure, on any licensure applicant. Chapter 180 of this title (relating to Rehabilitation Orders) shall govern procedures relating to acupuncturists who are found eligible for a rehabilitation order. If the provisions of Chapter 180 conflict with the Act or rules under this chapter, the Act and provisions of this chapter shall control.

§183.10. Patient Records.

(a) Acupuncturists licensed under the Act shall keep and maintain adequate records of all patient visits or consultations which shall, at a minimum, include:

(1) the patient's name and address;

(2) vital signs;

(3) the chief complaint of the patient;

(4) a patient history;

(5) a treatment plan for each patient visit or consultation;

(6) a notation of any herbal medications, including amounts and forms, and other modalities used in the course of treatment with corresponding dates for such treatment;

(7) a system of billing records which accurately reflect patient names, services rendered, the date of the services rendered, and the amount charged or billed for each service rendered;

(8) a written record regarding whether or not a patient was evaluated by a physician or dentist, as appropriate, for the condition being treated within 12 months before the date acupuncture was performed as required by §183.7(a) of this title (relating to Scope of Practice);

(9) a written record regarding whether or not a patient was referred to a physician after the acupuncturist performed acupuncture 20 times or for two months whichever occurs first, as required by §183.7(b) of this title (relating to Scope of Practice) in regard to treatment of patients upon referral by a doctor licensed to practice chiropractic by the Texas Board of Chiropractic Examiners;

(10) in the case of referrals to the acupuncturist of a patient by a doctor licensed to practice chiropractic by the Texas Board of Chiropractic Examiners, the acupuncturist shall record the date of the referral and the most recent date of chiropractic treatment prior to acupuncture treatment; and,

(11) reasonable documentation that the evaluation required by §183.7 of this title (relating to Scope of Practice) was performed or, in the event that the licensee is unable to determine that the evaluation took place, a written statement signed by the patient stating that the patient has been evaluated by a physician within the required time frame on a copy of the following form:
Figure 1: 22 TAC §183.10(a)(11)
Figure 2: 22 TAC §183.10(a)(11)

(b) Pursuant to §205.302 of the Act, an acupuncturist shall not be required to keep and maintain the documentation set forth in subsection (a)(11) of this section when performing acupuncture on a patient only for smoking addiction, substance abuse, alcoholism, chronic pain, or weight loss.

(c) Acupuncturists licensed under the Act shall keep copies of patient treatment records indefinitely and billing records for a period of five years from the time of the last treatment rendered to the patient by the acupuncturist.

(d) Consent for the release of confidential information must be in writing and signed by the patient, or a parent or legal guardian if the patient is a minor, or a legal guardian if the patient has been adjudicated incompetent to manage his or her personal affairs, or an attorney ad litem appointed for the patient, as authorized by the Texas Mental Health Code Subtitle C, Title 7, Health and Safety Code; the Persons with Mental Retardation Act, Subtitle D, Title 7, Health and Safety Code; Chapter 452, Health and Safety Code, (relating to Treatment of Chemically Dependent Persons); Chapter 5, Texas Probate Code; and Chapter 11, Family Code; or a personal representative if the patient is deceased, provided that the written consent specifies the following:

(1) the information or records to be covered by the release;

(2) the reason or purposes for the release; and

(3) the person to whom the information is to be released.

(e) The patient, or other person authorized to consent, has the right to withdraw his or her consent to the release of any information. Withdrawal of consent does not affect any information disclosed prior to the written notice of the withdrawal.

(f) Any person who receives information made confidential by this act may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

(g) An acupuncturist shall furnish legible copies of patient records requested, or a summary or narrative of the records in English, pursuant to a written consent for release of the information as provided by subsection (d) of this section, except if the acupuncturist determines that access to the information would be harmful to the physical, mental, or emotional health of the patient. The acupuncturist may delete confidential information about another person who has not consented to the release. The information shall be furnished by the acupuncturist within 30 days after the date of receipt of the request. Reasonable fees for furnishing the information shall be paid by the patient or someone on his or her behalf. If the acupuncturist denies the request, in whole or in part, the acupuncturist shall furnish the patient a written statement, signed and dated, stating the reason for

denial. A copy of the statement denying the request shall be placed in the patient's records. In this subsection, "patient records" means any records pertaining to the history, diagnosis, treatment, or prognosis of the patient.

§183.11. Complaint Procedure Notification.

Pursuant to §205.152 of the Act, Chapter 188 of this title (relating to Complaint Procedure Notification) shall govern acupuncturists with regard to methods of notification for filing complaints with the agency. If the provisions of Chapter 188 conflict with the Act or rules under this chapter, the Act and provisions of this chapter shall control.

§183.12. Medical Board Review and Approval.

(a) Pursuant to §205.202 of the Act, after consulting the acupuncture board, the medical board shall issue a license to practice acupuncture in this state to a person who meets the requirements of the Act and the rules adopted pursuant to the Act.

(b) The issuance, renewal, surrender, or cancellation of a license to practice acupuncture in this state shall be subject to final approval by the medical board after consultation with the acupuncture board.

(c) The acupuncture board recommendations of the revocation, suspension, restriction, probation, cancellation, or surrender of a license to practice acupuncture, as well as all recommended disciplinary actions, dismissals of allegations of violations of the Act, and agreed dispositions, shall be subject to medical board review and final approval by the medical board.

(d) Medical board approval of acupuncture board actions under this section shall be memorialized in the minutes of the medical board, the minutes of a committee of the medical board, or in a writing signed by the medical board's presiding officer, secretary-treasurer, or authorized committee chairman after consideration of the recommendations of the acupuncture board.

§183.13. Construction.

The provisions of this chapter shall be construed and interpreted so as to be consistent with the statutory provisions of the Act. In the event of a conflict between this chapter and the provisions of the Act, the provisions of the Act shall control; however, this chapter shall be construed so that all other provisions of this chapter which are not in conflict with the Act shall remain in effect.

§183.14. Acudetox Specialist.

(a) For purposes of this chapter, an "acudetox specialist" shall be defined as a person who is certified to practice auricular acupuncture for the limited purpose of treating alcoholism, substance abuse, and chemical dependency.

(b) Any person who does not possess a Texas acupuncture license or is not otherwise authorized to practice acupuncture under Tex. Occ. Code Ann. Title 3, Subtitle C, Chapter 205, may practice as an acudetox specialist for the sole purpose of the treatment of alcoholism, substance abuse, or chemical dependency upon obtaining certification as an acudetox specialist only under the following conditions listed in paragraphs (1)-(4) of this subsection:

(1) after issuance of certification by the Medical Board, payment of any required fee and receipt of written confirmation of certification from the Medical Board;

(2) after successful completion of a training program in acupuncture for the treatment of alcoholism, substance abuse, or chemical dependency, which has been approved by the Medical Board. Such program in auricular acupuncture shall be 70 hours in length, and shall include a clean needle technique course or equivalent universal infection control precaution procedures course approved by the Medical Board;

(3) if the individual holds an unrestricted and current license, registration, or certification issued by the appropriate Texas regulatory agency authorizing practice as a social worker, a licensed professional counselor, a licensed psychologist, a licensed chemical dependency counselor, a licensed vocational nurse, or a licensed registered nurse; provided, however, that such practice of acudetox is not prohibited by the regulatory agency authorizing such practice as a social worker, professional counselor, psychologist, chemical dependency counselor, licensed vocational nurse, or registered nurse; and,

(4) if the individual works under protocol and has access to a licensed Texas physician or a licensed Texas acupuncturist readily available by telephonic means or other methods of communication.

(c) For purposes of this chapter, auricular acupuncture shall be defined as acupuncture treatment limited to the insertion of needles into five acupuncture points in the ear. These points being the liver, kidney, lung, sympathetic and shen men.

(d) Certification as an acudetox specialist shall be subject to suspension, revocation, or cancellation on any grounds substantially similar to those set forth in the Act, (205.351 or for practicing acupuncture in violation of this chapter.

(e) Practitioners certified as acudetox specialists shall keep records of patient care which at a minimum shall include the dates of treatment, the purpose for the treatment, the name of the patient, the points used, and the name, signature, and title of the certificate-holder.

(f) The fee for certification as an acudetox specialist for the treatment of alcoholism, substance abuse, or chemical dependency shall be set in such an amount as to cover the reasonable cost of administering and enforcing this chapter without recourse to any other funds generated by the Medical or the Acupuncture Board. Such fee shall be $50 for the initial application for certification and $25 per renewal.

(g) Certificate-holders under this chapter shall keep a current mailing and practice address on file with the Medical Board and shall notify the Medical Board in writing of any address change within ten days of the change of address.

(h) Individuals practicing as an acudetox specialist under the provisions of this chapter shall ensure that any patient receiving such treatment is notified in writing of the qualifications of the individual providing the acudetox treatment and the process for filing complaints with the Medical Board, and shall ensure that a copy of the notification is retained in the patient's record.

(i) Applications for certification as an acudetox specialist shall be submitted in writing on a form approved by the Medical Board which contains the information set forth in subsection (b) of this section and any supporting documentation necessary to confirm such information.

(j) Each individual who is certified as an acudetox specialist may annually renew certification by completing and submitting to the Medical Board an approved renewal form together with the following as listed in paragraphs (1)-(3) of this subsection:

(1) documentation that the certification or license as required by subsection (b)(3) of this section is still valid;

(2) proof of any Continuing Auricular Acupuncture Education (CAAE) obtained as provided for in §183.21 of this title (relating

to Continuing Auricular Acupuncture Education for Acudetox Specialists); and,

(3) payment of a certification renewal fee in the amount of $25.

(k) Each individual who obtains certification as an acudetox specialist under this section may only use the titles "Certified Acudetox Specialist" or "C.A.S." to denote his or her specialized training.

§183.15. Use of Professional Titles.

(a) A licensee shall use the title "Licensed Acupuncturist," "Lic. Ac.," or "L. Ac.," alongside his/her name on any advertising or other materials visible to the public which pertain to the licensee's practice of acupuncture. Only persons licensed as an acupuncturist may use these titles.

(b) If a licensee uses any additional title or designation, it shall be the responsibility of the licensee to comply with the provisions of the Healing Art Identification Act, Tex. Occ. Code Ann., Chapter 104.

§183.16. Texas Acupuncture Schools.

(a) A licensed Texas acupuncturist operating an acupuncture school in Texas which has not yet been accredited by the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM) or reached candidate status for accreditation by ACAOM, a licensed Texas acupuncturist with any ownership interest in such a school, or a licensed Texas acupuncturist who teaches in or operates such a school, shall ensure that students of the school and applicants to the school are made aware of the provisions of the Medical Practice Act governing acupuncture practice, the rules and regulations adopted by the Texas State Board of Acupuncture Examiners, and the educational requirements for obtaining a Texas acupuncture license to include the rules and regulations establishing the criteria for an approved acupuncture school for purposes of licensure as an acupuncturist by the Texas State Board of Acupuncture Examiners as set forth in subsection (b) of this section.

(b) Compliance with the provisions of subsection (a) of this section shall be accomplished by providing students and applicants with a copy of Subchapter H of the Act, a copy of Chapter 183 (Acupuncture) contained in the Rules of the Texas State Board of Medical Examiners, and the following typed statement:
Figure: 22 TAC §183.16(b)

(c) A licensed Texas acupuncturist who operates, teaches at, or owns, in whole or in part, a Texas acupuncture school which is not accredited by ACAOM or is not a candidate for ACAOM accreditation shall not state directly or indirectly, explicitly or by implication, orally or in writing, either personally or through an agent of the acupuncturist or the school, that the school is endorsed, accredited, registered with, affiliated with, or otherwise approved by the Texas State Board of Acupuncture Examiners for any purpose.

(d) Failure to comply with the requirements or abide by the prohibitions of this section shall be grounds for disciplinary action against a licensed Texas acupuncturist who operates, teaches at, or owns, in whole or in part, a Texas acupuncture school which is not accredited by ACAOM or is not a candidate for ACAOM accreditation. Such disciplinary action shall be based on the violation of a rule of the Texas State Board of Acupuncture Examiners as provided for in the Act, §205.351(a)(6).

(e) For purposes of licensure and regulation of acupuncturists practicing in Texas, ACAOM approved acupuncture schools in Texas meeting the criteria set forth in §183.2 of this title (relating to Definitions) may issue masters of science in oriental medicine degrees in a manner consistent with the laws of the State of Texas. The Texas State Board of Acupuncture Examiners shall recognize any such lawfully issued degrees. For purposes of licensure and regulation of acupuncturists practicing in Texas, acupuncture schools in Texas which are ACAOM candidates for masters level programs in acupuncture and oriental medicine and who have issued diplomas or degrees during the period of candidacy, may upgrade such degrees to masters degrees upon obtaining full ACAOM accreditation. The Texas State Board of Acupuncture Examiners shall recognize any such lawfully upgraded degrees.

§183.17. Compliance.

Chapter 189 of this title (relating to Compliance shall be applied to acupuncturists who are under board orders. If the provisions of Chapter 189 conflict with the Act or rules under this chapter, the Act and provisions of this chapter shall control.

§183.18. Administrative Penalties.

(a) Pursuant to §205.352 of the Act and Chapter 165 of the Medical Practice Act, the board by order may impose an administrative penalty, subject to the provisions of the APA, against a person licensed or regulated under the Act who violates the Act or a rule or order adopted under the Act. The imposition of such a penalty shall be consistent with the requirements of the Act and the APA.

(b) The penalty for a violation may be in an amount not to exceed $5,000. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

(c) Prior to the imposition of an administrative penalty by board order, a person must be given notice and opportunity to respond and present evidence and argument on each issue that is the basis for the proposed administrative penalty at a show compliance proceeding.

(d) The amount of the penalty shall be based on the factors set forth under Chapter 190 of this title (relating to Disciplinary Guidelines).

(e) If the board by order determines that a violation has occurred and imposes an administrative penalty on a person licensed or regulated under the Act, the board shall give notice to the person of the board's order which shall include a statement of the right of the person to seek judicial review of the order.

(f) An administrative penalty may be imposed under this section for the following:

(1) failure to timely comply with a board subpoena issued by the board shall be grounds for the imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation;

(2) failure to timely comply with the terms, conditions, or requirements of a board order shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation;

(3) failure to timely report a change of address to the board shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation;

(4) failure to timely respond to a patient's communications shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation;

(5) failure to comply with the complaint procedure notification requirements as set forth in §183.11 of this title (relating to Complaint Procedure Notification) shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation;

(6) failure to provide show compliance proceeding information in the prescribed time shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation; and

(7) for any other violation other than quality of care that the board deems appropriate shall be grounds for imposition of an administrative penalty of no less than $100 and no more than $5,000 for each separate violation.

(g) In the case of untimely compliance with a board order, the board staff shall not be authorized to impose an administrative penalty without an informal show compliance proceeding if the person licensed or regulated under the Act has not first been brought into compliance with the terms, conditions, and requirements of the order other than the time factors involved.

(h) Any order proposed under this section shall be subject to final approval by the board.

(i) Failure to pay an administrative penalty imposed through an order shall be grounds for disciplinary action by the board pursuant to the Act, §205.351(a)(10), regarding unprofessional or dishonorable conduct likely to deceive or defraud, or injure the public, and shall also be grounds for the executive director to refer the matter to the attorney general for collection of the amount of the penalty.

(j) A person who becomes financially unable to pay an administrative penalty after entry of an order imposing such a penalty, upon a showing of good cause by a writing executed by the person under oath and at the discretion of the Discipline and Ethics Committee of the board, may be granted an extension of time or deferral of no more than one year from the date the administrative penalty is due. Upon the conclusion of any such extension of time or deferral, if payment has not been made in the manner and in the amount required, action authorized by the terms of the order or subsection (i) of this section.

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

Filed with the Office of the Secretary of State on December 23, 2002.

TRD-200208521
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: February 9, 2003
For further information, please call: (512) 305-7016

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 21. TRADE PRACTICES

SUBCHAPTER R. DIABETES

28 TAC §§21.2601, 21.2602, 21.2604, 21.2606

The Texas Department of Insurance proposes amendments to §§21.2601, 21.2602, 21.2604, and 21.2606 concerning minimum standards for benefits provided to enrollees with diabetes in health benefit plans and coverage under health benefit plans for equipment and supplies and self-management training associated with the treatment of diabetes. The amendments are necessary to implement legislation enacted by the 76th Legislature in Senate Bill 982, amending Article 21.53G, Coverage for Supplies and Services Associated with Treatment of Diabetes. The amendments are also necessary to clarify applicability of the sections to health benefits provided by a risk pool created under Chapter 172, Local Government Code, consistent with Insurance Code Article 21.53D.

The proposed amendments to §21.2601 remove unnecessary language and add a definition for nutrition counseling. The proposed amendments to §21.2604 establish that, consistent with Article 21.53D, Insurance Code, the provisions relating to diabetes equipment and supplies and diabetes self-management training apply to health benefits provided by a risk pool created under Chapter 172, Local Government Code, and delete references to §21.2607, which is being simultaneously proposed for repeal elsewhere in this issue of the *Texas Register.* The proposed amendments to §21.2606 identify the components of diabetes self-management training and those individuals or entities who may provide diabetes self-management training and the required training for those individuals. The proposal also includes grammatical and other changes to conform language to *Texas Register* style guidelines.

Kim Stokes, Senior Associate Commissioner, Life, Health and Licensing, has determined that for each year of the first five years the proposed sections will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the rule. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Stokes has determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of the proposed amendments will be the identification of components of diabetes self-management training and clarification of the applicability of certain provisions to health benefits provided by a risk pool. Ms. Stokes also has determined that any economic costs to entities required to comply with these amendments, as well as any costs to a covered entity qualifying as a small or micro business under Government Code §2006.001, for each year of the first five years the proposed amendments will be in effect, are the result of the legislative enactment of SB 982, and not as a result of the adoption, enforcement, or administration of the proposed amendments. The total cost to a covered entity would not vary between the smallest and largest businesses. Therefore, it is the department's position that the adoption of these proposed amendments will have no adverse economic effect on small businesses or micro-businesses. Regardless of the fiscal effect, the department does not believe it is either legal or feasible to exempt small businesses or micro-businesses from the requirements of these proposed amendments. To do so would allow differentiation in the provision of diabetes self-management training or coverage for diabetes self-management training between small business health carriers compared to large health carriers.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on February 10, 2003 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Margaret Lazaretti, Director of Project

Development, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. A request for a public hearing should be submitted separately to the Office of the Chief Clerk.

The amendments are proposed under the Insurance Code Article 21.53G, 21.53D and §36.001. Article 21.53G determines and defines the component or components of self-management training and provides that the commissioner shall adopt rules as necessary for the implementation of the article. Article 21.53D §3 provides that the commissioner shall by rule adopt minimum standards for benefits to enrollees with diabetes and that each health care benefit plan shall provide benefits for the care required by the minimum standards. Section 36.001 provides that the Commissioner of Insurance may adopt rules to execute the duties and functions of the Texas Department of Insurance as authorized by statute.

The following articles are affected by this proposal: Insurance Code Article 21.53G and 21.53D

§21.2601. Definitions.

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

(1) Basic benefit--Health care service or coverage, which is included in the evidence of coverage, policy, or certificate, without additional premium.

(2) Caretaker--A family member or significant other responsible for ensuring that an insured not able to manage his or her illness (due to age or infirmity) is properly managed, including overseeing diet, administration of medications, and use of equipment and supplies.

(3) Diabetes--Diabetes mellitus. A chronic disorder of glucose metabolism that can be characterized by an elevated blood glucose level. The terms diabetes and diabetes mellitus are synonymous.

(4) Diabetes equipment--The term "diabetes equipment" includes items defined in Insurance Code Article 21.53 G §§1(1) and [§]5, and §21.2605 of this title (relating to Diabetes Equipment and Supplies).

(5) Diabetes supplies--The term "diabetes supplies" includes items defined in Insurance Code Article 21.53 G §§1(2) and 5, and §21.2605 of this title [~~(relating to Diabetes Equipment and Supplies)~~].

(6) Diabetes self-management training--Instruction enabling an insured and/or his or her caretaker to understand the care and management of diabetes, including nutritional counseling and proper use of diabetes equipment and supplies.

(7) Health benefit plan--A health benefit plan, for purposes of this subchapter, means:

(A) a plan that provides benefits for medical or surgical expenses incurred as a result of a health condition, accident, or sickness, including:

(i) an individual, group, blanket, or franchise insurance policy or insurance agreement, a group hospital service contract, or an individual or group evidence of coverage that is offered by:

(I) an insurance company;

(II) a group hospital service corporation operating under Chapter 20 of the Texas Insurance Code;

(III) a fraternal benefit society operating under Chapter 10 of the Texas Insurance Code;

(IV) a stipulated premium insurance company operating under Chapter 22 of the Insurance Code;

(V) a reciprocal exchange operating under Chapter 19 of the Texas Insurance Code; or

(VI) a health maintenance organization (HMO) operating under the Texas Health Maintenance Organization Act (Chapter 20A, Texas Insurance Code);

(ii) to the extent permitted by the Employee Retirement Income Security Act of 1974 (29 USC §1002), a health benefit plan that is offered by a multiple employer welfare arrangement as defined by §3, Employee Retirement Income Security Act of 1974 (29 USC §1002) that holds a certificate of authority under Insurance Code Article 3.95-2; or

(iii) notwithstanding §172.014, Local Government Code, or any other law, health and accident coverage provided by a risk pool created under Chapter 172, Local Government Code.

(B) A plan offered by an approved nonprofit health corporation that is certified under §5.01(a), Medical Practice Act, and that holds a certificate of authority issued by the commissioner under Insurance Code Article 21.52F.

(C) A health benefit plan is not:

(i) a plan that provides coverage:

(I) only for a specified disease or other limited benefit;

(II) only for accidental death or dismemberment;

(III) for wages or payments in lieu of wages for a period during which an employee is absent from work because of sickness or injury;

(IV) as a supplement to liability insurance;

(V) for credit insurance;

(VI) dental or vision care only; or

(VII) hospital confinement indemnity coverage only.

(ii) a small employer plan written under Chapter 26 of the Insurance Code;

(iii) a Medicare supplemental policy as defined by §1882(g)(1), Social Security Act (42 USC §1395 ss);

(iv) workers' compensation insurance coverage;

(v) medical payment insurance issued as part of a motor vehicle insurance policy; or

(vi) a long-term care policy, including a nursing home fixed indemnity policy, unless the commissioner determines that the policy provides benefit coverage so comprehensive that the policy is a health benefit plan as described by subparagraph (A) of this paragraph.

(8) Insured--A person enrolled in a health benefit plan who has been diagnosed with:

(A) insulin dependent or noninsulin dependent diabetes; or

(B) elevated blood glucose levels induced by pregnancy or another medical condition associated with elevated glucose levels.

(9) Nutrition counseling--As defined in §701.002 of the Texas Occupations Code.

(10) [~~(9)~~] Physician--A Doctor of Medicine or a Doctor of Osteopathy licensed by the Texas State Board of Medical Examiners.

(11) [~~(10)~~] Practitioner--An Advanced Practice Nurse, Doctor of Dentistry, Physician Assistant, Doctor of Podiatry, or other licensed person with prescriptive authority.

§21.2602. Required Benefits for Persons with Diabetes.

(a) Notwithstanding §172.014, Local Government Code, or any other law, health plans provided by a risk pool created under Chapter 172, Local Government Code, delivered, issued for delivery, or renewed on or after January 1, 1998, that provide benefits for the treatment of diabetes and associated conditions must provide coverage to an insured for diabetes equipment, diabetes supplies, and diabetes self-management training programs, in accordance with §21.2603 of this title (relating to Out of Pocket Expenses), §21.2605 of this title (relating to Diabetes Equipment and Supplies) and §21.2606 of this title (relating to Diabetes Self-Management Training).

(b) Health benefit plans (other than reciprocal exchanges operating under Chapter 19 of the Texas Insurance Code) delivered, issued for delivery, or renewed on or after January 1, 1999, must provide coverage to each insured in accordance with §21.2603 of this title and §21.2604 of this title (relating to Minimum Standards for Benefits for Persons with Diabetes).

(c) Health benefits plans delivered, issued for delivery, or renewed on or after January 1, 1998, by an entity other than an HMO, which provide coverage limited to hospitalization expenses, shall provide coverage to each insured for diabetes equipment, diabetes supplies, and diabetes self-management training programs, in accordance with §§21.2603, 21.2605[~~§21.2603 of this title, §21.2605 of this title~~], and §21.2606 of this title, during hospitalization of the insured.

(d) A determination of medical necessity may be applied to benefits required under this subchapter provided it complies with all applicable laws and regulations.

§21.2604. Minimum Standards for Benefits for Persons with Diabetes, Requirement for Periodic Assessment of Physician and Organizational Compliance.

(a) Health benefit plans provided by HMOs shall provide coverage for the services in paragraphs (1) through (7) of this subsection and shall contract with providers that agree to comply with the minimum practice standards outlined in subsection (b) of this section. Services to be covered include:

(1) office visits and consultations with physicians and practitioners for monitoring and treatment of diabetes, including office visits and consultations with appropriate specialists;

(2) immunizations required by Insurance Code Article 21.53F, Coverage for Childhood Immunizations;

(3) immunizations for influenza and pneumococcus;

(4) inpatient services, and physician and practitioner services when the insured is confined to:

(A) a hospital;

(B) a rehabilitation facility; or

(C) a skilled nursing facility;

(5) inpatient and outpatient laboratory and diagnostic imaging services;

(6) diabetes equipment and supplies in accordance with §21.2605 of this title (relating to Diabetes Equipment and Supplies), [~~except~~] notwithstanding §172.014, Local Government Code, or any other law, this subsection applies [~~does not apply~~] to health benefits provided by a risk pool created under Chapter 172, Local Government Code; and

(7) diabetes self-management training, in accordance with subsection (b)(1)(iii) [~~(b)(1)(ii)~~] of this section[~~, §21.2606 of this title (relating to Diabetes Self-Management Training) or §21.2607 of this title (relating to Accessibility and Availability of Diabetes Self-Management Training Prior to January 1, 2002), except~~], notwithstanding §172.014, Local Government Code, or any other law, this subsection applies [~~does not apply~~] to health benefits provided by a risk pool created under Chapter 172, Local Government Code;

(b) HMOs shall contract with providers who, at a minimum, provide care that complies with subsection (a) of this section that includes:

(1) for all insureds:

(A) at initial visit by the insured:

(i) a complete history and physical including an assessment of immunization status;

(ii) development of a management plan addressing all of the following that are applicable to the insured:

(I) nutrition and weight evaluation;

(II) medications;

(III) an exercise regimen;

(IV) glucose and lipid control;

(V) high risk behaviors;

(VI) frequency of hypoglycemia and hyperglycemia;

(VII) compliance with applicable aspects of self care;

(VIII) assessment of complications;

(IX) follow up on any referrals;

(X) psychological and psychosocial adjustment;

(XI) general knowledge of diabetes; and

(XII) self-management skills;

(iii) diabetes self-management training given or referred by the physician or practitioner as required by §21.2606 of this title[~~and §21.2607 of this title~~)];

(iv) referral for a dilated funduscopic eye exam to be performed by an ophthalmologist or therapeutic optometrist for an insured with Type 2 Diabetes.

(B) at every visit the following:

(i) weight and blood pressure taken,

(ii) foot exam performed without shoes or socks, and

(iii) dental inspection.

(C) every six months the following:

(i) review of the management plan, and

(ii) glycosylated hemoglobin test.

(D) annually the following:

(i) lipid profile,

(ii) microalbuminuria;

(iii) influenza immunization;

(iv) referral for a dilated funduscopic eye exam performed by an ophthalmologist or therapeutic optometrist; and

(v) for insureds under 18 [~~eighteen~~] years of age, a referral for a retinal camera examination to be performed by an ophthalmologist or therapeutic optometrist.

(2) For treatment of an insured 65 [~~sixty-five~~] years of age and over or an insured with complications affecting two or more body systems:

(A) minimum practice standards as set forth in paragraph (1) of this subsection; and

(B) specific inquiries into and consideration of treatment goals for comorbidity and polypharmacy.

(3) For pregnant insureds with pre-existing or gestational diabetes:

(A) minimum practice standards as set forth in paragraph (1) of this subsection; and

(B) enhanced fetal monitoring based on the standards promulgated by the American College of Gynecologists and Obstetricians.

(4) For insureds with Type 1 Diabetes:

(A) minimum practice standards as set forth in paragraph (1) of this subsection;

(B) an initial diagnosis, consideration of hospitalization due to the insured's:

(i) age;

(ii) physical condition;

(iii) psychosocial circumstances; or

(iv) lack of access to outpatient diabetes self-management training as required in §21.2606 of this title [~~or §21.2607 of this title~~]; and

(C) on-going management which includes quarterly office visits at which evaluation includes:

(i) weight;

(ii) blood pressure;

(iii) ophthalmologic exam;

(iv) thyroid palpation;

(v) cardiac exam;

(vi) examination of pulses;

(vii) foot exam;

(viii) skin exam;

(ix) neurological exam;

(x) dental inspection;

(xi) results of home glucose self monitoring;

(xii) frequency and severity of hypoglycemia or hyperglycemia;

(xiii) medical nutrition plan;

(xiv) exercise regimen;

(xv) adherence problems;

(xvi) psychosocial adjustment;

(xvii) reevaluation of short and long term self-management goals;

(xviii) anticipatory guidance related to issues of Type 1 Diabetes;

(xix) glycosylated hemoglobin;

(xx) counseling for high risk behaviors; and

(xxi) for insureds under eighteen years of age, growth assessment.

(c) Health plans provided by HMOs shall periodically assess physician and organizational compliance with the minimum practice standards contained in subsection (b) of this section.

(d) Health benefit plans provided by entities other than HMOs shall provide coverage at a minimum for:

(1) office visits and consultations with physicians and practitioners for monitoring and treatment of diabetes, including office visits and consultations with appropriate specialists;

(2) immunizations required by Insurance Code Article 21.53F, Coverage for Childhood Immunizations;

(3) immunizations for influenza and pneumococcus;

(4) inpatient services, physician, and practitioner services when an insured is confined to:

(A) a hospital;

(B) a rehabilitation facility; or

(C) a skilled nursing facility;

(5) inpatient and outpatient laboratory and diagnostic imaging services;

(6) diabetes equipment and supplies in accordance with §21.2605 of this title, [~~except~~] notwithstanding §172.014, Local Government Code, or any other law, this subsection applies [~~does not apply~~] to health benefits provided by a risk pool created under Chapter 172, Local Government Code; and

(7) diabetes self-management training in accordance with §21.2606 of this title [~~or §21.2607 of this title, except~~], notwithstanding §172.014, Local Government Code, or any other law, this subsection applies [~~does not apply~~] to health benefits provided by a risk pool created under Chapter 172, Local Government Code.

§21.2606. Diabetes Self-Management Training.

(a) A health benefit plan shall provide diabetes self-management training or coverage for diabetes self-management training for which a physician or practitioner has written an order, including a written order of a practitioner practicing under protocols jointly developed with a physician, to each insured or the caretaker of the insured in accordance with the standards contained in Insurance Code Article 21.53G, Sec. 4(b) and (c) [~~from:~~]

[~~(1) a diabetes self-management training program recognized by the American Diabetes Association;~~]

[~~(2) a multidisciplinary team coordinated by a Certified Diabetes Educator (CDE), who is certified by the National Certification~~

~~Board for Diabetes Educators. The team shall consist of at least a dietitian and a nurse educator; other team members may include a pharmacist and a social worker. Other than a social worker, all team members must have recent didactic and experiential preparation in diabetes clinical and educational issues;~~]

[~~(3) a Certified Diabetes Educator (CDE); or~~]

[~~(4) a licensed health care professional, including a physician, a physician assistant, a registered nurse, a licensed or registered dietician, or a pharmacist, who has been determined by his or her licensing board to have recent didactic and experiential preparation in diabetes clinical and educational issues,~~]

(b) A person may not provide a component of diabetes self-management training under subsection (a) of this section unless the subject matter of the component is within the scope of the person's practice and the person meets the education requirements as determined by the person's licensing agency in consultation with the commissioner of health. [~~All individuals providing self-management training pursuant to subsection (a) of this section must be licensed, registered, or certified in Texas to provide appropriate health care services.~~]

(c) Self-management training shall include the development of an individualized management plan that is created for and in collaboration with the insured and that meets the requirements of the minimum standards for benefits in accordance with §21.2604 of this title (relating to Minimum Standards for Benefits for Persons with Diabetes).

(d) Nutrition [~~Medical nutritional~~] counseling and instructions on the proper use of diabetes equipment and supplies shall be provided or covered as part of the training.

(e) Diabetes self-management training shall be provided, or coverage for diabetes self-management training shall be provided to an insured or a caretaker, upon the following occurrences relating to an insured, provided that any training involving the administration of medications must comply with the applicable delegation rules from the appropriate licensing agency:

(1) the initial diagnosis of diabetes;

(2) the written order of a physician or practitioner indicating that a significant change in the symptoms or condition of the insured requires changes in the insured's self-management regime;

(3) the written order of a physician or practitioner that periodic or episodic continuing education is warranted by the development of new techniques and treatment for diabetes.

(f) An HMO shall provide oversight of its diabetes self-management training program on an ongoing basis to ensure compliance with this section.

(g) Health benefit plans provided by entities other than HMOs shall disclose in the plan how to access providers or benefits described in subsection (a) of this section [~~and §21.2607 of this title (relating to Accessibility and Availability of Diabetes Self-Management Training Prior to January 1, 2002)~~].

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

Filed with the Office of the Secretary of State on December 30, 2002.

TRD-200208568

Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: February 9, 2003
For further information, please call: (512) 463-6327

28 TAC §21.2607

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

The Texas Department of Insurance proposes the repeal of §21.2607 concerning minimum standards for benefits provided to enrollees with diabetes in health benefit plans and coverage under health benefit plans for equipment and supplies and self-management training associated with the treatment of diabetes. The repeal is necessary to remove language for which the statutory authority has expired. Contemporaneously with this proposed repeal, proposed amendments to §§21.2601-21.2606 are published elsewhere in this issue of the *Texas Register*.

Kim Stokes, Senior Associate Commissioner, Life, Health and Licensing, has determined that for each year of the first five years the proposed repeal is in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the rule. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Stokes has determined that for each year of the first five years the proposed repeal is in effect, the public benefits anticipated as a result of the proposed repeal will be the removal language for which the statutory authority has expired. Regardless of the fiscal effect, the department does not believe it is either legal or feasible to exempt small businesses or micro-businesses from the requirements of the proposed repeal. To do so would allow differentiation in the provision of diabetes self-management training or coverage for diabetes self-management training between small business health carriers compared to large health carriers.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on February 10, 2003 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Margaret Lazaretti, Director of Project Development, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. A request for a public hearing should be submitted separately to the Office of the Chief Clerk.

The repeal is proposed under the Insurance Code Articles 21.53D and §36.001. Article 21.53D §3 provides that the commissioner shall by rule adopt minimum standards for benefits to enrollees with diabetes. Section 36.001 provides that the Commissioner of Insurance may adopt rules to execute the duties and functions of the Texas Department of Insurance as authorized by statute.

The following articles are affected by this proposal: Insurance Code Article 21.53D

§21.2607. Accessibility and Availability of Diabetes Self-Management Training Prior to January 1, 2002.

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

Filed with the Office of the Secretary of State on December 30, 2002.

TRD-200208571
Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: February 9, 2003
For further information, please call: (512) 463-6327

CHAPTER 22. PRIVACY

SUBCHAPTER B. INSURANCE CONSUMER HEALTH INFORMATION PRIVACY

28 TAC §§22.51, 22.58, 22.59

The Texas Department of Insurance proposes an amendment to §22.51 and new §22.58 and §22.59, concerning privacy of nonpublic personal health information provided by consumers to insurers and other covered entities regulated by the department. This proposal is necessary to complete implementation of Senate Bill (SB) 11, 77th Texas Legislature. SB 11 added Chapter 28B to the Insurance Code (Article 28B.01 et seq.), which establishes standards for entities regulated by the department with regard to protected consumer health information. SB 11 also added Subtitle I to Title 2 of the Health & Safety Code (Section 181.001 et seq.), which requires certain persons, including covered entities subject to regulation by the department, to comply with provisions addressing reidentification of persons and marketing using protected health information. SB 11 authorizes the Commissioner to adopt rules necessary to implement protected health information privacy requirements as they relate to entities regulated by the department.

The subchapter as originally adopted set forth the requirements that covered entities must meet in structuring their consumer health information practices to comply with SB 11. Specifically, the current rules provide notice requirements, as well as other procedures that covered entities must follow with regard to nonpublic personal health information collected about a consumer. The proposed amendment to §22.51 expands the scope of the subchapter to include proposed new §22.58 and §22.59. Proposed §22.58 outlines requirements for marketing using protected health information, including requirements for authorization of the individual who is the subject of the protected health information. Proposed §22.59 prohibits reidentification of or any attempt to reidentify a person who is the subject of any protected health information.

Kim Stokes, Senior Associate Commissioner for Life, Health, & Licensing, has determined that for each year of the first five years the proposed sections will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the rule. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Stokes has also determined that for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the proposed sections will be enhanced protection of privacy of consumer health information. Ms. Stokes has determined that any economic cost to persons required to comply with the new sections, as well as any costs to a covered entity qualifying as a small business under Government Code 2006.001, for each year of the first five years the proposed new sections will be in effect are the result of the legislative enactment of the Insurance Code Chapter 28B and Health & Safety Code §181.151 and §181.152, and not as a result of the adoption, enforcement, or administration of the proposed new sections. The total cost to a covered entity is not dependent upon the size of the entity, but rather is dependent upon the entity's number of consumers. Therefore, it is the department's position that the adoption of these proposed new sections will have no adverse economic effect on small businesses or micro-businesses. Regardless of the fiscal effect, the department does not believe it legal or feasible to waive the requirements of these rules for small businesses or micro-businesses. To do so would allow differentiation of protection between consumers of small business covered entities compared to those protections provided to the consumers of large covered entities. In an effort to minimize costs, however, covered entities may deliver required notices along with other correspondence rather than in a separate mailing.

To be considered, comments on the proposal must be submitted in writing no later than 5:00 p.m., Central Daylight Time, on February 10, 2003 to Gene C. Jarmon, General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Bill Bingham, Deputy for Regulatory Matters, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. A request for a public hearing should be submitted separately to the Office of the Chief Clerk.

The new sections are proposed under the Insurance Code Article 28B.08 and §36.001 and the Health & Safety Code, §181.004. Insurance Code Article 28B.08 provides that the Commissioner may adopt rules as necessary to implement the chapter. Insurance Code §36.001 provides that the Commissioner of Insurance may adopt rules to execute the duties and functions of the Texas Department of Insurance only as authorized by statute. Health & Safety Code §181.004 authorizes a state agency that licenses or regulates a covered entity subject to Chapter 181 to adopt rules as necessary to carry out the purposes of the chapter.

The following articles of the Insurance Code and sections of Chapter 181 of the Health & Safety Code are affected by this proposal: Insurance Code Art. 28B.01 et seq., Health & Safety Code, §181.151 and §181.152.

§22.51. Purpose and Scope.

(a) Purpose. This subchapter governs the treatment by all covered entities of a consumer's nonpublic personal health information. This subchapter:

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

(3) prohibits a covered entity from reidentifying or attempting to reidentify a consumer who is the subject of any protected health information without obtaining the consumer's consent or authorization; and

(4) sets forth requirements for written marketing communication using protected health information.

(b) (No change.)

§22.58. Disclosure of Protected Health Information for Marketing Purposes; Requirements for Marketing By or On Behalf of a Covered Entity.

(a) A covered entity may not disclose, use, or sell protected health information, including prescription information or prescription patterns, for marketing purposes without an authorization from the person who is the subject of the protected health information which complies with this subchapter.

(b) A covered entity may not coerce or encourage the coercion of a person to consent to or authorize the disclosure, use, or sale of protected health information for marketing purposes.

(c) Any written marketing communications sent by or on behalf of a covered entity must:

(1) be sent in an envelope showing only the address of the sender and the name and address of the recipient;

(2) state the name and toll-free number of the sender and, if different, the covered entity on whose behalf the communication was sent; and

(3) explain the recipient's right to have the recipient's name removed from the sender's mailing list.

(d) A person who receives a request under subsection (c)(3) of this section to remove a recipient's name from a mailing list shall remove the recipient's name not later than the fifth day after the person receives the request.

§22.59. Reidentified Information.

A covered entity may not reidentify or attempt to reidentify a person who is the subject of any protected health information without obtaining from that person an authorization that complies with this subchapter, if required under Chapter 181, Health & Safety Code; Article 28B, Insurance Code; or other state or federal law.

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

Filed with the Office of the Secretary of State on December 30, 2002.

TRD-200208565
Gene C. Jarmon
Acting General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: February 9, 2003
For further information, please call: (512) 463-6327

WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 48. RIDING STABLE REGISTRATION PROGRAM

4 TAC §48.2, §48.7

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed amended section's, submitted by the Texas Animal Health Commission have been automatically withdrawn. The amended section's as proposed appeared in the June 28, 2002 issue of the *Texas Register* (27 TexReg 5658).

Filed with the Office of the Secretary of State on January 3, 2003.

TRD-200300013

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 7. GAS UTILITIES DIVISION

SUBCHAPTER B. SUBSTANTIVE RULES

16 TAC §7.45

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed repealed section, submitted by the Railroad Commission of Texas has been automatically withdrawn. The repealed section as proposed appeared in the June 21, 2002 issue of the *Texas Register* (27 TexReg 5335).

Filed with the Office of the Secretary of State on January 3, 2003.

TRD-200300011

♦ ♦ ♦

SUBCHAPTER D. CUSTOMER SERVICE AND PROTECTION

16 TAC §§7.401, 7.405, 7.410, 7.415, 7.420, 7.425, 7.430, 7.435, 7.440, 7.445, 7.470, 7.475, 7.480, 7.485

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed new section's, submitted by the Railroad Commission of Texas have been automatically withdrawn. The new section's as proposed appeared in the June 21, 2002 issue of the *Texas Register* (27 TexReg 5335).

Filed with the Office of the Secretary of State on January 3, 2003.

TRD-200300012

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 9. TEXAS STATE BOARD OF MEDICAL EXAMINERS

CHAPTER 193. STANDING DELEGATION ORDERS

22 TAC §193.11, §193.12

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed new section's, submitted by the Texas State Board of Medical Examiners have been automatically withdrawn. The new section's as proposed appeared in the June 28, 2002 issue of the *Texas Register* (27 TexReg 5688).

Filed with the Office of the Secretary of State on January 3, 2002.

TRD-200300014

♦ ♦ ♦

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 5. TEXAS BUILDING AND PROCUREMENT COMMISSION

CHAPTER 111. EXECUTIVE ADMINISTRATION DIVISION

SUBCHAPTER C. COST OF COPIES OF PUBLIC INFORMATION

1 TAC §§111.61 - 111.64, 111.68, 111.70, 111.71

The Texas Building and Procurement Commission adopts amendments to the Texas Administrative Code, Title 1, Part 5, Chapter 111, Subchapter C, §§111.61-64, 111.68, 111.70 and 111.71 (relating to Cost of Copies of Public Information), 1, T.A.C., §§111.61-64, 111.68, 111.70 and 111.71 are adopted without changes to the proposed text as published in the November 8, 2002 issue of the *Texas Register* (27 TexReg 10515). The text will not be republished.

The amended rules are adopted due to the enactment of S.B. 311, 77th Legislature, 2001, which abolished the General Services Commission and created the Texas Building and Procurement Commission. The amendments will update the name of the commission throughout the rules.

The amendments to the Texas Administrative Code, Title 1, Part 5, Chapter 111, Subchapter C, §§111.61-64, 111.68, 111.70 and 111.71 will update the name of the commission throughout the rules.

No comments were received regarding the adoption of Texas Administrative Code, Title 1, Part 5, Chapter 111, Subchapter C, §§111.61-64, 111.68, 111.70 and 111.71.

The amendments to Texas Administrative Code, Title 1, Part 5, Chapter 111, Subchapter C, §§111.61-64, 111.68, 111.70 and 111.71 are proposed under the authority of the Texas Government Code, Title 5, Subtitle A, Subchapter F, §552.262 which provides the Texas Building and Procurement Commission with the authority to promulgate rules necessary to implement the sections.

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

Filed with the Office of the Secretary of State on December 27, 2002.

TRD-200208535

William Warnick
General Counsel
Texas Building and Procurement Commission
Effective date: January 16, 2003
Proposal publication date: November 8, 2002
For further information, please call: (512) 463-4257

♦ ♦ ♦

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 351. COORDINATED PLANNING AND DELIVERY OF HEALTH AND HUMAN SERVICES

1 TAC §§351.501, 351.503, 351.505

The Texas Health and Human Services Commission (HHSC or Commission) adopts new §§351.501, Definitions; 351.503, Minimum Standards for Investigations; and 351.505, Information Collection; Uniform Data Collection Procedures, of Title 1 of the Texas Administrative Code. The rules are adopted with change to the proposed text as published in the June 28, 2002, issue of the *Texas Register* (27 TexReg 5649). The text of the rules will be republished. The adopted rules concern abuse, neglect, and exploitation investigations of children who reside in any facility operated, licensed, certified, or registered by a state agency. The new sections set forth minimum standards for these investigations, describe uniform data collection procedures, and provide definitions applicable to the investigation and data collection procedures. The adopted sections implement Senate Bill 664, 77th Legislature, 2001, codified at §261.407 of the Family Code, concerning minimum standards for investigations of suspected child abuse, neglect, and exploitation, and at §261.408 of the Family Code, concerning the collection of information in the investigation of child abuse, neglect, and exploitation.

The proposed rules were developed in conjunction with a work group consisting of representatives of the health and human services agencies, the Texas School for the Blind and Visually Impaired (TSBVI), the Texas School for the Deaf (TSD), and Advocacy, Incorporated. In drafting the proposed rules, the work group met regularly from January 2000 until December 2000.

The Commission received no written comments on the proposed rules within the 30-day comment period. However, the following entities submitted comments after the comment period: the Texas Department of Protective and Regulatory Services (DPRS), the Texas Department of Mental Health and Mental Retardation (MHMR), TSBVI, TSD, and Advocacy, Incorporated.

The commenters were generally in agreement with the proposed rules; however, they suggested several clarifications and provided wording changes they believed would strengthen the rules and better reflect the intent of the work group. Changes in the adopted rules respond to these comments or otherwise reflect non-substantive changes to the proposed rules.

Comment: A commenter recommended that the definition of "exploitation" in §351.501(5) should indicate that the children at issue in these rules are those served by a "facility," as that term is defined in §351.501(6).

Response: The definitions in §351.501(5) are based on §261.401 of the Family Code, Agency Investigation, and are designed specifically for facilities. HHSC agrees with the comment, and for clarification and consistency within the rule adds "served by a facility."

Comment: Two commenters noted that the term "facility," defined in §351.501(6) is not used often in the proposed rules and is used only to denote an entity licensed, operated, certified, or registered by a state agency. The commenters stated that the use of "facility" in the rules is confusing because, in the proposed rules, the definition included individuals.

Response: HHSC agrees with the comment and believes that, for the purposes of these rules, "facility" means an agency or an individually-operated unit of an agency but not an individual, such as an administrator. HHSC has limited the definition to entities. HHSC intends that individuals responsible for the operation, management, or administration of a facility are included in the definition of "persons who work under the auspices of a facility" in §351.501(7).

Comment: A commenter suggested that the introductory phrase in §351.501(7), "a person who is responsible for a child's care, custody, or welfare," may exclude some of the individuals intended to be included within the definitions in subparagraphs (E), (F), and (G). The commenter explained that, for example, someone who works at the facility may have unsupervised access to the child even though he or she does not have actual responsibility for the child's care, custody, and welfare.

Response: HHSC agrees that the phrase unintentionally excludes some individuals intended to come within the definition and deletes the phrase.

Comment: A commenter objected to the inclusion of "student" in §351.501(7)(A). The commenter explained that the term could include a child served by a facility and noted that DPRS does not investigate as perpetrators children served by a facility.

Response: HHSC agrees to delete "student" from §351.501(7)(A) and adds §351.501(7)(H), to clarify that the rules are intended to cover university or college students who work at a facility, such as interns, student teachers, and trainees.

Comment: A commenter stated that the phrase "in his or her care," in §351.501(7) (D), (E), and (G), is unclear when used in the context of a facility.

Response: HHSC agrees that the phrase "in his or her care" is confusing when children are in the care of a facility and has deleted the phrase from §351.501(7) (D), (E), and (G).

Comment: A commenter observed that the word "substantial" in the definition of "observable physical, mental, or emotional impairment" at §351.501(10) could allow someone to argue that emotional harm must be substantial. The commenter requested that the term be deleted from the definitions.

Response: To avoid confusion, HHSC agrees to delete the definition of "observable physical mental, or emotional impairment." Section 351.501 includes definitions of both "emotional harm" and "substantial emotional harm."

Comment: A commenter expressed concerns that the definition of "physical injury" in §351.501(12) requires a physician to determine the nature of even a simple injury.

Response: HHSC agrees with the comment and deletes the phrase "that is determined not to be serious by an examining physician." It would not be cost effective to have a physician examine a child for a simple physical injury, such as scrapes and bruises.

Comment: A commenter requested that §351.501(17)(E) and (F) (adopted rule §351.501(16)) be deleted from this definition because they deal with drugs rather than sexual abuse.

Response: HHSC agrees with the comment and deletes subparagraph (E) and (F). In discussions with the commenter about §351.501(17) (adopted §351.501(16)), it was also agreed that the definition was intended to define "sexual abuse" rather than the "sexual conduct" that is harmful to a child and the definition was revised to reflect this intent.

Comment: A commenter recommended that the term "state agency" in §351.501(18) (adopted rule §351.501(17)) should identify or list agencies to which these rules apply.

Response: For clarity, HHSC agrees to change the definition to include "under the umbrella of HHSC," to further define "state agency."

Comment: A commenter recommended that §351.503 be changed to clarify that these rules are applicable to investigations conducted under §261.401 of the Family Code rather than to reports made under that section.

Responses: HHSC agrees to revise §351.503(a) to clarify that the rules are applicable to investigations conducted, rather than reports made, under §261.401 of the Family Code.

Comment: A commenter noted that "preferably within 24 hours, but not later than 48 hours" in §351.503(b) should be deleted because the phrase could be read to conflict with paragraph (c) and this section.

Response: HHSC agrees with the comment and deletes the phrase. Section 351.503(c)(2)(A) and (B) in the adopted rules, Priorities for Investigations, require a facility to establish timelines for initiating an investigation that are reasonable in light of the allegations; to begin investigations within 24 hours if there are exigent circumstances; and, in most instances, to complete the investigation within 30 days.

Comment: A commenter requested that "an evaluation of the parent(s) or person(s) responsible for the care of the alleged victim" in §351.503(b)(3)(D) be deleted from the examples of relevant information that should be considered in investigations. The commenter stated that the word "parent" is confusing in rules that cover facility investigations and that the task of evaluating parents is also vague in the context of facility investigations.

Response: HHSC agrees with the comment and has deleted the phrase, but notes that the rules provide, in §351.503(d)(2), that evidence should include interviews of anyone who may provide collateral information about the abuse, neglect, or exploitation.

Comment: A commenter noted that the use of "must" and "should" is confusing in §351.503(c) and §351.503(d)(5).

Response: HHSC agrees with the comment. In developing these abuse, neglect, and exploitation rules, HHSC intended to take into consideration current state agency practice and to give state agencies some flexibility in how these rules would be implemented. HHSC has revised the use of "must" and "should" in §351.503(c) and §351.503(d)(5).

Comment: A commenter recommended that the number of days to complete an investigation in §351.503 (c)(2)(A) (adopted rule §351.503 (c)(2)(B)) be expanded from 21 days to 30 days.

Response: HHSC agrees with the comment and has changed §351.503 (c)(2)(A) to 30 days.

Comment: A commenter recommended that "original notes" in §351.503 (d)(7) be changed to "case record" or "investigative report" because information from the original notes is entered into a computer.

Response: HHSC disagrees with the comment because some state agencies retain their original notes. HHSC has added "computer generated notes made in the investigation" to assist those agencies that put their original notes on the computer.

Comment: An agency objected to changing its current classification of findings to the classifications in §351.503(e)(1), (2), (3), and (4) because of the cost of modifying the agency's computer system.

Response: In order to provide flexibility to accommodate the agency's current classification terminology, HHSC retained "confirmed" as a mandatory classification and recommends the classifications of "unconfirmed," "inconclusive," and "unfounded."

Comment: A commenter recommended that references to §261.106(c) and §261.107(a) of the Family Code in §351.503(e)(4) be deleted because the Family Code cites relate only generally to investigations conducted under these rules.

Response: To clarify that the definition of "spurious or without factual basis" is not intended to be limited by §§261.106(c) and 261.107(a) of the Family Code, HHSC has deleted the citations from §351.503(e)(4).

Comment: DPRS requested that some language be included in §351.503(g)(1) and (3) to indicate that DPRS conducts the investigations in MHMR-operated facilities, community centers, MHAs and MRAs, and programs providing services through a contract with MHMR.

Response: HHSC agrees with the comment and has added the language to §351.503(g)(1)(B).

Comment: A commenter asked that §351.503(c) be revised to add an acknowledgement of the underlying duty of those who work under the auspices of a facility to report suspected abuse, neglect, and exploitation in accordance with the agency's rules and policies.

Response: HHSC has added such language to §351.503(c)(1).

Comment: A commenter noted that in §§351.503 (j)(1) and 351.503 (j)(1) (A) the use of words "should consider" and "must" were confusing when discussing professional training standards and curriculum. Section 351.503 (j)(1) indicates that the annual training is not mandatory, while §351.503 (j)(1)(A) implies that it is mandatory.

Response: HHSC agrees with the comment and has changed the "should consider" to "must."

Comment: Commenters stated that they could not differentiate between the professional training described in §351503(j)(1)(A) and the training standards in §351.503(j)(2).

Response: To clarify the distinction, HHSC has combined the curriculum and training standards; added sexual abuse to the training curriculum; deleted §351.503 (j)(D) and added the language to §351.503 (b)(2); and restructured §351.503(j).

Comment: DPRS stated that §261.408(b) of the Family Code implies that DPRS is responsible for receiving and compiling the different agency reports of investigations of alleged abuse, neglect, and exploitation in facilities. DPRS requested that language be added to §351.505 to require designated state agencies to send abuse, neglect, and exploitation investigation reports and information to DPRS.

Response: HHSC agrees with the comment and has added language to §351.505 requesting the designated state agencies to forward their reports and information to DPRS.

These sections are adopted under the Texas Government Code, §531.033, which authorizes HHSC's Commissioner to adopt rules necessary to carry out the Commission's duties, and §261.407 and §261.408 of the Family Code, which authorize HHSC to adopt minimum standards for investigating and uniform procedures for collecting information concerning child abuse, neglect, and exploitation in facilities operated, licensed, certified, or registered by a state agency.

§351.501. Definitions relating to child abuse, neglect, and exploitation.

The following words and terms, when used in this section, §351.503, and §351.505, have the following meanings, unless the context clearly indicates otherwise:

(1) Abuse--any intentional, knowing, or reckless act or omission by an employee, volunteer, or other individual working under the auspices of a facility that causes or may cause emotional harm or physical injury, whether substantial or not, to or the death of a child the facility serves. Abuse includes both physical and sexual abuse.

(2) Allegation--a report by a person who believes or has knowledge that a child has been or may be abused, neglected, or exploited in a facility.

(3) Child--a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes.

(4) Emotional harm--an injury to a child as evidenced by an observable physical, mental, or emotional impairment in the child's psychological growth, development, or functioning.

(5) Exploitation--the illegal or improper use of a child or of the resources of a child served by a facility for monetary or personal benefit, profit, or gain by an employee, volunteer, or other individual working under the auspices of a facility.

(6) Facility--an entity licensed, operated, certified, or registered by a state agency that provides care and services to a child, the Texas School for the Deaf, and the Texas School for the Blind and Visually Impaired.

(7) "Persons who work under the auspices of a facility" include:

(A) an employee or volunteer of the facility;

(B) a person under contract with the facility;

(C) a director, owner, operator, or administrator of a facility;

(D) anyone who has responsibility for a child in a facility's care;

(E) anyone who has unsupervised access to a child in a facility's care;

(F) anyone who regularly or routinely lives at the facility;

(G) any other person permitted by act or omission to have access to a child in the facility's care; and

(H) a university or college student working at the facility, including student teachers and interns.

(8) Intentional, knowing, or reckless--an act or omission is intentional, knowing, or reckless if the person committing it:

(A) deliberately causes or may cause physical injury or emotional harm, whether substantial or not, to the child;

(B) knows or should know that physical injury or emotional harm, whether substantial or not, to the child is a likely result of the act or omission; or

(C) consciously disregards an unjustifiable risk of physical injury or emotional harm, whether substantial or not, to the child.

(9) Neglect--a negligent act or omission by an employee, volunteer, or other person working under the auspices of a facility, including failure to comply with an individual treatment plan, plan of care, or individualized service plan, that causes or may cause substantial emotional harm or substantial physical injury to, or the death of, a child served by the facility.

(10) Omission--a failure to act.

(11) Physical injury--any bodily harm, including, but not limited to, scrapes, cuts, welts, and bruises.

(12) Professional--an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children.

(13) Preponderance of evidence--the greater weight of the evidence, evidence that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

(14) Report--a report that alleged or suspected abuse, neglect, or exploitation of a child has occurred or may occur.

(15) Reporter--a person filing a report of alleged abuse, neglect, or exploitation. The "Reporter" may be the victim of the alleged abuse, neglect, or exploitation, a third party filing a report on behalf of the alleged victim, or both.

(16) Sexual abuse--

(A) conduct harmful to a child's mental, emotional, or physical welfare;

(B) conduct that constitutes the offense of indecency with a child under §21.11 of the Penal Code, sexual assault under §22.011 of the Penal Code, or aggravated sexual assault under §22.021 of the Penal Code;

(C) failure to make a reasonable effort to prevent sexual conduct harmful to a child;

(D) compelling or encouraging the child to engage in sexual conduct, as defined in §43.01 of the Penal Code;

(E) causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the child, if the person knew or should have known that the resulting photograph, film, or depiction of the child is obscene, as defined in §43.21 of the Penal Code, or pornographic;

(F) causing, permitting, encouraging, engaging in, or allowing a sexual performance by a child, as defined in §43.25 of the Penal Code.

(17) State agency--an agency under the umbrella of HHSC that operates, licenses, certifies, or registers a facility in which a child is located; the Texas School for the Blind and Visually Impaired; and the Texas School for the Deaf.

(18) Substantial emotional harm--an observable physical, mental, or emotional impairment in a child's psychological growth, development, or functioning that is significant enough to require treatment by a medical or mental health professional.

(19) Substantial physical injury--bodily harm or damage to a child for which a prudent person would conclude that the injury required professional medical attention. These injuries include, but are not limited to, dislocated, fractured, or broken bones; brain damage; subdural hematoma; internal injuries; lacerations requiring stitches; second and third degree burns; poisoning; and concussions.

(20) Substantial risk--a real and significant possibility or likelihood.

§351.503. Minimum Standards for Investigations.

(a) Applicability. This section applies to investigations, conducted under §261.401 of the Family Code, of alleged child abuse, neglect, or exploitation in facilities operated, licensed, certified, or registered by a state agency.

(b) Formal investigation. On receiving an oral or written allegation or report of abuse, neglect or exploitation, a state agency must immediately initiate a formal investigation to determine the accuracy of the report and to evaluate the need for protective services for the child. A state agency should consider the following steps (which may vary according to circumstances) in conducting its investigation:

(1) a face-to-face interview with the alleged victim to evaluate immediate and long-term risk. The investigator should make every effort to establish face-to-face contact with the alleged victim, including a diligent search to locate the alleged victim, if the victim's whereabouts are unknown;

(2) make a reasonable effort to locate and inform each parent of a child who is the alleged victim of abuse, neglect, or exploitation, of the nature of the allegation and of the fact that the interview was conducted.

(3) a face-to-face interview with the person(s) thought to have knowledge of the circumstances related to the alleged abuse, neglect or exploitation, including anyone responsible for the ongoing care of a child;

(4) collecting relevant information such as:

(A) the nature, extent, and cause of the abuse, neglect, or exploitation;

(B) the identity of the person responsible for the abuse, neglect, or exploitation;

(C) the names and conditions of the other individual(s) in the home;

(D) the adequacy of the environment; and

(E) the relationship of the alleged victim to the person(s) responsible; and

(5) assigning a priority rating to the investigation based on the information received and the degree of severity and immediacy of the alleged harm to the child.

(c) Priorities for investigation. A state agency, as defined in §351.501 of this title (relating to Definitions Relating to Child Abuse Neglect and Exploitation):

(1) must ensure that the facility establishes a system for informing persons who work under the auspices of the facility of their obligations to report suspected abuse, neglect, and exploitation in accordance with the state agency's rules and/or policies;

(2) must establish a system for assigning reasonable timelines for initiating and for completing an investigation of a report of abuse, neglect or exploitation that is based on the degree to which the alleged victim is believed to be in immediate danger of physical harm and the degree to which relevant evidence may be lost in relation to the initiation date of the investigation:

(A) at any time the alleged victim may incur physical injury or evidence may be lost pending the initiation of an investigation, the investigation must be initiated within 24 hours of receipt of the report;

(B) notwithstanding the potential risk of physical injury to the child or loss of evidence, all investigations must be completed within 30 calendar days of receipt of the report; provided, however, that the completion date for an investigation may be extended beyond 30 days for good cause as documented in the investigation report;

(3) may conclude an investigation and retain any applicable immunity granted pursuant to the Family Code, §261.106, at any time that the agency determines that the report of abuse, neglect or exploitation is frivolous or patently without a factual basis or, the conduct reported, even if true, does not constitute abuse, neglect or exploitation; and

(4) must refer any report of abuse, neglect or exploitation received by the agency but not investigated by the agency to the appropriate law enforcement or state agency that should conduct the investigation.

(d) Collection of evidence. The collection of evidence should include, but is not limited to:

(1) a full statement of the allegation(s);

(2) interview(s) with the alleged victim, alleged perpetrator, and all witnesses or persons who may provide collateral information that may be relevant to the investigation;

(A) interviews must be conducted in a timely manner so as to maximize the information obtained through the interview;

(B) any person authorized to conduct an investigation of abuse, neglect, or exploitation should coordinate investigative activities and share information with other appropriate agencies, if any, in order to minimize the number of interviews of the victim;

(3) written statements signed and dated, respectively, by the alleged victim, alleged perpetrator, and other collateral witnesses interviewed by the investigator; if the alleged victim, alleged perpetrator or other witness is unable or unwilling to write and/or sign a statement, the investigation report must include a statement to this effect;

(4) documentation of a physical examination of the alleged victim and medical treatment rendered, as needed;

(5) photographs should be taken whenever there are allegations of physical injuries;

(6) diagrams, as needed;

(7) the original or computer generated notes made during the investigation, videotapes and audiotapes of interviews, in order to preserve and document the chain of evidence; and

(8) any other physical evidence that is relevant to the investigation.

(e) Burden of proof. After the evidence has been collected and evaluated, the investigative staff must determine whether or not to confirm the allegation. To confirm an allegation, the investigative staff must find the abuse, neglect, and exploitation is supported by a preponderance of the evidence. The following classifications are recommended for investigative findings that are not confirmed:

(1) Unconfirmed means it is reasonable to conclude that abuse, neglect, or exploitation did not occur or is unlikely to occur.

(2) Inconclusive means there is insufficient evidence to support or refute an allegation. This occurs when an allegation of abuse, neglect, or exploitation could not be confirmed, unconfirmed, or unfounded because there is a lack of witnesses or other relevant evidence.

(3) Unfounded means that an allegation of abuse, neglect, or exploitation is spurious or patently without factual basis.

(f) Content of the investigative report. An investigative report should, to the greatest extent possible, be written concisely, clearly, factually, and objectively. The following elements should be included in the report:

(1) a brief description of the allegation that identifies the alleged victim, alleged perpetrator(s), and any witnesses;

(2) date and time the incident occurred and when it was reported;

(3) a summary of investigative procedures;

(4) a summary and an analysis of the evidence, the investigative finding(s), and recommendations; and

(5) supporting documents such as witness statements, injury reports, and diagrams, as appropriate.

(6) The investigating state agency must submit the report, and any recommendations to the district attorney or other appropriate law enforcement agency, if requested to do so by law enforcement, the agency determined further legal action is warranted, or the agency confirmed that the alleged victim was abused, neglected, or exploited and it appears that there is a criminal violation.

(g) Referrals to appropriate agencies. A state agency that receives a report of abuse, neglect, or exploitation that is not within the agency's jurisdiction must refer the matter to the agencies listed below, as appropriate:

(1) to the Texas Department of Protective and Regulatory Services, if

(A) the alleged or suspected abuse, neglect, or exploitation involves a person responsible for the care, custody, or welfare of the alleged victim;

(B) the alleged or suspected abuse, neglect or exploitation of a person receiving services in a facility operated by MHMR, in or from a community center or a local mental health or mental retardation authority, or through a program that contracts with MHMR, a community center, or local mental health or mental retardation authority;

(2) to the appropriate law enforcement agency, if the allegation does not involve a caretaker or the allegation appears to involve an incident that violates the Penal Code; the state agency must send its final report to law enforcement, if the investigation indicates a crime has been committed; and

(3) to the state agency that operates, licenses, certifies, or registers the facility in which the alleged abuse, neglect, or exploitation occurred, may have occurred, or is likely to occur.

(h) Administrative review of investigation findings. A state agency should develop and implement policies and procedures to resolve complaints as described in §261.309 of the Family Code.

(i) Confidentiality of Reports. A state agency may disclose the allegation, report, records, communications, and working papers used or developed in the investigative process, including the resulting final report regarding abuse, neglect, or exploitation, only as provided by §261.201 of the Family Code, concerning the confidentiality of information.

(j) Qualifications and training of investigator(s). A state agency must establish minimum qualifications for all abuse, neglect, and exploitation investigators.

(1) In determining the appropriate qualifications, a state agency must include a minimum number of hours of annual professional training for investigators of suspected child abuse, neglect, or exploitation. The annual professional training curriculum should include information concerning:

(A) physical abuse and neglect, including distinguishing physical abuse from ordinary injuries;

(B) psychological and emotional abuse and neglect;

(C) exploitation;

(D) sexual abuse;

(E) available treatment resources;

(F) the incidence and types of reports of victim abuse, neglect, or exploitation that are received by the investigating agencies, including information concerning false reports;

(G) interview techniques, including setting appropriate limits on the number of interviews and examinations of a suspected victim and the taping (audio or video) of a suspected victim without interruption; and

(H) procedures to preserve evidence, including the original or computer generated notes made during the investigation and videotapes and audiotapes of interviews.

(2) The investigator must have knowledge of Penal Code sections that relate to abuse, neglect, and exploitation.

(3) The investigator must know how to develop written statements and other documentary records related to the interview process and how to handle evidence, for example, collection and preservation of physical evidence.

§351.505. Information Collection; Uniform Data Collection Procedures.

Each state agency must prepare and keep on file a complete written report of each investigation the agency conducts under Chapter 261 of the Family Code. Each state agency must compile, maintain, and make available statistics on the incidence of child abuse, neglect, and exploitation in each facility it investigates. The statistics also must be forwarded to the Texas Department of Protective and Regulatory Services to be compiled. The rules and policies adopted and implemented by a state agency must, to the greatest extent practicable, provide a uniform method of collecting and analyzing data on suspected child abuse, neglect, or exploitation in a facility. A state agency must use the following procedures when analyzing data on abuse, neglect, and exploitation investigations:

(1) Sort by program classification the number of investigations completed. Examples of program classification include state hospitals, private psychiatric facilities, and maternity homes.

(2) Sort by program classification the number of confirmed investigations that are completed.

(3) Sort all completed investigations according to disposition for example confirmed, unconfirmed, inconclusive, or unfounded.

(4) Sort all completed confirmed investigations by whether the identity of the perpetrator is known or unknown.

(5) Develop a confirmation rate by dividing the sum of all confirmed investigations by the sum of all completed investigations with dispositions of confirmed, unconfirmed, and inconclusive or other dispositions classification used by the state agencies. Unfounded cases are not included in this calculation.

(6) Calculate the average number of days to complete investigations and sort by program.

(7) Calculate the number of investigations referred to law enforcement.

(8) Calculate the number of investigations pending at the end of the report period.

(9) Calculate the number of disciplinary actions resulting from confirmed findings.

(10) Calculate the number of deaths that occur as a result of child abuse or neglect in the affected facilities.

(11) Calculate the number of appeals and the number of cases appealed that are overturned.

(12) Investigations with multiple allegations are to be counted once, based on the highest level of injury. For example, if a single incident involves one allegation of physical abuse that resulted in serious physical injury and a second allegation of verbal abuse, the investigation should be counted only once, as an instance of physical abuse resulting in serious physical injury. In other words, the sum of completed investigations involving serious injuries, non-serious injuries, verbal/emotional abuse and neglect, and exploitation should not exceed the total number of cases completed.

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

Filed with the Office of the Secretary of State on December 23, 2002.

TRD-200208522

Steve Aragon
General Counsel
Texas Health and Human Services Commission
Effective date: January 12, 2003
Proposal publication date: June 28, 2002
For further information, please call: (512) 424-6756

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 14. PERISHABLE COMMODITIES HANDLING AND MARKETING PROGRAM
SUBCHAPTER A. GENERAL PROVISIONS

4 TAC §14.1

The Texas Department of Agriculture (the department) adopts an amendment to §14.1, concerning handling and marketing of perishable commodities, without changes to the proposal published in the November 15, 2002, issue of the *Texas Register* (27 TexReg 10688).

The definition for the term "Agent" has been amended by removing the word "either" and adding the word "and" in the definition. This amendment is adopted to clarify that an agent may be a buying agent and/or a transporting agent.

No comments were received on the proposal.

The amendment to §14.1, is adopted under the Texas Agriculture Code (the Code), §101.010, which provides the department with the authority to adopt rules related to transporting agents and buying agents.

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

Filed with the Office of the Secretary of State on December 23, 2002.

TRD-200208515
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: January 12, 2003
Proposal publication date: November 15, 2002
For further information, please call: (512) 463-4075

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION
SUBCHAPTER B. UNDERWRITING, MARKET ANALYSIS, APPRAISAL, AND ENVIRONMENTAL SITE ASSESSMENT RULES AND GUIDELINES

10 TAC §§1.31 - 1.35

The Texas Department of Housing and Community Affairs ("the Department" or "TDHCA") adopts new Subchapter B, Underwriting, Market Analysis, Appraisal, and Environmental Site Assessment Rules and Guidelines, §§1.31, 1.32, 1.33, 1.34, and 1.35, with changes, to the proposed text as published in the September 27,2002 issue of the *Texas Register* (27 TexReg 9013).

This subchapter is adopted in order to establish stand alone guidelines for underwriting, market analysis, appraisal, and environmental site assessment performed for requests submitted to the Department for review.

On September 27, 2002, the proposed Underwriting, Market Analysis, Appraisal and Environmental Site Assessment Rules and Guidelines were published in the *Texas Register*. A public comment period commenced on September 27, 2002, and ended on October 25, 2002. In addition to publishing the document in the *Texas Register*, a copy was published on the Department's web site and made available to the public upon request. The Department held public hearings in Clint, New Braunfels, Weslaco, Austin, Fort Worth, Wichita Falls, Pampa, Mount Pleasant, San Angelo, and Liberty. A hearing scheduled for Galveston was canceled due to inclement weather. In addition to comments received at the public hearings, the Department received written comments.

The scope of the public comment concerning the Underwriting, Market Analysis, Appraisal and Environmental Site Assessment Rules and Guidelines pertains to the following sections:

SUMMARY OF COMMENTS RECEIVED UPON PUBLICATION OF THE PROPOSED RULES IN THE *TEXAS REGISTER* AND COMMENTS PROVIDED AT PUBLIC HEARINGS HELD BY THE DEPARTMENT ON ITEMS THAT RELATE DIRECTLY TO THE UNDERWRITING, MARKET ANALYSIS, APPRAISAL, AND ENVIRONMENTAL SITE ASSESSMENT RULES AND GUIDELINES

§1.31 General Provisions.

Comment: The Department may want to clarify how and when the Guidelines can be changed and what public input process will be used prior to any changes.

Department Response: The public hearing process already prescribes how this administrative code is changed. Staff does not recommend a change.

Board Response: Department response accepted.

§1.31(b)(7) Definition of Debt Coverage Ratio

Comment: Current language states, "A measure of the number of times loan principal and interest are covered by net after tax income." §1.32(d) refers to the Debt Coverage Ratio as being Net Operating Income divided by debt service. This is a more accurate definition of Debt Coverage Ratio and should be used in this §1.31(b)(7). The following language could be used: "A measure of the number of times the required payments of loan principal and interest are covered by Net Operating Income."

Department Response: Staff agrees the change should be made to maintain consistency and the proposed language is recommended.

(7) DCR--Debt Coverage Ratio. Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." A measure of the number of times the required payments of loan principal and interest are covered by Net Operating Income.

Board Response: Department response accepted.

§1.31(b)(11) Definition of Local Amenities

Comment: Should the definition reference the location of the amenities with respect to the Development? In other words, should it say something like: "Amenities located near and available to the tenants of a proposed Development, including but not limited to police and fire protection, transportation, healthcare, retail, grocers, educational institutions, employment centers, parks, public libraries, and entertainment centers."

Department Response: Staff agrees the change should be made and the proposed language is recommended.

(11) Local Amenities-- Amenities located near and available to the tenants of a proposed Development, including but not limited to police and fire protection, transportation, healthcare, retail, grocers, educational institutions, employment centers, parks, public libraries, and entertainment centers.

Board Response: Department response accepted.

§1.31(b)(16) Definition of Net Operating Income.

Comment: The calculation of NOI for bond-financed Developments should be calculated using the same methodology as 9% LIHTC Developments. Applicants should be required to identify and support which fees are "below-the-line", fees not included by the principal lender or syndicator in their calculation of NOI, in order to exclude the fee from the NOI calculation.

Department Response: Staff agrees that the same methodology should be used in both bond-financed and 9% LIHTC developments. The discussion of operating expenses in §1.32(d)(5)(A-J) is the Department's attempt to standardize the assumptions regarding fees and expenses. No change is recommended.

Board Response: Department response accepted.

§1.31(b)(23) Definition of Unstabilized Development

Comment: Current language states, "A Development that has not maintained a 90% occupancy level for at least 12 consecutive months." Instead of using a 90% standard, which may or may not indicate the actual financial stability of the Development, should a reference to the defined term "Sustaining Occupancy" be used? This definition could be revised to read: "A Development that has not maintained Sustaining Occupancy for at least 12 consecutive months."

Department Response: Staff believes the proposed revision is too subjective and the 90% standard for 12 months is a more objective way to measure stabilized occupancy for all developments. No change is recommended.

Board Response: Department response accepted.

§1.31(b)(24) Definition of Utility Allowances.

Comment: The definition of utility costs needs to be as in prior years-using the PHA that most closely represents the utility provider's charges. Harris County is twice the City of Houston cost which most closely represent Reliant Energy's data. In order to compete with project funds to deep skew units, one could not develop in Harris County, outside Houston's city limits under the suggested language. Also, what happened to using utility provider data for operations-seems to be prohibited by QAP which may violate federal law. In the event of overlapping jurisdiction between local housing authorities, the utility allowance for the building must be based on where the Development property is located according to the Development's legal description unless (i) (in the case of county properties) if the property is located within five miles of city limits, then the city allowances may be used or (ii) if the service provider has submitted data showing costs, then one must use the service provider's data. (There is a HUD requirement as to (ii).)

Department Response: While staff believes the draft definition is consistent with the comment provided and the comment provided is significantly addressing the QAP, the definition in this document should be consistent with that which is proposed in the QAP. Therefore, staff recommends the following change:

(24) Utility Allowance(s)-The estimate of tenant-paid utilities, based either on the most current HUD Form 52667, "Section 8, Existing Housing Allowance for Tenant-Furnished Utilities and Other Services," provided by the appropriate local Public Housing Authority consistent with the current QAP or a documented estimate from the utility provider proposed in the Application. Documentation from the local utility provider to support an alternative calculation can be used to justify alternative Utility Allowance conclusions but must be specific to the subject Development and consistent with the building plans provided.

Board Response: Department response accepted.

§1.32(a) General Provisions.

Comment: Current language states, "The Department, through the division responsible for underwriting, produces or causes to be produced a Credit Underwriting Analysis Report (the "Report") for every multifamily Development recommended for funding through the Department." First, remove the word "multifamily" because these Guidelines are supposed to apply to single family and multifamily projects. Second, does the underwriting division really produce a report for every Development recommended for funding? For instance, in the tax credit program, Developments are recommended to be underwritten but are not necessarily recommended to receive funding.

Department Response: Due to a staff error, the version of the 2003 Draft Underwriting, Market Analysis, Appraisal, and Environmental Site Assessment Rules and Guidelines included in the 9/12/2002 Board Book included the word "multifamily" in inappropriate places. The version of the 2003 Draft Underwriting, Market Analysis, Appraisal, and Environmental Site Assessment Rules and Guidelines published in the *Texas Register* and on the Department's website subsequent to the 9/12/2002 board meeting does not include the inappropriate uses of the word "multifamily."

Board Response: Department response accepted.

§1.32(b)(1)(and others) Use of the word "Principal"

Comment: Current language states, "principals of the Applicant." The word "principals" is used from time to time throughout the Guidelines, but it is not defined. Given the complex organizational structure of many of the Applicants, the term "principal", without definition, could be interpreted in a variety of ways. The Department has an interest in knowing who is going to own and operate a Development. This includes not only the ownership entity itself but all other entities and individuals on the organizational chart that own or have the ability to control the ownership entity. If the Department is going to require, on its Uniform Application, that each Applicant submit an organizational chart for

the ownership entity, then the "principals" might be defined as every entity or individual on the organizational chart who has the ability to control the Development owner, either directly or indirectly. This should exclude, however, intervening entities in multi-layer ownership structures. This gets the Department to its ultimate goal while reducing the paperwork burden for the Applicant. Please review the use of the word "principals" throughout the Guidelines, considering who the Department wants to identify, and create some sort of appropriate definition for this term so that we do not have to address interpretive issues of who is a "principal."

Department Response: Staff agrees that a definition of Principal would be a good idea. However, staff does not recommend adding a definition of the word "Principal" to this subchapter. As §1.32(b) states, "Many of the terms used in this subchapter are defined in 10TAC §§49 and 50 of this title (the Department's Low Income Housing Tax Credit Program Qualified Allocation Plan and Rules, known as the "QAP")." Staff understands that the proposed 2003 QAP includes a definition of the word "Principal." Therefore, the definition included in the QAP would apply to this subchapter.

Board Response: Department response accepted.

§1.32(d)(1)(a) Market Rents.

Comment: Current language states, ". . .and determines if the adjustments and conclusions made are reasoned and well documented." We believe this language should be removed, as it gives the Department too much discretion. The Department establishes a list of Market Analysts they deem to be qualified. The Department requires the submission of the Market Study, and the Applicant pays a significant fee to obtain it. The Department should rely on the Market Analyst's conclusions. If the Department has serious concerns about a Market Analyst's work, then it should remove the Market Analyst from its approved list. Otherwise, the Development Owner should be entitled to rely on the Market Study it pays for, and the Department should accept the Market Analyst's conclusions. This helps the Department to avoid criticism for exercising discretion and creates a more level playing field.

Department Response: Removal of the statement in question is not recommended. Although the Department maintains a list of Approved Market Analysts, §1.33(c)(2) clearly indicates that review of submitted market analyses is required in order to maintain the List of Approved Market Analysts. In addition, it is believed that even Approved Market Analysts are capable of making mistakes. The Department must have the ability to have discretion in this regard to avoid basing a funding recommendation on flawed analysis.

Board Response: Department response accepted.

§1.32(d)(4) Effective Gross Income and (5) Expenses.

Comment: Current language states, ". . . the Underwriter will maintain and use its independent calculation . . . regardless of the characterization of the Applicant's figure." If the Applicant's calculation is acceptable, then the Applicant's figure should be used in all circumstances.

Department Response: While the suggestion might on the surface make intuitive sense, following the suggestion will distort the Underwriter's analysis and cause it to appear to be inconsistent when comparing similarly-sized transactions in the same general location in the same year. By maintaining the Underwriter's independently derived figure for comparison, other competing transactions can more easily see that they have been treated in a consistent manner. Staff does not recommend a change.

Board Response: Department response accepted.

§1.32(d)(5) Expenses.

Comment: In many instances, it is not appropriate to measure operating costs on a per square foot basis. Costs may be more dependent on the number of units than the number of square feet in those units.

Department Response: In many cases the opposite is also true; that is why both methods, as identified in the Rules and Guidelines, are used. Staff does not recommend a change.

Board Response: Department response accepted.

§1.32(d)(5)(a)(h) Operating Feasibility.

Comment: Because of the diversity in the kinds of Developments and the locations of Developments, we do not believe the Department should analyze operating expenses on a line item basis with a tolerance level for each. Rather, an aggregate expense figure should be used and analyzed for tolerance.

Department Response: Staff agrees that there is diversity in the kinds of Developments and the locations of Developments; that is why line by line adjustment is the only way to fairly evaluate expenses. For example, the utility cost for a Development with a central boiler is very different from one without, yet if a Development with a central boiler is also tax-exempt, its operating expenses may be lower overall compared to a similar Development without a central boiler and no tax exemption. This difference could not be evaluated without taking into account the individual line item expenses. Staff does not recommend a change.

Board Response: Department response accepted.

§1.32(d)(5)(e) Utilities Expense (Gas & Electric).

Comment: Third sentence apparently refers to common area expenses but is not specific.

Department Response: Staff agrees and, since no specific language was suggested by the public, staff recommends inserting the phrase "…for utility expenses attributable to common areas."

(e) Utilities Expense (Gas & Electric). Utilities Expense includes all gas and electric energy expenses paid by the owner. It includes any pass-through energy expense that is reflected in the unit rents. Historically, the lower of an estimate based on 25.5% of the PHA local Utility Allowance or the TDHCA Database or local IREM averages have been used as the most significant data point for utility expenses attributable to common areas. The higher amount may be used, however, if the current typical higher efficiency standard utility equipment is not projected to be included in the Development upon completion or if the higher estimate is more consistent with the Applicant's projected estimate. Also a lower or higher percentage of the PHA allowance may be used, depending on the amount of common area, and adjustments will be made for utilities typically paid by tenants that in the subject are owner-paid as determined by the Underwriter. The underwriting tolerance level for this line item is 30%.

Board Response: Department response accepted.

§1.32(d)(5)(g) Insurance Expense.

Comment: Insurance at $0.16 seems too low.

Department Response: Staff agrees that $0.16 is low in the current market for most Developments; however some Developers contrive to provide documentation of blanket coverage with rates at or below this level. This figure was chosen as a minimum level at which an Applicant's estimate may be considered reasonable without further documentation. Since no alternative recommendation was made, staff does not recommend a change.

Board Response: Department response accepted.

§1.32(d)(5)(h) Property Tax.

Comment: Current language states, "For CHDO owned or controlled properties, this documentation includes, at a minimum, evidence of the CHDO designation from the State or local participating jurisdiction and a letter from the local taxing authority recognizing that the Applicant is or will be considered eligible for the property exemption." In the case of American Agape Foundation, Inc. v. Travis Central Appraisal District, the court said that an Applicant for an ad valorem tax exemption under the CHDO exemption is not required to show its certificate of CHDO designation to be eligible for the exemption. The statute (§11.182 of the Texas Tax Code) says that the organization owning the property and applying for the exemption must be organized as a CHDO; it does not say that the organization must be certified as a CHDO. Thus, where an Applicant for a tax exemption met all of the requirements to be a CHDO (including an affordable housing purpose, community representation on the board of directors, etc.) but did not have a CHDO certificate, the Applicant and its property were still eligible for the tax exemption because the Applicant was organized as a CHDO. Given this case law, the Department should change its documentation requirements with respect to the CHDO ad valorem tax exemption. §11.43 of the Texas Tax Code permits a CHDO that intends to acquire control of a property to request a pre-determination of its eligibility for the ad valorem tax exemption. This pre-determination letter from the appraisal district should be sufficient for the Department's underwriting purposes. The taxing authorities themselves do not make determinations as to exemptions; that function is within the realm of the appraisal district. Therefore, we recommend the language of §1.32(d)(5)(h) be revised to read: "For CHDO owned or controlled properties, this documentation includes, at a minimum, a letter from the local appraisal district recognizing that the Applicant is or will be considered eligible for the ad valorem tax exemption."

Department Response: Staff agrees and recommends the suggested language.

(h) Property Tax. Property Tax includes all real and personal property taxes but not payroll taxes. The TDHCA Database is used to interpret a per unit assessed value average for similar properties which is applied to the actual current tax rate. The per unit assessed value is most often contained within a range of $15,000 to $35,000 but may be higher or lower based upon documentation from the local tax assessor. Location, size of the units, and comparable assessed values also play a major role in evaluating this line item expense. Property tax exemptions or proposed payment in lieu of taxes (PILOT) must be documented as being reasonably achievable if they are to be considered by the Underwriter. For Community Housing Development Organization ("CHDO") owned or controlled properties, this documentation includes, at a minimum, a letter from the local appraisal district recognizing that the Applicant is or will be considered eligible for the ad valorem tax exemption. The underwriting tolerance level for this line item is 10%.

Board Response: Department response accepted.

§1.32(d)(5)(i) Reserves.

Comment: It is highly recommended that reserves for replacements, with the possible exception of new construction for elderly tenants, be set at minimum of $250 per unit. Most other states require at least $250 per unit for replacement reserves and increasing the minimum reserve level is proactive preservation of affordable housing.

Department Response: Staff supports and proposed this increase in the roundtable discussions held this summer, but after considerable discussion, a consensus was established to maintain the current NCHA $200 per unit standard which is viewed as an adequate reserve amount.

Board Response: Department response accepted.

§1.32(d)(5)(j)(i) Supportive Services Expense.

Comment: If any supportive service expenses are subject to available cash flow or otherwise "soft," they should not be included in expenses and Debt Coverage Ratio.

Department Response: We also received recommendations during the summer ad hoc sessions to continue to differentiate the way this issue is addressed for 9% LIHTC and 4% LIHTC/bond-financed developments. For 9% LIHTC Developments, the fee is shown above line as an operating expense. For 4% LIHTC/bond-financed Developments the fee has been shown below line as a potentially "soft" cost. Despite this ad hoc recommendation, staff recommends in the draft rules to treat both types of transactions in the same manner. Where supportive services are required due to a request for points or due to QAP requirements for bond transactions, there is no provision that allows them only to be provided when cash flow exists, thus they should not be treated as "soft." Staff recommends no change.

Board Response: Department response accepted.

§1.32(d)(7)(a) Interest Rate.

Comment: Current language states, "The maximum rate that will be allowed . . . " We all agree that predicting the permanent loan interest rate that will be in effect once a Development is stabilized is difficult. But allowing the Department to establish a cap on the permanent loan interest rate is problematic as well. If an artificially low rate is dictated, projects will wind up with fewer tax credits than they need and the numbers will not work. This section indicates that the Department has historically used a certain average figure for the interest rate cap, but it does not say over what period the average is calculated or that this is definitely the figure that will be used.

Department Response: The purpose of the cap is to attempt to apply a fair and consistent maximum rate for all transactions by surveying the market at the time of application. Prescribing an absolute method of calculating this maximum will give rise to many transactions being set to this artificial rate rather than the actual market rate and thereby reduce the validity of the underwriting. The last sentence of §1.32(d)(7)(a) states, "Historically this maximum acceptable rate has been at or below the average rate for 30-year US Treasury Bonds plus 400 basis points." Staff does not recommend a change.

Board Response: Department response accepted.

§1.32(d)(7)(c) Acceptable Debt Coverage Ratio Range.

Comment: Current language states, "The acceptable DCR range for all priority or foreclosable lien financing plus the Department's proposed financing falls between a minimum of 1.10 to a maximum of 1.30." The language "priority or foreclosable lien financing" is ambiguous. The debt service coverage ratio should measure "hard" debt repayment obligations and not "soft" or cash flow debt. Yet, a cash flow debt can still have a foreclosable lien. Therefore, the language as written does not clearly state the Department's intention. Also, it should be clear that the debt service coverage ratio measures permanent financing and not construction financing.

Department Response: Staff believes the "hard" and "soft" language suggested is equally ambiguous. Staff recommends rewriting the sentence as follows:

(c) Acceptable Debt Coverage Ratio Range. The initial acceptable DCR range for all debt associated with permanent priority liens that are foreclosable as a result of nonpayment of a regularly scheduled amount plus the Department's proposed financing falls between a minimum of 1.10 to a maximum of 1.30. In rare instances, such as for HOPE VI and USDA Rural Development transactions, the minimum DCR may be less than 1.10 based upon documentation of acceptance of such an acceptable DCR from the lender. If the DCR is less than the minimum, a reduction in the debt service amount is recommended based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (a) and (b) of this paragraph. If the DCR is greater than the maximum, an increase in the debt service amount is recommended based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (a) and (b) of this paragraph, and the funding gap is reviewed to determine the continued need for Department financing. When the funding gap is reduced no adjustments are made to the level of Department financing unless there is an excess of financing, after the need for deferral of any developer fee is eliminated. If the increase in debt capacity provides excess sources of funds, the Underwriter adjusts any Department grant funds to a loan, if possible, and/or adjusts the interest rate of any Department loans upward until the DCR does not exceed the maximum or up to the prevailing current market rate for similar conventional funding, whichever occurs first. Where no Department grant or loan exists or the full market interest rate for the Department's loan has been accomplished, the Underwriter increases the conventional debt amount until the DCR is reduced to the maximum allowable. Any adjustments in debt service will become a condition of the Report, however, future changes in income, expenses, rates, and terms could allow additional adjustments to the final debt amount to be acceptable. In a Tax Credit transaction, an excessive DCR could negatively affect the amount of recommended tax credit, if based upon the Gap Method, more funds are available than are necessary after all deferral of developer fee is reduced to zero.

Board Response: Department response accepted.

§1.32(d)(7) Net Operating Income and Debt Service.

Comment: Current language states, "NOI is the difference between the EGI and total operating expenses." This language is different from the language defining NOI in §1.31(b)(16). If the definition in §1.31(b)(16) is correct, then this sentence should be eliminated to avoid confusion. In addition, current language states, "If the NOI figure provided by the Applicant is within five percent of the NOI figure calculated by the Underwriter, the Applicant's figure is characterized as acceptable or reasonable in the Report, however, for purposes of calculating the DCR the Underwriter will maintain and use its independent calculation of NOI regardless of the characterization of the Applicant's figure. Only if the Applicant's EGI, total expenses, and NOI are each within five percent of the Underwriter's estimates and characterized as acceptable or reasonable in the Report will the Applicant's estimate of NOI be used to determine the acceptable debt service amount." The first sentence implies that the Applicant's NOI figure cannot be used for the calculation of NOI under any circumstance. Then the second sentence states that the Applicant's NOI figure can be used for the calculation of NOI under special conditions. The structure of this paragraph could be more clearly set forth as follows: "The Underwriter will review the Development's proposed NOI and DCR and determine an acceptable debt level for the Development. If the Applicant's EGI, total expenses, and NOI are each within five percent of the Underwriter's estimates, then the Applicant's estimate of NOI will be used to determine the acceptable debt level for the Development. Otherwise, the Underwriter's estimate of NOI will be used to determine the acceptable debt level for the Development. The NOI figure provided by the Applicant must be within five percent of the NOI figure calculated by the Underwriter to be considered acceptable or reasonable in the Report."

Department Response: Staff agrees that the first sentence is inconsistent with the definition of NOI and, therefore, it has been deleted from §1.32(d)(7). Staff also agrees that the suggested language for the remainder of §1.32(d)(7) provides for a clearer statement. However, the final sentence of the suggested language is redundant. It is recommended that the current language is replaced with the suggested language, save the final sentence.

(7) Net Operating Income and Debt Service. The Underwriter will review the Development's proposed NOI and DCR and determine an acceptable debt level for the Development. If the Applicant's EGI, total expenses, and NOI are each within five percent of the Underwriter's estimates, then the Applicant's estimate of NOI will be used to determine the acceptable debt level for the Development. Otherwise, the Underwriter's estimate of NOI will be used to determine the acceptable debt level for the Development. In addition to NOI, the interest rate, term, and Debt Coverage Ratio range affect the determination of the acceptable debt service amount.

Board Response: Department response accepted

§1.32(d)(7) Long Term Feasibility (or §1.32(e)(7) Developer Fee Limit)

Comment: Much comment was received on limiting to 50% the allowable amount of deferred developer fees. The amount of developer fee allowed to be deferred should be limited to 50% as in 2002 or at worst 60% and this should be added back to the QAP. An interest rate, suggested as the long term AFR, must be considered when calculating the ability of a Development to repay deferred developer fees within 15 years. Otherwise, part of the developer fee may be disallowed, causing a loss of eligible basis. We do not know of an attorney who will opine to developer fee as eligible basis unless paid back within 13 years. All investors look to the developer fee for cost overruns or as interest rate increase protection.

Department Response: Staff believes the 50% or 60% deferred developer fee limit can be unnecessarily burdensome to large developments in major metropolitan areas where the expense to income ratio may be low allowing for more potential future cash flow. In such cases, 100% of the developer fee could be deferred

and be projected to be repaid in less than 10 years. Conversely, a small development where the expense to income ratio is high might not be able to repay a 30% deferral of developer fee within 15 years. Staff believes the evaluation of the repayment capacity of a Development is a better measurement of infeasibility. The 15-year, zero percent interest limits were established to provide maximum flexibility and when staff proposed stiffer limits of ten years at AFR during the summer discussion groups, they were widely discouraged. Staff feels that several transactions, which passed the 50% deferred developer fee test in 2002, would have failed a 15-year at AFR test. Fundamentally, the Department's objective should not be to fail the potentially marginal transaction at this stage, but rather to fail the extreme transaction. Staff recommends no change.

Board Response: Department response accepted.

§1.32(e)(1)(b) Identity of Interest Acquisitions.

Comment: Much public comment was submitted opposing the Department's approach to acquisition transactions involving an identity of interest. It was suggested that current policy may be well-intentioned, but establishes a tremendous disincentive for property owners to rehabilitate their projects in a manner that make them more serviceable for tenants in the long term. The current method is also viewed by some to be discriminatory. The Internal Revenue Code, through its related party rules, already establishes a significant restriction on the amount of profit that a property owner can achieve in an acquisition transaction. These federal rules should be sufficient for the Department. The Department should rely on a third party appraisal in making its calculations and should not open itself up to the criticism that can come with discretionary review. Since an appraisal is required for related party transactions, then that should be the only item required and (i), (iii), and (iv) should be eliminated. As currently drafted, this section allows the Department to look at a variety of factors, some of which are entirely subjective, and to establish its own acquisition costs figure. It can completely ignore the calculations of a third party appraiser who has been designated as a qualified professional by the Department. Why should the Department qualify the appraisers if it is not going to rely on them? Identity of interest transfers should be at reasonable market value, verified by an appraisal, either from a TDHCA approved list of appraisers or ordered by TDHCA.

Department Response: This issue received the most comment and staff's position was clearly opposed by the participants in the ad hoc meetings held this summer to discuss these rules. As opposed to providing a disincentive for rehabilitation, this rule was drafted by staff to encourage funds to stay in the Development and to maximize their use for rehabilitation. The rule is intended to prevent existing owners from having the benefits of the seller and of the purchaser in the same transaction and extracting equity from a development in need of a cash infusion to maintain its affordability. The State of Texas, through its legislation, QAP, and rule making process, has established and is required to establish rules for the program that in many instances are more restrictive than the minimum Internal Revenue Code requirements. The Department does rely upon the third party appraisals that are provided through the Applicant. The appraisal provides a maximum acceptable transfer value amount. The Department hopes to avoid future potential criticism from the public for over-subsidizing an affordable Development, which could lead to a lack of future funding support from the public for all of the Department's programs. The factors that should additionally be taken into account to validate funding needs of the redevelopment have been significantly clarified in the draft rules and were written to provide standards for considerably more objectivity than may have been perceived to exist in the past. An example of the effect of this rule is as follows:An Applicant claims site acquisition costs of $2 million and submits an appraisal indicating a market value of $2 million. However, the Applicant originally acquired the property for only $1.2 million. During the period of control, the Applicant has expended an additional $300 thousand to make site improvements and $100 thousand in interest expense, and has provided documentation verifying these costs. In addition, it is anticipated they will pay $100 thousand in taxes on the profit from the transfer. The transfer value utilized in the underwriting analysis would be the

Original Acquisition Cost ($1.2 million) + Holding Costs ($0.5 million) = Transfer Value ($1.7 million)

Items that may be considered as holding costs include property taxes paid on vacant land, capital improvements on the improved property, interest expense and anticipated exit taxes. The example reflects an Applicant's request for $300 thousand in profit that would not be limited by the 15% developer profit limit. If, however, the final development budget indicates more than $300 thousand in deferred developer fees, there would be no effect on the funding source recommendation amounts as the "excess" would be funded out of cashflow from the operation of the Development and the Applicant is already entitled to receive Development cashflow. Staff does not recommend a change.

Board Response: Department response accepted.

§1.32(e)(3) Site Work Costs.

Comment: We believe that analyzing a distinct category for site work costs is not necessary. The underwriting process already establishes a maximum total construction cost per square foot, and the site work is part of this figure. Concern about eligible basis under the TAMS has been addressed. In the alternative, if the Department believes that site work costs must be evaluated separately, then the $7,500 threshold number should be increased significantly because it is not realistic. A maximum guideline of $9,200 to $10,000 per unit is suggested. In addition, historical data should be accepted as substantiation for costs in excess of the maximum guideline in lieu of an engineer's cost certification in order to save developers money.

Department Response: While other direct construction costs of "sticks and bricks" can be predicted across transactions using costing techniques, sitework costs are Development specific and can and do vary widely. Moreover sitework cost differences can make or break a Development and should be thoroughly explored, especially when they are believed to be higher than typical. The draft rule and this rule in prior years have intended to encourage an Applicant who anticipates a higher than typical sitework cost to more thoroughly explore this significant variable prior to application. The Department increased this threshold from $6,500 per unit last year and $5,500 per unit the previous year. The actual average budgeted amount for 2002 applications underwritten was $5,897 per unit for new construction Developments. Therefore, the 15% increase in the draft rule to $7,500 should provide ample cushion for a typical Development. Staff does not recommend a change.

Board Response: Department response accepted.

§1.32(e)(4)(a) New Construction.

Comment: Direct Construction Cost use of Marshall and Swift Residential Cost Handbook has proven to be an inaccurate technique for estimating cost around the state of Texas. The Marshall and Swift Residential Cost Handbook generally reflects the cost of construction in smaller communities as less than that in larger cities. However, cost associated with Developments contemplated in the LIHTC applications are of a larger scale than those in the Handbook and will require much of the labor and material to be imported to areas outside the major metropolitan areas of the state. As a result, the use of the Marshall and Swift Residential Cost Handbook places an unfair disadvantage on Developments in rural communities that are not in close proximity to a major city. Instead use the Marshall and Swift Cost Guide (Brown Book) to estimate cost in major cities of Texas and add cost factor for each 100 miles from the central business district. (i.e., 1-100 = 0%; 100-200 = 5%; 201-300 = 10%; 301-400 = 15%). An alternative may be to use existing LIHTC production cost, both 4% and 9%, by region, taken from final cost certifications of prior year's allocations indexed accordingly.

Department Response: While no cost estimating technique is going to be capable of perfectly predicting the final actual costs of a development, the Marshall and Swift methods employed by the Department have historically provided reasonably fair and accurate cost estimates. The accuracy of the Department's methodology is most significantly impacted by the timing of the Development as it predicts costs as if they have just occurred rather than to occur in nine to 18 months in the future. Both the Marshall Valuation Services book (Brown Book) and the Residential Cost Handbook (Black Book) are employed by the Department and both emphasize the use of local multipliers which tend to be lower for the smaller communities. This is not always the case as Austin and San Antonio are currently reflecting multipliers that are less than those in Longview, Beaumont and Abilene according to both books. The Department generally emphasizes the use of the Black Book because it provides for a slightly more detailed, yet simple and consistent, approach specifically tailored to housing development, while the Brown Book covers more generally all types of commercial development. While it is a long term goal of the underwriting division to more effectively utilize the final cost certification information available in identifying additional trends and anomalies to consider in the Marshall and Swift-based methodology, there is insufficient volume of cost certified transactions to base the entire costing methodology exclusively on recent cost certifications. The use of a distance adjuster as proposed would require significantly more detail as a proposal in regards to which major cities would be used for what areas and then may still be considered more arbitrary and artificial than the current Marshall and Swift methodologies. No change is recommended.

Board Response: Department response accepted.

§1.32(e)(4)(a) New Construction.

Comment: The direct construction cost of providing gas utilities is higher than the cost for providing only electric. This difference in costs should be considered.

Department Response: This difference is difficult to measure except on a case-by-case basis, but would be accepted as established through third party documentation provided by the Applicant indicating the unique local factors that affect gas and electric utility installation and access. Without specific knowledge of extraordinary local differences, the general differences between the cost of gas versus electric amount to less than 1% of the total development budget and, therefore, are well within the Department's 5% tolerance level. No change is recommended.

Board Response: Department response accepted.

§1.32(e)(9) Reserves.

Comment: It is highly recommended that TDHCA underwrite Development reserves at a minimum of three months of stabilized operating expenses including replacement reserves and management fees. Furthermore, TDHCA should allow Applicants to submit an amount of Development reserves in excess of three months worth so long as the Applicant submits an affidavit that there will be no provisions for the release of those reserves to the Applicant, Developer or its affiliates during the compliance period except to meet valid operating deficits or debt service payments as determined by the lender or syndicator, as applicable. However, another comment indicated operating reserves should not be required at the time of stabilization.

Department Response: Staff agrees with the first comments and recommends the following changes:

(9) Reserves. The Department will utilize the terms proposed by the syndicator or lender as described in the commitment letter(s) or the amount described in the Applicant's projected cost schedule if it is within the range of three to six months of stabilized operating expenses less management fees plus debt service.

Board Response: Department response accepted.

§1.32(f) Developer Capacity.

Comment: TDHCA should consider obtaining the right for an underwriter to contact in writing only, any contractor, syndicator or lender that has previously worked with the Applicant, with a request for written response to determine if a material event of default currently exists in any construction contract, loan agreement or partnership agreement. Such responses should be noted or attached to the credit underwriting report.

Department Response: By virtue of the Applicant signing the Department's Authorization to Release Credit Information form, staff believes it currently has the right to make such inquiry on an as-needed basis. Due to time constraints in the underwriting process and the significant delays and limited value a routine request from every principal and every lender and syndicator is not made. The Applicant who has had a significantly bad performance record will have difficulty in obtaining initial and final commitments and will likely be exposed through the previous participation compliance process. No change is recommended.

Board Response: Department response accepted.

§1.32(f)(1) Previous Experience.

Comment: Current language indicates, "The Underwriter will characterize the Development as 'high risk' if the Developer has no previous experience in completing construction and reaching stabilized occupancy in a previous Development." Should the defined term "Sustaining Occupancy" be used instead for clarity?

Department Response: Staff agrees that the use of the defined term "Sustaining Occupancy" in place of "stabilized occupancy" is acceptable and the change is recommended.

(1) Previous Experience. The Underwriter will characterize the Development as "high risk" if the Developer has no previous experience in completing construction and reaching Sustaining Occupancy in a previous Development.

Board Response: Department response accepted.

§1.32(f)(3)(b) Financial Statements of Principals.

Comment: The current underwriting guidelines indicate if a Development is financially feasible. However, there are sections within the underwriting guidelines that characterize a Development as 'high risk'. To expand on this, it is suggested that TDHCA establish ranges of risk criteria for certain aspects of each Development so that an overall feasibility risk can be presented. The risk levels assigned to a particular Development aspect could simply be "high risk" or "low risk". Some suggested aspects of Development include Debt Coverage Ratio on mandatory debt service, percentage of deferred developer fee, developer capacity, and market demand levels. For example, Developments with a Debt Coverage Ratio of less than 1.15 would receive a "high risk" indication on that Development aspect. The same Development could receive a "low risk" indication for having less than 10% of the Development fee projected to be deferred. Doing this should help provide the tax credit evaluation committee and staff with an overall picture of the risk of a Development in a summary format.

Department Response: Staff agrees and as part of the underwriting report and the standard operating procedures employed by the Department, various additional high risk indicators are indicated in the section of the report labeled "Summary of Salient Risks and Issues." However, there are numerous standard operating procedures that have not been re-documented in the draft rules since they apply to how the Department summarizes applications and monitors transactions and do not directly affect the current allocation process.

Board Response: Department response accepted.

§1.32(g)(1) Floodplains.

Comment: Local engineering studies, if available, may be a better option than submission of FEMA floodplain maps. Floodplain requirements should be: buildings at least one foot above floodplain and drives and parking lots no lower than six inches below floodplain, subject to local regulations, if more restrictive.

Department Response: Staff believes that funding in floodplains is an issue that should be re-evaluated in the coming year. In the meantime, staff proposes the following change:

(1) Floodplains. The Underwriter evaluates the site plan, floodplain map, local engineering studies provided through the Applicant, and other information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter and the buildings' finished ground floor are not clearly engineered to be at least one foot above the floodplain and all drives and parking lots are not clearly engineered to be not lower than six inches below the floodplain, the Report will include a condition that the Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F) or require the Applicant to identify the cost of flood insurance for the buildings and for the tenants' contents for buildings within the 100-year floodplain.

Board Response: Department response accepted.

§1.32(g)(2) Inclusive Capture Rate.

Comment: It is not realistic to assume a capture rate in a community that has had no new Development in a number of years. Generally there is a pent-up demand for housing in smaller communities or in those communities that would not be able to support new construction cost without the LIHTC equity. These types of communities should be exempt from capture rate as long as the economic climate is strong and the need for housing is apparent. Further comment states, if the Market Study supports the feasibility of the proposed Development, the Department should not use the capture rate to disqualify that Development unless there is clear evidence (based on the Department's independent verifications) that the Market Study is flawed or fails to consider all applicable comparable units

Department Response: A Development proposed in a community that has not had a Development in recent years would be less likely to be impacted by the inclusive capture rate calculation since only the subject's proposed units would be considered. Moreover, the types of communities suggested in the first part of this comment are typically rural and the inclusive capture rate for rural areas allows up to 100% of the established demand to be captured before a negative recommendation is made. In response to the second part of the comment, the extent of the Market Study feasibility analysis as currently conceived is for the primary focus to be on the Development at hand, only. Unfortunately, because of timing differences, the Market Analyst is often not aware of recent Department awards and therefore, the Department's re-evaluation here is critical. The inclusive capture rate is designed to account for the effect of all proposed developments in the area. Furthermore, the last sentence of the comment does not offer a viable tool for underwriting. If the Market Study is flawed, staff would not have a means to calculate capture rate because of the need for a reliable demand calculation. No change is recommended.

Board Response: Department response accepted.

§1.33(c)(2)(a) Market Analyst Qualifications.

Comment: Current language states, "Removal from the list of approved Market Analysts will not, in and of itself, invalidate a Market Analysis that has already been commissioned not more than 90 days before the Department's due date for submission as of the date the change in status of the Market Analyst is posted to the web." This language is difficult to read and confusing. Can it be clarified?

Department Response: Staff agrees and proposes the following:

(a) Removal from the list of approved Market Analysts will not, in and of itself, invalidate a Market Analysis. A Market Analysis, completed by a Market Analyst who is removed from the approved Market Analyst list, may be valid if the Market Analysis was commissioned before the Market Analyst's removal from the list, and this removal occurred less than 90 days before the Department's due date for submission of Market Analyses. For purposes of this paragraph, the effective date of removal from the approved Market Analyst list is the first date in which the Department's web posting no longer reflects the Market Analyst as being an approved Market Analyst.

Board Response: Department response accepted.

§1.33(d)(15)(a) Conclusions.

Comment: The term "subsidized rental rate conclusion" should be revised to reflect "restricted rental rate conclusions" to encompass units restricted under LIHTC program rules.

Department Response: Staff agrees that the use of the defined term "restricted" in place of "subsidized" is acceptable and the change is recommended.

(a) Provide a separate market and restricted rental rate conclusion for each proposed unit type and rental restriction category.

Conclusions of rental rates below the maximum net rent limit rents must be well reasoned, documented, consistent with the market data, and address any inconsistencies with the conclusions of the demand for the subject units.

Board Response: Department response accepted.

§1.33(d)(15)(a) Conclusions.

Comment: The market rate rents should not be underwritten at a rate greater than 90% of the market rate rents for similar units in the market area. It is very common for lenders and syndicators to discount the market rate rents on an income restricted Development to this level. To underwrite at a higher rent level places a Development in serious jeopardy, especially if underwritten at less than 1.15 DCR.

Department Response: While staff agrees in principal with this recommendation, the Department already does not generally preclude an Applicant from anticipating market rents that are less than the Market Analyst's market rent conclusions so long as they are not less than the maximum restricted rent being charged. No change is recommended.

Board Response: Department response accepted.

§1.33(d)(15)(d) Conclusions.

Comment: Current language states, "Calculate an inclusive capture rate for the subject Development defined as the sum of the proposed subject units plus any previously approved but unstabilized new comparable units in the Primary Market divided by the total income-eligible targeted renter demand identified by the Market Analysis for the subject Development's Primary Market Area. The Market Analyst should calculate a separate capture rate for the subject Development's proposed affordable units and market rate units as well as the subject Development as a whole." Proposed Language: "The Market Analyst should calculate a separate capture rate for the Development's proposed affordable units and market rate units as well as the Development as a whole. The capture rate of each applicable category (affordable, market rate, or both) shall be calculated individually and as follows: the sum of the proposed units in the Development plus any new Comparable Units located in the Primary Market Area that are in projects that have not achieved stabilized occupancy, divided by the total renter demand identified by the Market Analysis for the Primary Market." The new language is suggested to improve clarity.

Department Response: Staff agrees that clarification is needed, but the suggested language changes some of the intended meaning. Staff recommends the following:

(d) Calculate an inclusive capture rate for the subject Development defined as the sum of the proposed subject units plus any comparable units in previously approved new, but unstabilized Developments in the Primary Market, divided by the total income-eligible targeted renter demand identified by the Market Analysis for the subject Development's Primary Market Area. The Market Analyst should calculate a separate inclusive capture rate for the subject Development's proposed affordable units, market rate units, andthe subject Development as a whole.

Board Response: Department response accepted.

§1.33(d) Market Analysis Contents and (e) Single Family Developments.

Comment: Paragraph headings §1.33(d) deals with Market Analysis contents for multifamily Developments, and §1.33(e) deals with Market Analysis contents for single family Developments. In order to better distinguish these sections, it may be desirable to title §1.33(d) as "Market Analysis Contents Multifamily" and §1.33(e) as "Market Analysis Contents Single Family".

Department Response: Staff agrees with the proposed clarification and recommends the following:

(d) Market Analysis Contents - Multifamily. A Market Analysis for a Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) through (17) of this subsection.

(e) Market Analysis Contents - Single Family.

Board Response: Department response accepted.

§1.33(g) Market Analysis Rules and Guidelines.

Comment: Current language states, ". . . the Department . . . may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst." If the Department is going to certify Market Analysts as "qualified", then it should rely on the recommendations of those Analysts and should not substitute its own discretionary conclusions without some extraordinary circumstances. Comment was also received via comments on §49.9(e)(13)(b) of the draft 2003 Qualified Allocation Plan which states, "The Department does not have to rely on the Market Analyst and may substitute its own analysis and conclusions for those submitted by the qualified Market Analyst." In the event there is a Market Study disagreement, there needs to be an independent third party binding arbitration review to settle the issue. The Department, the Market Analysis, and the Developer may have valid reasons to assert a position. In fairness to all, a third party binding arbitrator can objectively review all the issues and render an unbiased opinion. It was also suggested that the arbiter should be an independent third party with no working history of either the Department or the Applicant.

Department Response: The current language is not new and no comment had been made to change it prior to the posting of these draft rules. The statement has been in the QAP since at least 1997 and preserves the Department's overall discretion to disagree with the conclusions of a particular Market Study. Applicants have the ability to appeal underwriting conclusions and could ask for a third party arbitrator on a case-by-case basis. Moreover, the time and resource constraints for the allocation process would preclude introducing another appeal process. Staff does not recommend a change.

Board Response: Department response accepted.

§1.35(a) Environmental Site Assessment Guidelines.

Comment: The rule appears to exclude all environmental professionals who are not environmental or professional engineers from conducting a Phase I Environmental Site Assessment for the Department. A revision to the current language was suggested as follows: "The environmental assessment shall be conducted by a qualified environmental professional and be prepared at the expense of the Development Owner." The intent is to allow all environmental professionals with appropriate qualifications to be included.

Department Response: The current language is not new and has been part of the QAP for several years, staff recommends researching the issue and setting up an ad hoc group to focus on revising the Environmental Site Assessment Rules and Guidelines during the coming year.

Board Response: Department response accepted.

§1.35(a)(1) Environmental Site Assessment Guidelines.

Comment: Current language states, "The report must include, but is not limited to: "The opening phrase of §1.35(a)(1) purports to set forth a list of information that must be included in the Environmental Site Assessment. However, §1.35(a)(1)(c) states that a noise study "is recommended". This implies that the noise study is discretionary and not mandatory, which is inconsistent with the opening phrase of this section. Similarly, §1.35(a)(1)(d) states that a survey should be provided "if available." This also implies that the survey is discretionary and not mandatory, which is inconsistent with the opening phrase of this section. Because §1.35(a)(1) presents a list, ";and" should be added after clause (e) and it should be deleted after clause (f).

Department Response: Staff agrees with the comment and recommends adjusting §1.35 accordingly.

(1) The report must include, but is not limited to:

(A) A review of records, interviews with people knowledgeable about the property;

(B) A certification that the environmental engineer has conducted an inspection of the property, the building(s), and adjoining properties, as well as any other industry standards concerning the preparation of this type of environmental assessment;

(C) A copy of a current survey or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the environmental site assessment or identified during the physical inspection;

(D) A copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map. A determination of the flood risk for the proposed Development described in the narrative of the report includes a discussion of the impact of the 100-year floodplain on the proposed Development based upon a review of the current site plan; and

(E) A statement that clearly states that the person or company preparing the environmental assessment will not materially benefit from the Development in any other way than receiving a fee for the environmental assessment.

(2) A noise study is recommended for property located adjacent to or in close proximity to industrial zones, major highways, active rail lines, and civil and military airfields.

(3) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site but would nonetheless affect the Property, the Development Owner must act on such a recommendation or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(4) For Developments which have had a Phase II Environmental Assessment performed and hazards identified, the Development Owner is required to maintain a copy of said assessment on site available for review by all persons which either occupy the Development or are applying for tenancy.

(5) Developments whose funds have been obligated by TxRD will not be required to supply this information; however, the Development Owners of such Developments are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(6) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms with the requirements of this subsection.

Board Response: Department response accepted.

REQUESTS THROUGH PUBLIC COMMENT FOR CLARIFICATION

§1.31(b)(1) Definition of Affordable Housing.

Comment: Current language states, "Housing that has been funded . . . or has at least one unit that is restricted in the rent that can be charged either by a Land Use Restriction Agreement or other form of Deed Restriction or by natural market forces at the equivalent of 30% of 100% of an area's median income as determined by HUD." What does it mean for rents to be restricted by "natural market forces," and does this language help in the understanding of the definition of Affordable Housing?

Department Response: The definition is intended to suggest that market rate units that rent at or below 30% of AMI due to "natural market forces" are affordable even if they are not restricted by LURA to this rent level.

§1.32(c)(2) Equity Gap Method.

Comment: Current language states, "This method evaluates the amount of funds needed to fill the gap created by total Development cost less total non-Department-sourced funds." Does this language work in circumstances where an Applicant requests funding under multiple TDHCA programs?

Department Response: The language that follows the quoted sentence addresses multiple Department programs.

§1.32(d)(2) Miscellaneous Income.

Comment: Current language states, "Exceptions must be justified by operating history of existing comparable properties . . ." What if there are no comparable properties? For instance, what if this is the first property in this area to provide certain kinds of services?

Department Response: Staff believes there would be significantly more risk associated with the Development's ability to rely on a fee for a service that has not been tested in the market place. Therefore, reliance on it would be more speculative and generally should not be relied upon.

§1.32(d)(2) Miscellaneous Income.

Comment: Current language states, "Collection rates of these exceptional fee items will generally be heavily discounted." What does the highlighted language mean? This appears to give the Department a great deal of discretion in calculation without any discernible standards.

Department Response: Because there are a myriad of potential fees that could be considered and because some are more speculative than others, the allowance of anything over the standard $5 to $15 per unit must be evaluated on a case-by-case basis. Likewise, the appropriate amount of the discount must be evaluated on a case-by-case basis depending on the reliability of the documentation provided.

§1.32(d)(7)(c) Acceptable Debt Coverage Ratio Range.

Comment: Current language states, "Any adjustments in debt service will become a condition of the Report, however, future changes in income, expenses, rates, and terms could allow additional adjustment to the final debt amount to be acceptable." Many transactions have a change in the debt service between the time they are underwritten and the time the final permanent loan is closed. What does the sentence above mean for that scenario? If a change in the debt structure is a condition to the commitment, then virtually every Development Owner will need to come back to the Department with a revised debt service plan at the time of permanent loan closing. This places a significant burden on the Department and creates uncertainty for the Development Owner in trying to syndicate its tax credits.

Department Response: Staff believes that SB 322 and the QAP already require every Development owner to come back to the Department with a revised debt structure as a material change when that occurs. In addition, every deal is already required to be re-evaluated for feasibility at cost certification. The language in this rule is intended to provide some acknowledgement to the Applicant of the Department's understanding that structures and conditions can and do change.

§1.32(e) Development Costs.

Comment: Current language states, "In the case of a rehabilitation Development, the Underwriter may use a lower tolerance level, due to the reliance upon the Applicant's authorized Third Party cost assessment." What does this mean? It appears to give the Department a great deal of discretion in calculation without any discernible standards.

Department Response: The statement means that if the Applicant provides a third party cost assessment, the Underwriter may use it to determine the appropriate fund amount even if the Applicant's figure is within 5% of the third party assessment.

§1.32(e)(4)(a) New Construction.

Comment: Current language states, "Whenever the Applicant's estimate is more than fiver percent greater or less than the Underwriter's Marshall and Swift based estimate, the Underwriter will attempt to reconcile this concern and ultimately identify this as a cost concern in the Report." The language says that the Underwriter will attempt to reconcile deviations. What does this mean for the feasibility of the Development and the Underwriter's ultimate recommendation for funding? Further, the Department requires the Market Analyst to determine if the cost of construction is reasonable. Why isn't this used for the analysis if it is required?

Department Response: The underwriting report will denote differences in Development costs and will identify them as a salient Development risk. The Market Analyst is not required to make such a determination.

§1.32(e)(8) Financing Costs.

Comment: We want to be sure that limiting construction period interest to one year of fully drawn interest on the construction loan applies only to limit eligible basis and not to limit total costs for gap calculation purposes. Each project is unique and leases up at its own rate. Seniors projects, in particular, are slow to lease up, and the construction loan may be outstanding for more than a year. Limiting the eligible basis may not affect the deal, but the costs are real and should be allowed for gap calculation purposes.

Department Response: This statement pertains to eligible basis only. The remaining "excess" interim interest cost would be removed to ineligible cost and, therefore, would be included in gap calculation.

§1.33(c)(1) Market Analyst Qualifications.

Comment: When is this information submitted? How much discretion is the Department going to have in placing a Market Analyst on the list or removing a Market Analyst from the list after receiving this?

Department Response: This information must be submitted before a Market Analyst can be placed on the approved list. If it is provided, they will be placed on the list and they will remain on the list until they ask to be removed or until removal as described in §1.33(c)(2) occurs.

§1.33(d)(13)(a) Comparable Property Analysis.

Comment: "Total adjustments made to the Comparable Units in excess of 15% suggest a weak comparable." What are the implications of this for the underwriting and the potential allocation of funding?

Department Response: This provides the Market Analyst with a guideline beyond which the Department would require additional explanation. Without the additional explanation, the underwriting report would indicate a reduced confidence in the conclusions of the study.

MINOR TECHNICAL CHANGES FOR CONSISTENCY

§§1.32 and 1.33 Defined Terms.

Comment: A number of terms are capitalized and defined in §1.31(b). Once they are defined, they should be used as capitalized, defined terms consistently throughout the Guidelines. Consistency in the use of defined terms ensures uniform interpretation of the Guidelines in a manner that is consistent with the Department's intent. The following defined terms should be capitalized in the Sections described below.

Applicant §§1.33(d)(15)(b), 1.33(g)

Debt Coverage Ratio §§1.32(d), 1.32(d)(5)(j)(i), 1.32(d)(5)(j)(iii), 1.32(d)(7)

Development §1.32(d)(1)(b)

Market Analyst §§1.33(c), 1.33(c)(1), 1.33(c)(2), 1.33(c)(2)(a)

Market Study §§1.32(d)(2), 1.33(e)(1)

Net Operating Income §1.32(d)

Program Rents §1.32(d)(1)

Department Response: Staff recommends the change.

Board Response: Department response accepted.

§1.31(b)(3) Definition of Cash Flow.

Comment: Current language states, "The funds available from operations after all expenses and debt service required to be paid has been considered." Due to a tense problem, the statement should be changed to: "The funds available from operations after all expenses and debt service required to be paid have been considered."

Department Response: Staff recommends the change.

Board Response: Department response accepted.

§1.32(d)(2) Miscellaneous Income.

Comment: Current language states, "Any estimates for secondary income above or below this amount are only considered if they are well documented by the financial statements of comparable properties as being achievable in the proposed market area as determined by the Underwriter." "Market area" should be changed to "Primary Market".

Department Response: Staff recommends the change.

Board Response: Department response accepted.

§1.32(d)(3) Vacancy and Collection Loss.

Comment: Current language states, "The Underwriter uses a vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss) unless the Market Analysis reflects a higher or lower established vacancy rate for the area." Change "area" to "Primary Market". Use of a defined term is always preferable for clarity of interpretation.

Department Response: Staff recommends the change.

Board Response: Department response accepted.

§1.32(d)(7)(b) Term.

Comment: Current language states, "The primary debt loan term is reflected in the commitment letter." For clarity, the statement should be changed to: "The primary debt loan term utilized by the Underwriter is the one reflected in the commitment letter."

Department Response: Staff recommends the change.

Board Response: Department response accepted.

§1.32(d)(7) Long Term Feasibility.

Comment: Current language states, "The base year projection utilized is the Underwriter's EGI, expenses, and NOI unless the Applicant's EGI, total expenses, and NOI are each within five percent . . . . " To make language consistent internally and also consistent with a similar provision in Section 1.32(d)(7), the statement should be changed to: "The base year projection utilized is the Underwriter's EGI, total expenses, and NOI unless the Applicant's EGI, total expenses, and NOI are each within five percent . . . . "

Department Response: Staff recommends the change.

Board Response: Department response accepted.

§1.32(e)(2) Off-Site Costs.

Comment: Current language states, "Off-Site costs are costs of Development up to the site itself such as the cost of roads, water, sewer and other utilities to provide the site with access." For clarity, the statement should be changed to: "Off-site costs are Development costs for work done outside of the actual Development site such as the cost of roads, water, sewer and other utilities to provide the site with access."

Department Response: Staff recommends the change.

Board Response: Department response accepted.

§1.32(e)(4)(a) New Construction.

Comment: Current language states, "Whenever the Applicant's estimate is more than fiver percent greater or less than the Underwriter's Marshall and Swift based estimate, the Underwriter will attempt to reconcile this concern and ultimately identify this as a cost concern in the Report." Note, the incorrect spelling of the word "five".

Department Response: The spelling correction from "fiver" to "five' is recommended.

Board Response: Department response accepted.

§1.32(e)(5) Hard Cost Contingency.

Comment: Current language states, "The Applicant's figure is used by the Underwriter if the figure is less than five percent (5%)." For balance with the immediately preceding sentence, the statement should be changed to: "The Applicant's figure is used by the Underwriter if the figure is less than five percent (5%) or ten percent (10%), respectively."

Department Response: Staff recommends the change.

Board Response: Department response accepted.

§1.32(e)(10) Other Soft Costs.

Comment: Current language states, ". . . the Applicant is given an opportunity to clarify and address the concern prior to removal form basis." Due to a spelling error, the statement should be changed to: ". . . the Applicant is given an opportunity to clarify and address the concern prior to removal from basis."

Department Response: Staff recommends the change.

Board Response: Department response accepted.

§1.34(e)(13)(d) Description of Improvements.

Comment: Current language states, "Provide a thorough description and analysis of the improvement . . . " To correct syntax, the statement should be changed to: "Provide a thorough description and analysis of the improvements . . . "

Department Response: Staff recommends the change.

Board Response: Department response accepted.

§1.34(e)(15)(b)(ii)(iii) NOI/Unit of Comparison.

Comment: Current language states, "If used in the report, the net income statistics for the comparables for must . . . " To correct syntax, the statement should be changed to: "If used in the report, the net income statistics for the comparables must . . . "

Department Response: Staff recommends the change.

Board Response: Department response accepted.

§1.34(e)(15)(c)(iii) Vacancy/Collection Loss.

Comment: Current language states, ". . . overall occupancy data for the subject's market area." Change "market area" to "Primary Market." Use of a defined term is always preferable for clarity of interpretation.

Department Response: Staff recommends the change.

Board Response: Department response accepted.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306; and Chapter 2001 and 2002, Texas Government Code, V.T.C.A., which provides the Departments with the authority to adopt rules governing the administration of the Department and its programs.

§1.31. General Provisions.

(a) Purpose. The Rules in this subchapter apply to the underwriting, market analysis, appraisal, and environmental site assessment standards employed by the Texas Department of Housing and Community Affairs (the "Department" or "TDHCA"). This chapter provides rules for the underwriting review of an affordable housing

Development's financial feasibility and economic viability. In addition, this chapter guides the underwriting staff in making recommendations to the Executive Award and Review Advisory Committee ("the Committee"), Executive Director, and TDHCA Governing Board ("the Board") to help ensure procedural consistency in the award determination process. Due to the unique characteristics of each Development the interpretation of the rules and guidelines described in subchapter B of this chapter is subject to the discretion of the Department and final determination by the Board.

(b) Definitions. Many of the terms used in this subchapter are defined in 10 TAC §§49 and 50 of this title (the Department's Low Income Housing Tax Credit Program Qualified Allocation Plan and Rules, known as the "QAP"). Those terms that are not defined in the QAP or which may have another meaning when used in subchapter B of this title, shall have the meanings set forth in this subsection unless the context clearly indicates otherwise.

(1) Affordable Housing-Housing that has been funded through one or more of the Department's programs or other local, state or federal programs or has at least one unit that is restricted in the rent that can be charged either by a Land Use Restriction Agreement or other form of Deed Restriction or by natural market forces at the equivalent of 30% of 100% of an area's median income as determined by the United States Department of Housing and Urban Development ("HUD").

(2) Affordability Analysis-An analysis of the ability of a prospective buyer or renter at a specified income level to buy or rent a housing unit at specified price or rent.

(3) Cash Flow--The funds available from operations after all expenses and debt service required to be paid have been considered.

(4) Credit Underwriting Analysis Report-Sometimes referred to as the "Report." A decision making tool used by the Department and Board, described more fully in §1.32(a) and (b) of this subchapter.

(5) Comparable Unit-A unit of housing that is of similar type, age, size, location and other discernable characteristics that can be used to compare and contrast from a proposed or existing unit.

(6) DCR--Debt Coverage Ratio. Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." A measure of the number of times the required payments of loan principal and interest are covered by Net Operating Income.

(7) Development-Proposed multi-unit residential housing that meets the affordability requirements for and requests funds from one or more of the Department's sources of funds.

(8) EGI--Effective Gross Income. The sum total of all sources of anticipated or actual income for a rental Development less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(9) Gross Program Rent-Sometimes called the "Program Rents." Maximum Rent Limits based upon the tables promulgated by the Department's division responsible for compliance by program and by county or Metropolitan Statistical Area ("MSA") or Primary Metropolitan Statistical Area ("PMSA").

(10) HUD--The United States Department of Housing and Urban Development. The department of the US Government responsible for major housing and urban Development programs, including programs that are redistributed through the State such as HOME and CDBG.

(11) Local Amenities-- Amenities located near and available to the tenants of a proposed Development, including but not limited to police and fire protection, transportation, healthcare, retail, grocers, educational institutions, employment centers, parks, public libraries, and entertainment centers.

(12) Low Income Housing Tax Credit(s)--Sometimes referred to as "LIHTC" or "Tax Credit(s)." A financing source allocated by the Department as determined by the QAP. The Tax Credits are typically sold through syndicators to raise equity for the Development.

(13) Market Analysis-Sometimes referred to as a Market Study. An evaluation of the economic conditions of supply, demand and pricing conducted in accordance with the Department's Market Analysis Rules and Guidelines in §1.33 of this subchapter as it relates to a specific Development

(14) Market Analyst-An individual or firm providing market information for use by the Department.

(15) Market Rent-The unrestricted rent concluded by the Market Analyst for a particular unit type and size after adjustments are made to Comparable Units.

(16) NOI--Net Operating Income. The income remaining after all operating expenses, including replacement reserves and taxes have been paid.

(17) Primary Market-Sometimes referred to as "Primary Market Area" or "Submarket." The area defined from which political/geographical boundaries that a proposed or existing Development is most likely to draw the bulk of its prospective tenants or homebuyers.

(18) Rent Over-Burdened Households-- Non-elderly households paying more than 35% of gross income towards total housing expenses (unit rent plus utilities) and elderly households paying more than 40% of gross income towards total housing expenses.

(19) Sustaining Occupancy--The occupancy level at which rental income plus secondary income is equal to all operating expenses and mandatory debt service requirements for a Development.

(20) TDHCA Operating Expense Database-Sometimes called the TDHCA Database. This is a consolidation of recent actual operating expense information collected through the Department's Annual Owner Financial Certification process and published on the Department's web site.

(21) Third Party--A Third Party is a Person which is not an Affiliate, Related Party, or Beneficial Owner of the Applicant, General Partner(s), Developer, or Person receiving any portion of the developer fee or contractor fee.

(22) Underwriter-the author(s), as evidenced by signature, of the Credit Underwriting Analysis Report.

(23) Unstabilized Development- A Development that has not maintained a 90% occupancy level for at least 12 consecutive months.

(24) Utility Allowance(s)-The estimate of tenant-paid utilities, based either on the most current HUD Form 52667, "Section 8, Existing Housing Allowance for Tenant-Furnished Utilities and Other Services," provided by the appropriate local Public Housing Authority consistent with the current QAP or a documented estimate from the utility provider proposed in the Application. Documentation from the local utility provider to support an alternative calculation can be used to justify alternative Utility Allowance conclusions but must be specific to the subject Development and consistent with the building plans provided.

§1.32. Underwriting Rules and Guidelines.

(a) General Provisions. The Department, through the division responsible for underwriting, produces or causes to be produced a Credit Underwriting Analysis Report (the "Report") for every Development recommended for funding through the Department. The primary function of the Report is to provide the Committee, Executive Director, the Board, Applicants, and the public a comprehensive analytical report and recommendations necessary to make well informed decisions in the allocation or award of the State's limited resources. The Report in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development by the Department.

(b) Report Contents. The Report provides an organized and consistent synopsis and reconciliation of the application information submitted by the Applicant. At a minimum, the Report includes:

(1) Identification of the Applicant and any principals of the Applicant;

(2) Identification of the funding type and amount requested by the Applicant;

(3) The Underwriter's funding recommendations and any conditions of such recommendations;

(4) Evaluation of the affordability of the proposed housing units to prospective residents;

(5) Review and analysis of the Applicant's operating proforma as compared to industry information, similar Developments previously funded by the Department, and the Department guidelines described in this section;

(6) Analysis of the Development's debt service capacity;

(7) Review and analysis of the Applicant's Development budget as compared to the estimate prepared by the Underwriter under the guidelines in this section;

(8) Evaluation of the commitment for additional sources of financing for the Development;

(9) Review of the experience of the Development team members;

(10) Identification of related interests among the members of the Development team, Third Party service providers and/or the seller of the property;

(11) Analysis of the Applicant's and principals' financial statements and creditworthiness including a review of the credit report for each of the principals in for-profit Developments subject to the Texas Public Information Act;

(12) Review of the proposed Development plan and evaluation of the proposed improvements and architectural design;

(13) Review of the Applicant's evidence of site control and any potential title issues that may affect site control;

(14) Identification and analysis of the site which includes review of the independent site inspection report prepared by a TDHCA staff member;

(15) Review of the Phase I Environmental Site Assessment in conformance with the Department's Environmental Site Assessment Rules and Guidelines in §1.35 of this subchapter or soils and hazardous material reports as required; and,

(16) Review of market data and Market Study information and any valuation information available for the property in conformance with the Department's Market Analysis Rules and Guidelines in §1.33 of this subchapter.

(c) Recommendations in the Report. The conclusion of the Report includes a recommended award of funds or allocation of Tax Credits based on the lesser amount calculated by the eligible basis method (if applicable), equity gap method, or the amount requested by the Applicant as further described in paragraphs (1) through (3) of this subsection.

(1) Eligible Basis Method. This method is only used for Developments requesting Low Income Housing Tax Credits. This method is based upon calculation of eligible basis after applying all cost verification measures and limits on profit, overhead, general requirements, and developer fees as described in this section. The Applicable Percentage used in the Eligible Basis Method is as defined in the QAP.

(2) Equity Gap Method. This method evaluates the amount of funds needed to fill the gap created by total Development cost less total non-Department-sourced funds. In making this determination, the Underwriter resizes any anticipated deferred developer fee down to zero before reducing the amount of Department funds. In the case of Low Income Housing Tax Credits, the syndication proceeds are divided by the syndication rate to determine the amount of Tax Credits. In making this determination, the Department adjusts the permanent loan amount and/or any Department-sourced loans, as necessary, such that it conforms to the NOI and DCR standards described in this section.

(3) The Amount Requested. This is the amount of funds that is requested by the Applicant as reflected in the application documentation.

(d) Operating Feasibility. The operating financial feasibility of every Development funded by the Department is tested by adding total income sources and subtracting vacancy and collection losses and operating expenses to determine Net Operating Income. This Net Operating Income is divided by the annual debt service to determine the Debt Coverage Ratio. The Underwriter characterizes a Development as infeasible from an operational standpoint when the Debt Coverage Ratio does not meet the minimum standard set forth in paragraph (7) of this subsection. The Underwriter may choose to make adjustments to the financing structure, such as lowering the debt and increasing the deferred developer fee that could result in a re-characterization of the Development as feasible based upon specific conditions set forth in the Report.

(1) Rental Income. The Program Rent less Utility Allowances and/or Market Rent (if the project is not 100% affordable) is utilized by the Underwriter in calculating the rental income for comparison to the Applicant's estimate in the application. Where multiple programs are funding the same units, the lowest Program Rents for those units is used. If the Market Rents, as determined by the Market Analysis, are lower than the net Program Rents, then the Market Rents for those units are utilized.

(A) Market Rents. The Underwriter reviews the Attribute Adjustment Matrix of Market Rent comparables by unit size provided by the Market Analyst and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Market Rent by unit, as long as the proposed Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable rent. Random checks of the validity of the Market Rents may include direct contact with the comparable properties. The Market Analyst's Attribute Adjustment Matrix should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this subchapter, the Department's Market Analysis Rules and Guidelines.

(B) Program Rents. The Underwriter reviews the Applicant's proposed rent schedule and determines if it is consistent with the representations made in the remainder of the application. The Underwriter uses the Program Rents as promulgated by the Department's Compliance Division for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all of the applications are underwritten with the rents promulgated for the same year. Program Rents are reduced by the Utility Allowance. The Utility Allowance figures used are determined based upon what is identified in the application by the Applicant as being a utility cost paid by the tenant and upon other consistent documentation provided in the application. Water and sewer can only be a tenant-paid utility if the units will be individually metered for such services. Gas utilities are verified on the building plans and elsewhere in the application when applicable. Trash allowances paid by the tenant are rare and only considered when the building plans allow for individual exterior receptacles. Refrigerator and range allowances are not considered part of the tenant-paid utilities unless the tenant is expected to provide their own appliances, and no eligible appliance costs are included in the Development cost breakdown.

(2) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including but not limited to late fees, storage fees, laundry income, interest on deposits, carport rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $15 per unit per month range. Any estimates for secondary income above or below this amount are only considered if they are well documented by the financial statements of comparable properties as being achievable in the proposed Primary Market as determined by the Underwriter. Exceptions may be made for special uses, such as garages, congregate care/assisted living/elderly facilities, and child care facilities. Exceptions must be justified by operating history of existing comparable properties and should also be documented as being achievable in the submitted Market Study. The Applicant must show that the tenant will not be required to pay the additional fee or charge as a condition of renting an apartment unit and must show that the tenant has a reasonable alternative. Collection rates of these exceptional fee items will generally be heavily discounted. If the total secondary income is over the maximum per unit per month limit, any cost associated with the construction, acquisition, or Development of the hard assets needed to produce an additional fee may also need to be reduced from eligible basis for Tax Credit Developments as they may, in that case, be considered to be a commercial cost rather than an incidental to the housing cost of the Development. The use of any secondary income over the maximum per unit per month limit that is based on the factors described in this paragraph is subject to the determination by the Underwriter that the factors being used are well documented.

(3) Vacancy and Collection Loss. The Underwriter uses a vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss) unless the Market Analysis reflects a higher or lower established vacancy rate for the Primary Market. Elderly and 100% project-based rental subsidy Developments and other well documented cases may be underwritten at a combined 5% at the discretion of the Underwriter if the historical performance reflected in the Market Analysis is consistently higher than a 95% occupancy rate.

(4) Effective Gross Income ("EGI"). The Underwriter independently calculates EGI. If the EGI figure provided by the Applicant is within five percent of the EGI figure calculated by the Underwriter, the Applicant's figure is characterized as acceptable or reasonable in the Report, however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation of EGI regardless of the characterization of the Applicant's figure.

(5) Expenses. The Underwriter evaluates the reasonableness of the Applicant's expense estimate based upon line item comparisons with specific data sources available. Evaluating the relative weight or importance of the expense data points is one of the most subjective elements of underwriting. Historical stabilized certified or audited financial statements of the property will reflect the strongest data points to predict future performance. The Department also maintains a database of performance of other similar sized and type properties across the State. In the case of a new Development, the Department's database of property in the same location or region as the proposed Development provides the most heavily relied upon data points. The Department also uses data from the Institute of Real Estate Management's (IREM) most recent *Conventional Apartments-Income/Expense Analysis* book for the proposed Development's property type and specific location or region. In some cases local or project-specific data such as Public Housing Authority ("PHA") Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Finally, well documented information provided in the Market Analysis, the application, and other well documented sources may be considered. In most cases, the data points used from a particular source are an average of the per unit and per square foot expense for that item. The Underwriter considers the specifics of each transaction, including the type of Development, the size of the units, and the Applicant's expectations as reflected in the proforma to determine which data points are most relevant. The Underwriter will determine the appropriateness of each data point being considered and must use their reasonable judgment as to which one fits each situation. The Department will create and utilize a feedback mechanism to communicate and allow for clarification by the Applicant when the overall expense estimate is over five percent greater or less than the Underwriter‘s estimate or when specific line items are inconsistent with the Underwriter's expectation based upon the tolerance levels set forth for each line item expense in subparagraphs (a) through (j) of this paragraph. If an acceptable rationale for the individual or total difference is not provided, the discrepancy is documented in the Report and the justification provided by the Applicant and the countervailing evidence supporting the Underwriter's determination is noted. If the Applicant's total expense estimate is within five percent of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as acceptable or reasonable in the Report, however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation of expenses regardless of the characterization of the Applicant's figure.

(A) General and Administrative Expense. General and Administrative Expense includes all accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. Historically, the TDHCA Database average has been used as the Department's strongest initial data point as it has generally been consistent with IREM regional and local figures. The underwriting tolerance level for this line item is 20%.

(B) Management Fee. Management Fee is paid to the property management company to oversee the effective operation of the property and is most often based upon a percentage of Effective Gross Income as documented in the management agreement contract. Typically, five percent of the effective gross income is used, though higher percentages for rural transactions that are consistent with the TDHCA Database can be concluded. Percentages as low as three percent may be utilized if documented with a Third Party management contract agreement with an acceptable management company. The Underwriter will require documentation for any percentage difference from the 5% of the Effective Gross Income standard.

(C) Payroll and Payroll Expense. Payroll and Payroll Expense includes all direct staff payroll, insurance benefits, and payroll taxes including payroll expenses for repairs and maintenance typical of a conventional Development. It does not, however, include direct security payroll or additional supportive services payroll. In urban areas, the local IREM per unit figure has historically held considerable weight as the Department's strongest initial data point. In rural areas, however, the TDHCA Database is often considered more reliable. The underwriting tolerance level for this line item is 10%.

(D) Repairs and Maintenance Expense. Repairs and Maintenance Expense includes all repairs and maintenance contracts and supplies. It should not include extraordinary capitalized expenses that would result from major renovations. Direct payroll for repairs and maintenance activities are included in payroll expense. Historically, the TDHCA Database average has been used as the Department's strongest data point as it has generally been consistent with IREM regional and local figures. The underwriting tolerance level for this line item is 20%.

(E) Utilities Expense (Gas & Electric). Utilities Expense includes all gas and electric energy expenses paid by the owner. It includes any pass-through energy expense that is reflected in the unit rents. Historically, the lower of an estimate based on 25.5% of the PHA local Utility Allowance or the TDHCA Database or local IREM averages have been used as the most significant data point for utility expenses attributable to common areas. The higher amount may be used, however, if the current typical higher efficiency standard utility equipment is not projected to be included in the Development upon completion or if the higher estimate is more consistent with the Applicant's projected estimate. Also a lower or higher percentage of the PHA allowance may be used, depending on the amount of common area, and adjustments will be made for utilities typically paid by tenants that in the subject are owner-paid as determined by the Underwriter. The underwriting tolerance level for this line item is 30%.

(F) Water, Sewer and Trash Expense. Water, Sewer and Trash Expense includes all water, sewer and trash expenses paid by the owner. It would also include any pass-through water, sewer and trash expense that is reflected in the unit rents. Historically, the lower of the PHA allowance or the TDHCA Database average has been used. The underwriting tolerance level for this line item is 30%.

(G) Insurance Expense. Insurance Expense includes any insurance for the buildings, contents, and liability but not health or workman's compensation insurance. Historically, the TDHCA Database is used with a minimum $0.16 per net rentable square foot. Additional weight is given to a Third Party bid or insurance cost estimate provided in the application reflecting a higher amount for the proposed Development. The underwriting tolerance level for this line item is 50%.

(H) Property Tax. Property Tax includes all real and personal property taxes but not payroll taxes. The TDHCA Database is used to interpret a per unit assessed value average for similar properties which is applied to the actual current tax rate. The per unit assessed value is most often contained within a range of $15,000 to $35,000 but may be higher or lower based upon documentation from the local tax assessor. Location, size of the units, and comparable assessed values also play a major role in evaluating this line item expense. Property tax exemptions or proposed payment in lieu of taxes (PILOT) must be documented as being reasonably achievable if they are to be considered by the Underwriter. For Community Housing Development Organization ("CHDO") owned or controlled properties, this documentation includes, at a minimum, a letter from the local appraisal district recognizing that the Applicant is or will be considered eligible for the ad valorem tax exemption. The underwriting tolerance level for this line item is 10%.

(I) Reserves. Reserves include annual reserve for replacements of future capitalizable expenses as well as any ongoing additional operating reserve requirements. The Underwriter includes reserves of $200 per unit for new construction and $300 per unit for rehabilitation Developments. Higher levels of reserves may be used if they are documented in the financing commitment letters. The Underwriter will require documentation for any difference from the $200 new construction and $300 rehabilitation standard.

(J) Other Expenses. The Underwriter will include other reasonable and documented expenses, other than depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees. Lender or syndicator's asset management fees or other ongoing partnership fees are not considered in the Department's calculation of debt coverage in any way. The most common other expenses are described in more detail in clauses (i) through (iii) of this subparagraph.

(i) Supportive Services Expense. Supportive Services Expense includes the cost to the owner of any non-traditional tenant benefit such as payroll for instruction or activities personnel. Documented contract costs will be reflected in Other Expenses. Any selection points for this item will be evaluated prior to underwriting. The Underwriter's verification will be limited to assuring any documented costs are included. For all transactions supportive services expenses are considered part of Other Expenses and are considered part of the Debt Coverage Ratio.

(ii) Security Expense. Security Expense includes contract or direct payroll expense for policing the premises of the Development and is included as part of Other Expenses. The Applicant's amount is moved to Other Expenses and typically accepted as provided. The Underwriter will require documentation of the need for security expenses that exceed 50% of the anticipated payroll and payroll expenses estimate discussed in subsection (d)(4)(c) of this section.

(iii) Compliance Fees. Compliance fees include only compliance fees charged by TDHCA. The Department's charge for a specific program may vary over time, however, the Underwriter uses the current charge per unit per year at the time of underwriting. For all transactions compliance fees are considered part of Other Expenses and are considered part of the Debt Coverage Ratio.

(6) Net Operating Income and Debt Service. The Underwriter will review the Development's proposed NOI and DCR and determine an acceptable debt level for the Development. If the Applicant's EGI, total expenses, and NOI are each within five percent of the Underwriter's estimates, then the Applicant's estimate of NOI will be used to determine the acceptable debt level for the Development. Otherwise, the Underwriter's estimate of NOI will be used to determine the acceptable debt level for the Development. In addition to NOI, the interest rate, term, and Debt Coverage Ratio range affect the determination of the acceptable debt service amount.

(A) Interest Rate. The interest rate used should be the rate documented in the commitment letter. The maximum rate that will be allowed for a competitive application cycle is evaluated by the Director of Credit Underwriting and posted to the Department's web site prior to the close of the application acceptance period. Historically this maximum acceptable rate has been at or below the average rate for 30-year U.S. Treasury Bonds plus 400 basis points.

(B) Term. The primary debt loan term utilized by the Underwriter is the one reflected in the commitment letter. The Department generally requires an amortization of not less than 30 years and not more than 50 years or an adjustment to the amortization structure is evaluated and recommended. In non-Tax Credit transactions a lesser amortization term may be used if the Department's funds are fully amortized over the same period.

(C) Acceptable Debt Coverage Ratio Range. The initial acceptable DCR range for all debt associated with permanent priority liens that are foreclosable as a result of nonpayment of a regularly scheduled amount plus the Department's proposed financing falls between a minimum of 1.10 to a maximum of 1.30. In rare instances, such as for HOPE VI and USDA Rural Development transactions, the minimum DCR may be less than 1.10 based upon documentation of acceptance of such an acceptable DCR from the lender. If the DCR is less than the minimum, a reduction in the debt service amount is recommended based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (a) and (b) of this paragraph. If the DCR is greater than the maximum, an increase in the debt service amount is recommended based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (a) and (b) of this paragraph, and the funding gap is reviewed to determine the continued need for Department financing. When the funding gap is reduced no adjustments are made to the level of Department financing unless there is an excess of financing, after the need for deferral of any developer fee is eliminated. If the increase in debt capacity provides excess sources of funds, the Underwriter adjusts any Department grant funds to a loan, if possible, and/or adjusts the interest rate of any Department loans upward until the DCR does not exceed the maximum or up to the prevailing current market rate for similar conventional funding, whichever occurs first. Where no Department grant or loan exists or the full market interest rate for the Department's loan has been accomplished, the Underwriter increases the conventional debt amount until the DCR is reduced to the maximum allowable. Any adjustments in debt service will become a condition of the Report, however, future changes in income, expenses, rates, and terms could allow additional adjustments to the final debt amount to be acceptable. In a Tax Credit transaction, an excessive DCR could negatively affect the amount of recommended tax credit, if based upon the Gap Method, more funds are available than are necessary after all deferral of developer fee is reduced to zero.

(7) Long Term Feasibility. The Underwriter will evaluate the long term feasibility of the Development by creating a 30-year operating proforma. A three percent annual growth factor is utilized for income and a four percent annual growth factor is utilized for expenses. The base year projection utilized is the Underwriter's EGI, total expenses, and NOI unless the Applicant's EGI, total expenses, and NOI are each within five percent of the Underwriter's estimates and characterized as acceptable or reasonable in the Report. The DCR should remain above a 1.10 and a continued positive Cash Flow should be projected for the initial 30-year period in order for the Development to be characterized as feasible for the long term. Any Development where the amount of cumulative Cash Flow over the first fifteen years is insufficient to pay the projected amount of deferred developer fee amortized in irregular payments at zero percent interest is characterized as infeasible and will not be recommended for funding unless the Underwriter can determine a plausible alternative feasible financing structure and conditions the recommendation(s) in the Report accordingly.

(e) Development Costs. The Department's estimate of the Development's cost will be based on the Applicant's project cost schedule to the extent that it can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For new construction Developments, the Applicant's total cost estimate will be compared to the Underwriter's total cost estimate and where the difference in cost exceeds five percent of the Underwriter's estimate, the Underwriter shall substitute their own estimate for the Total Housing Development Cost to determine the Equity Gap Method and Eligible Basis Method where applicable. In the case of a rehabilitation Development, the Underwriter may use a lower tolerance level due to the reliance upon the Applicant's authorized Third Party cost assessment. Where the Applicant's costs are inconsistent with documentation provided in the Application, the Underwriter may adjust the Applicant's total cost estimate. The Department will create and utilize a feedback mechanism to communicate and allow for clarification by the Applicant before the Underwriter's total cost estimate is substituted for the Applicant's estimate.

(1) Acquisition Costs. The proposed acquisition price is verified with the fully executed site control document(s) for the entirety of the site.

(A) Excess Land Acquisition. Where more land is being acquired than will be utilized for the site and the remaining acreage is not being utilized as permanent green space, the value ascribed to the proposed Development will be prorated from the total cost reflected in the site control document(s). An appraisal or tax assessment value may be tools that are used in making this determination; however, the Underwriter will not utilize a prorated value greater than the total amount in the site control document(s).

(B) Identity of Interest Acquisitions. Where the seller or any principals of the seller is an Affiliate, Beneficial Owner, or Related Party to the Applicant, Developer, General Contractor, Housing Consultant, or persons receiving any portion of the Contractor or Developer Fees, the sale of the property will be considered to be an Identity of Interest transfer. In all such transactions the Applicant is required to provide the additional documentation identified in clauses (i) through (iv) of this subparagraph to support the transfer price and this information will be used by the Underwriter to make a transfer price determination.

(i) Documentation of the original acquisition cost, such as the settlement statement.

(ii) An appraisal that meets the Department's Appraisal Rules and Guidelines as described in §1.34 of this subchapter. In no instance will the acquisition value utilized by the Underwriter exceed the appraised value.

(iii) A copy of the current tax assessment value for the property.

(iv) Any other reasonably verifiable costs of owning, holding, or improving the property that when added to the value from clause (i) of this subparagraph justifies the Applicant's proposed acquisition amount.

(I) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include: property taxes; interest expense; a calculated return on equity at a rate consistent with the historical returns of similar risks; the cost of any physical improvements made to the property; the cost of rezoning, replatting, or developing the property; or any costs to provide or improve access to the property.

(II) For transactions which include existing buildings that will be rehabilitated or otherwise maintained as part of the property, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the property and the cost of exit taxes not to exceed

an amount necessary to allow the sellers to be indifferent to foreclosure or breakeven transfer.

(C) Non-Identity of Interest Acquisition of Buildings for Tax Credit Properties. In order to make a determination of the appropriate building acquisition value, the Applicant will provide and the Underwriter will utilize an appraisal that meets the Department's Appraisal Rules and Guidelines as described in §1.34 of this subchapter. The value of the improvements are the result of the difference between the as-is appraised value less the land value. Where the actual sales price is more than ten percent different than the appraised value, the Underwriter may alternatively prorate the actual sales price based upon the calculated improvement value over the as-is value provided in the appraisal, so long as the improved value utilized by the Underwriter does not exceed the total as-is appraised value of the entire property.

(2) Off-Site Costs. Off-Site costs are Development costs for work done outside of the actual Development site such as the cost of roads, water, sewer and other utilities to provide the site with access. All off-site costs must be well documented and certified by a Third Party engineer as presented in the required application form to be included in the Underwriter's cost budget.

(3) Site Work Costs. If Project site work costs exceed $7,500 per Unit, the Applicant must submit a detailed cost breakdown certified as being prepared by a Third Party engineer or architect, to be included in the Underwriter's cost budget. In addition, for Applicants seeking Tax Credits, a letter from a certified public accountant properly allocating which portions of the engineer's or architect's site costs should be included in eligible basis and which ones are ineligible, in keeping with the holding of the Internal Revenue Service Technical Advice Memoranda, is required for such costs to be included in the Underwriter's cost budget.

(4) Direct Construction Costs. Direct construction costs are the costs of materials and labor required for the building or rehabilitation of a Development.

(A) New Construction. The Underwriter will use the "Average Quality" multiple or townhouse costs, as appropriate, from the *Marshal and Swift Residential Cost Handbook*, based upon the details provided in the application and particularly site and building plans and elevations. If the Development contains amenities not included in the Average Quality standard, the Department will take into account the costs of the amenities as designed in the Development. If the Development will contain single-family buildings, then the cost basis should be consistent with single-family Average Quality as defined by *Marshall & Swift Residential Cost Handbook*. Whenever the Applicant's estimate is more than five percent greater or less than the Underwriter's *Marshall and Swift* based estimate, the Underwriter will attempt to reconcile this concern and ultimately identify this as a cost concern in the Report.

(B) Rehabilitation Costs. In the case where the Applicant has provided Third Party signed bids with a work write-up from contractors or estimates from certified or licensed professionals which are inconsistent with the Applicant's figures as proposed in the project cost schedule, the Underwriter utilizes the Third Party estimations in lieu of the Applicant's estimates even when the difference between the Underwriter's costs and the Applicant's costs is less than five percent. The underwriting staff will evaluate rehabilitation Developments for comprehensiveness of the Third Party work write-up and will determine if additional information is needed.

(5) Hard Cost Contingency. This is the only contingency figure considered by the Underwriter and is only considered in underwriting prior to final cost certification. Contingency is limited to a maximum of five percent (5%) of direct costs plus site work for new construction Developments and ten percent (10%) of direct costs plus site work for rehabilitation Developments. The Applicant's figure is used by the Underwriter if the figure is less than five percent (5%) or ten percent (10%), respectively.

(6) Contractor Fee Limits. Contractor fees are limited to six percent (6%) for general requirements, two percent (2%) for contractor overhead, and six percent (6%) for contractor profit. These fees are based upon the direct costs plus site work costs. Minor reallocations to make these fees fit within these limits may be made at the discretion of the Underwriter. For Developments also receiving financing from TxRD-USDA, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or TxRD-USDA requirements.

(7) Developer Fee Limits. For Tax Credit Developments, the Development cost associated with developer's fees cannot exceed fifteen percent (15%) of the project's Total Eligible Basis, as defined in §§49 and 50 of this title (adjusted for the reduction of federal grants, below market rate loans, historic credits, etc.), not inclusive of the developer fees themselves. The fee can be divided between overhead and fee as desired but the sum of both items must not exceed the maximum limit. The Developer Fee may be earned on non-eligible basis activities, but only the maximum limit as a percentage of eligible basis items may be included in basis for the purpose of calculating a project's credit amount. Any non-eligible amount of developer fee claimed must be proportionate to the work for which it is earned. For non-Tax Credit Developments, the percentage remains the same but is based upon total Development costs less: the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, and reserves.

(8) Financing Costs. Eligible construction period financing is limited to not more than one year's worth of fully drawn construction loan funds at the construction loan interest rate indicated in the commitment. Any excess over this amount is removed to ineligible cost and will not be considerd in the determination of developer fee.

(9) Reserves. The Department will utilize the terms proposed by the syndicator or lender as described in the commitment letter(s) or the amount described in the Applicant's projected cost schedule if it is within the range of three to six months of stabilized operating expenses less management fees plus debt service.

(10) Other Soft Costs. For Tax Credit Developments all other soft costs are divided into eligible and ineligible costs. Eligible costs are defined by Internal Revenue Code but generally are costs that can be capitalized in the basis of the Development for tax purposes; whereas ineligible costs are those that tend to fund future operating activities. The Underwriter will evaluate and accept the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Internal Revenue Code. If the Underwriter questions the eligibility of any soft costs, the Applicant is given an opportunity to clarify and address the concern prior to removal from basis.

(f) Developer Capacity. The Underwriter will evaluate the capacity of the Person(s) accountable for the role of the Developer to determine their ability to secure financing and successfully complete the Development. The Department will review certification of previous participation, financial statements, and personal credit reports for those individuals anticipated to guarantee the completion of the Development.

(1) Previous Experience. The Underwriter will characterize the Development as "high risk" if the Developer has no previous experience in completing construction and reaching Sustaining Occupancy in a previous Development.

(2) Credit Reports. The Underwriter will characterize the Development as "high risk" if the Developer or principals thereof have a credit score which reflects a 40% or higher potential default rate.

(3) Financial Statements of Principals. The Applicant, Developer, any principals of the Applicant, General Partner, and Developer and any Person who will be required to guarantee the Development will be required to provide a signed and dated financial statement and authorization to release credit information. The financial statement for individuals may be provided on the Personal Financial and Credit Statement form provided by the Department and must not be older than 90 days from the first day of the Application Acceptance Period. If submitting partnership and corporate financials in addition to the individual statements, the certified annual financial statement or audited statement, if available, should be for the most recent fiscal year not more than twelve months from first date of the Application Acceptance Period. This document is required for an entity even if the entity is wholly-owned by a person who has submitted this document as an individual. For entities being formed for the purposes of facilitating the contemplated transaction but who have no meaningful financial statements at the present time, a letter attesting to this condition will suffice.

(A) Financial statements must be provided to the Underwriting Division at least seven days prior to the close of the application acceptance period in order for an acknowledgment of receipt to be provided as a substitute for inclusion of the statements themselves in the application. The Underwriting Division will FAX, e-mail or send via regular mail an acknowledgement for each financial statement received. The acknowledgement will not constitute acceptance by the Department that financial statements provided are acceptable in any manner but only acknowledge their receipt. Where time permits, the acknowledgement may identify the date of the statement and whether it will meet the time constraints under the QAP.

(B) The Underwriter will evaluate and discuss individual financial statements in a confidential portion of the Report. Where the financial statement indicates a limited net worth and/ or lack of significant liquidity and the Development is characterized as a high risk for either of the reasons described in paragraphs (1) and (2) of this subsection, the Underwriter must condition any potential award upon the identification and inclusion of additional Development partners who can meet the criteria described in this subsection.

(g) Other Underwriting Considerations. The Underwriter will evaluate numerous additional elements as described in subsection (b) of this section and those that require further elaboration are identified in this subsection.

(1) Floodplains. The Underwriter evaluates the site plan, floodplain map, local engineering studies provided through the Applicant, and other information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter and the buildings' finished ground floor are not clearly engineered to be at least one foot above the floodplain and all drives and parking lots are not clearly engineered to be not lower than six inches below the floodplain, the Report will include a condition that the Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F) or require the Applicant to identify the cost of flood insurance for the buildings and for the tenant's contents for buildings within the 100-year floodplain.

(2) Inclusive Capture Rate. The Underwriter will not recommend the approval of funds to new Developments requesting funds where the anticipated inclusive capture rate is in excess of 25% for the Primary Market unless the market is a rural market or the units are targeted toward the elderly. In rural markets and for Developments that are strictly targeted to the elderly, the Underwriter will not recommend the approval of funds to new housing Developments requesting funds from the Department where the anticipated capture rate is in excess of 100% of the qualified demand. Affordable Housing which replaces previously existing substandard Affordable Housing within the same Submarket on a Unit for Unit basis, and which gives the displaced tenants of the previously existing Affordable Housing a leasing preference, is excepted from these inclusive capture rate restrictions. The inclusive capture rate for the Development is defined as the sum of the proposed units for a given project plus any previously approved but not yet stabilized new Comparable Units in the Submarket divided by the total income-eligible targeted renter demand identified in the Market Analysis for a specific Development's Primary Market. The Department defines Comparable Units, in this instance, as units that are dedicated to the same household type as the proposed subject property using the classifications of family, elderly or transitional as housing types. The Department defines a stabilized project as one that has maintained a 90% occupancy level for at least 12 consecutive months. The Department will independently verify the number of affordable units included in the Market Study and will ensure that all projects previously allocated funds through the Department are included in the final analysis. The documentation requirements needed to support decisions relating to this item are identified in §1.33 of this subchapter.

§1.33. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject property rental rates or sales price and state conclusions as to the impact of the property with respect to the determined housing needs. Furthermore, the Market Analyst shall certify that they are a Third Party and are not being compensated for the assignment based upon a predetermined outcome.

(b) Self-Contained. A Market Analysis prepared for the Department must contain sufficient data and analysis to allow the reader to understand the market data presented, the analysis of the data, and the conclusion(s) derived from such data and its relationship to the subject property. The complexity of this requirement will vary in direct proportion with the complexity of the real estate and the real estate market being analyzed. The analysis must clearly lead the reader to the same or similar conclusion(s) reached by the Market Analyst.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Market Analyst. The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) through (3) of this subsection.

(1) Market analysts must submit subparagraphs (A) through (F) of this paragraph for review by the Department.

(A) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis.

(B) General information regarding the firm's experience including references, the number of previous similar assignments and time frames in which previous assignments were completed.

(C) Resumes for all members of the firm who may author or sign the Market Analysis.

(D) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines described in this section.

(E) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines described in this section.

(F) Documentation of organization and good standing in the State of Texas.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the funding cycle and as time permits, staff and/or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of the discrepancies in the Market Analysis and will be removed from the approved Market Analyst list.

(A) Removal from the list of approved Market Analysts will not, in and of itself, invalidate a Market Analysis. A Market Analysis, completed by a Market Analyst who is removed from the approved Market Analyst list, may be valid if the Market Analysis was commissioned before the Market Analyst's removal from the list, and this removal occurred less than 90 days before the Department's due date for submission of Market Analyses. For purposes of this paragraph, the effective date of removal from the approved Market Analyst list is the first date in which the Department's web posting no longer reflects the Market Analyst as being an approved Market Analyst.

(B) To be reinstated as an approved Market Analyst, the Market Analyst must submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines. This new study will then be reviewed for conformance with the rules of this section and if found to be in compliance, the Market Analyst will be reinstated.

(3) The list of approved Market Analysts is posted on the Department's web site and updated within 72 hours of a change in the status of a Market Analyst.

(d) Market Analysis Contents - Multifamily. A Market Analysis for a Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) through (17) of this subsection.

(1) Title Page. Include property address and/or location, housing type, TDHCA addressed as client, effective date of analysis, date of report, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. Include date of letter, property address and/or location, description of property type, statement as to purpose of analysis, reference to accompanying Market Analysis, reference to all person(s) providing significant assistance in the preparation of analysis, statement from Market Analyst indicating any and all relationships to any member of the Development team and/or owner of the subject property, date of analysis, effective date of analysis, date of property inspection, name of person(s) inspecting subject property, and signatures of all Market Analysts authorized to work on the assignment.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Summary Form. Complete and include the TDHCA Primary Market Area Analysis Summary form. An electronic version of the form and instructions are available on the Department's website at http://www.tdhca.state.tx.us/underwrite.html.

(5) Assumptions and Limiting Conditions. Include a summary of all assumptions, both general and specific, made by the Market Analyst concerning the property.

(6) Disclosure of Competency. Include the Market Analyst's qualifications, detailing education and experience of all Market Analysts authorized to work on the assignment.

(7) Identification of the Property. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and Development characteristics.

(8) Statement of Ownership for the Subject Property. Disclose the current owners of record and provide a three year history of ownership.

(9) Purpose of the Market Analysis. Provide a brief comment stating the purpose of the analysis.

(10) Scope of the Market Analysis. Address and summarize the sources used in the Market Analysis. Describe the process of collecting, confirming, and reporting the data used in the Market Analysis.

(11) Secondary Market Information. Include a general description of the geographic location and demographic data and analysis of the secondary market area if applicable. The secondary market area will be defined on a case-by-case basis by the Market Analyst engaged to provide the Market Analysis. Additional demand factors and comparable property information from the secondary market may be addressed. However, use of such information in conclusions regarding the subject property must be well-reasoned and documented. A map of the secondary market area with the subject property clearly identified should be provided. In a Market Analysis for a Development targeting families, the demand and supply effects from the secondary market are not significant. For a Development that targets smaller subgroups such as elderly households, the demand and supply effects may be more relevant.

(12) Primary Market Information. Include a specific description of the subject's geographical location, specific demographic data, and an analysis of the Primary Market Area. The Primary Market Area will be defined on a case-by-case basis by the Market Analyst engaged to provide the Market Analysis. The Department encourages a conservative Primary Market Area delineation with use of natural political/geographical boundaries whenever possible. Furthermore, the Primary Market for a Development chosen by the Market Analyst will generally be most informative if it contains no more than 250,000 persons, though a Primary Market with more residents may be indicated by the Market Analyst, where political/geographic boundaries indicate doing so, with additional supportive narrative. A summary of the neighborhood trends, future Development, and economic viability of the specific area must be addressed with particular emphasis given to Affordable Housing. A map of the Primary Market with the subject property clearly identified must be provided. A separate scaled distance map of the Primary Market that clearly identifies the subject and the Local Amenities must also be included.

(13) Comparable Property Analysis. Provide a comprehensive evaluation of the existing supply of comparable properties in the Primary Market Area defined by the Market Analyst. The analysis should include census data documenting the amount and condition of local housing stock as well as information on building permits since the census data was collected. The analysis must separately evaluate existing market rate housing and existing subsidized housing to include local housing authority units and any and all other rent- or income-restricted units with respect to items discussed in subparagraphs (A) through (F) of this paragraph.

(A) Analyze comparable property rental rates. Include a separate attribute adjustment matrix for the most comparable market

rate and subsidized units to the units proposed in the subject, a minimum of three Developments each. The Department recommends use of HUD Form 922273. Analysis of the Market Rents must be sufficiently detailed to permit the reader to understand the Market Analyst's logic and rationale. Total adjustments made to the Comparable Units in excess of 15% suggest a weak comparable. Total adjustments in excess of 15% must be supported with additional narrative. The Department also encourages close examination of the overall use of concessions in the Primary Market Area and the effect on effective Market Rents.

(B) Provide an Affordability Analysis of the comparable unrestricted units.

(C) Analyze occupancy rates of each of the comparable properties and occupancy trends by property class. Physical occupancy should be compared to economic occupancy.

(D) Provide annual turnover rates of each of the comparable properties and turnover trends by property class.

(E) Provide absorption rates for each of the comparable properties and absorption trends by property class.

(F) The comparable Developments must indicate current research for the proposed property type. The rental data must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The minimum content of the individual data sheets include: property address, lease terms, occupancy, turnover, Development characteristics, current physical condition of the property, etc. A scaled distance map of the Primary Market that clearly identifies the subject Development and existing comparable market rate Developments and all existing/proposed subsidized Developments must be provided.

(14) Demand Analysis. Provide a comprehensive evaluation of the demand for the proposed housing. The analysis must include an analysis of the need for market rate and Affordable Housing within the subject Development's Primary Market Area using the most current census and demographic data available. The demand for housing must be quantified, well reasoned, and segmented to include only relevant income- and age-eligible targets of the subject Development. Each demand segment should be addressed independently and overlapping segments should be minimized and clearly identified when required. In instances where more than 20% of the proposed units are comprised of three- and four-bedroom units, the analysis should be refined by factoring in the number of large households to avoid overestimating demand. The final quantified demand calculation may include demand due to items in subparagraphs (A) through (C) of this paragraph.

(A) Quantify new household demand due to documented population and household growth trends for targeted income-eligible renter households OR confirmed targeted income-eligible renter household growth due to new employment growth.

(B) Quantify existing household demand due to documented turnover of existing targeted income-eligible renter households OR documented rent over-burdened targeted income-eligible renter households that would not be rent over-burdened in the proposed Development and documented targeted income-eligible renter households living in substandard housing.

(C) Include other well reasoned and documented sources of demand determined by the Market Analyst.

(15) Conclusions. Include a comprehensive evaluation of the subject property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) through (F) of this paragraph.

(A) Provide a separate market and restricted rental rate conclusion for each proposed unit type and rental restriction category. Conclusions of rental rates below the maximum net rent limit rents must be well reasoned, documented, consistent with the market data, and address any inconsistencies with the conclusions of the demand for the subject units.

(B) Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the Applicant's estimates, but based on historic and/or well established data sources of comparable properties.

(C) Correlate and quantify secondary market and Primary Market demographics of housing demand to the current and proposed supply of housing and the need for each proposed unit type and the subject Development as a whole. The subject Development specific demand calculation may consider total demand from the date of application to the proposed place in service date.

(D) Calculate an inclusive capture rate for the subject Development defined as the sum of the proposed subject units plus any comparable units in previously approved new, but unstabilized Developments in the Primary Market, divided by the total income-eligible targeted renter demand identified by the Market Analysis for the subject Development's Primary Market Area. The Market Analyst should calculate a separate inclusive capture rate for the subject Development's proposed affordable units, market rate units, andthe subject Development as a whole.

(E) Project an absorption period and rate for the subject until a Sustaining Occupancy level has been achieved. If absorption projections for the subject differ significantly from historic data, an explanation of such should be included.

(F) Analyze the effects of the subject Development on the Primary Market occupancy rates and provide sufficient support documentation.

(16) Photographs. Include good quality color photographs of the subject property (front, rear and side elevations, on-site amenities, interior of typical units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should also be included. An aerial photograph is desirable but not mandatory.

(17) Appendices. Any Third Party reports relied upon by the Market Analyst must be provided in appendix form and verified directly by the Market Analyst as to its validity.

(e) Market Analysis Contents - Single Family.

(1) Market studies for single-family Developments proposed as rental Developments must contain the elements set forth in subsections (d)(1) through (17) of this section. Market analyses for Developments proposed for single-family home ownership must contain the elements set forth in subsections (d)(1) through (17) of this section as they would apply to home ownership in addition to paragraphs (2) through (4) of this subsection.

(2) Include no less than three actual market transactions to inform the reader of current market conditions for the sale of each unit type in the price range contemplated for homes in the proposed Development. The comparables must rely on current research for this specific property type. The sales prices must be confirmed with the buyer, seller, or real estate agent and individual data sheets must be included. The minimum content of the individual data sheets should include property address, Development characteristics, purchase price

and terms, description of any federal, state, or local affordability subsidy associated with the transaction, date of sale, and length of time on the market.

(3) Analysis of the comparable sales should be sufficiently detailed to permit the reader to understand the Market Analyst's logic and rationale. The evaluation should address the appropriateness of the living area, room count, market demand for Affordable Housing, targeted sales price range, demand for interior and/or exterior amenities, etc. A scaled distance map of the Primary Market that clearly identifies the subject Development and existing comparable single family homes must be provided.

(4) A written statement is required stating if the projected sales prices for homes in the proposed Development are, or are not, below the range for comparable homes within the Primary Market Area. Sufficient documentation should be included to support the Market Analyst's conclusion with regard to the Development's absorption.

(f) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject property and the provisions of the particular program guidelines.

(g) All Applicants shall acknowledge, by virtue of filing an application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst

§1.34. Appraisal Rules and Guidelines.

(a) General Provisions. Appraisals prepared for the Department must conform to the Uniform Standards of Professional Appraisal Practice (USPAP) as adopted by the Appraisal Standards Board of the Appraisal Foundation. Self-contained reports must describe sufficient and adequate data and analyses to support the final opinion of value. The final value(s) must be reasonable, based on the information included. Any Third Party reports relied upon by the appraiser must be verified by the appraiser as to the validity of the data and the conclusions. The report must contain sufficient data, included in the appendix when possible, and analysis to allow the reader to understand the property being appraised, the market data presented, analysis of the data, and the appraiser's value conclusion. The complexity of this requirement will vary in direct proportion with the complexity of the real estate and real estate interest being appraised. The report should lead the reader to the same or similar conclusion(s) reached by the appraiser.

(b) Value Estimates. All appraisals shall contain a separate estimate of land value, based upon sales comparables. Appraisal assignments for new construction, which are required to provide a future value of to be completed structures, shall provide an "as restricted with favorable financing" value as well as an "unrestricted market" value. Properties to be rehabilitated shall address the "as restricted with favorable financing" value as well as both an "as is" value and an "as completed" value. Include a separate assessment of personal property, furniture, fixtures, and equipment (FF&E) and/or intangible items because their economic life may be shorter than the real estate improvements and may require different lending or underwriting considerations. If personal property, FF7E, or intangible items are not part of the transaction or value estimate, a statement to such effect should be included.

(c) Date of Appraisal. The appraisal report must be dated and signed by the appraiser who inspected the property. The date of the valuation, except in the case of proposed construction or extensive rehabilitation, must be a current date. The date of valuation should not be more than six months prior to the date of the application to the Department.

(d) Appraiser Qualifications. The qualifications of each appraiser are determined and approved on a case-by-case basis by the Director of Credit Underwriting and/or review appraiser, based upon the quality of the report itself and the experience and educational background of the appraiser, as set forth in the Statement of Qualifications appended to the appraisal. At minimum, a qualified appraiser will be certified or licensed by the Texas Appraiser Licensing and Certification Board.

(e) Appraisal Contents. An appraisal of a Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) through (18) of this subsection.

(1) Title Page. Include identification as to appraisal (e.g., type of process - complete or limited, type of report - self-contained, summary or restricted), property address and/or location, housing type, the Department addressed as the client, effective date of value estimate(s), date of report, name and address of person authorizing report, and name and address of appraiser(s).

(2) Letter of Transmittal. Include date of letter, property address and/or location, description of property type, extraordinary/special assumptions or limiting conditions that were approved by person authorizing the assignment, statement as to function of the report, statement of property interest being appraised, statement as to appraisal process (complete or limited), statement as to reporting option (self-contained, summary or restricted), reference to accompanying appraisal report, reference to all person(s) that provided significant assistance in the preparation of the report, date of report, effective date of appraisal, date of property inspection, name of person(s) inspecting the property, identification of type(s) of value(s) estimated (e.g., market value, leased fee value, as-financed value, etc.), estimate of marketing period, signatures of all appraisers authorized to work on the assignment.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Assumptions and Limiting Conditions. Include a summary of all assumptions, both general and specific, made by the appraiser(s) concerning the property being appraised. Statements may be similar to those recommended by the Appraisal Institute.

(5) Certificate of Value. This section may be combined with the letter of transmittal and/or final value estimate. Include statements similar to those contained in Standard Rule 2-3 of USPAP.

(6) Disclosure of Competency. Include appraiser's qualifications, detailing education and experience, as discussed in subsection (c) of this section.

(7) Identification of the Property. Provide a statement to acquaint the reader with the property. Real estate being appraised must be fully identified and described by street address, tax assessor's parcel number(s), and Development characteristics. Include a full, complete, legible, and concise legal description.

(8) Statement of Ownership of the Subject Property. Discuss all prior sales of the subject property which occurred within the past three years. Any pending agreements of sale, options to buy, or listing of the subject property must be disclosed in the appraisal report.

(9) Purpose and Function of the Appraisal. Provide a brief comment stating the purpose of the appraisal and a statement citing the function of the report.

(A) Property Rights Appraised. Include a statement as to the property rights (e.g., fee simple interest, leased fee interest, leasehold, etc.) being considered. The appropriate interest must be defined in terms of current appraisal terminology with the source cited.

(B) Definition of Value Premise. One or more types of value (e.g., "as is," "as if," "prospective market value") may be required. Definitions corresponding to the appropriate value must be included with the source cited.

(10) Scope of the Appraisal. Address and summarize the methods and sources used in the valuation process. Describes the process of collecting, confirming, and reporting the data used in the assignment.

(11) Regional Area Data. Provide a general description of the geographic location and demographic data and analysis of the regional area. A map of the regional area with the subject identified is requested, but not required.

(12) Neighborhood Data. Provide a specific description of the subject's geographical location and specific demographic data and an analysis of the neighborhood. A summary of the neighborhood trends, future Development, and economic viability of the specific area should be addressed. A map with the neighborhood boundaries and the subject identified must be included.

(13) Site/Improvement Description. Discuss the site characteristics including subparagraphs (a) through (f) of this paragraph.

(A) Physical Site Characteristics. Describe dimensions, size (square footage, acreage, etc.), shape, topography, corner influence, frontage, access, ingress-egress, etc. associated with the site. Include a plat map and/or survey.

(B) Floodplain. Discuss floodplain (including flood map panel number) and include a floodplain map with the subject clearly identified.

(C) Zoning. Report the current zoning and description of the zoning restrictions and/or deed restrictions, where applicable, and type of Development permitted. Any probability of change in zoning should be discussed. A statement as to whether or not the improvements conform to the current zoning should be included. A statement addressing whether or not the improvements could be rebuilt if damaged or destroyed, should be included. If current zoning is not consistent with the Highest and Best Use, and zoning changes are reasonable to expect, time and expense associated with the proposed zoning change should be considered and documented. A zoning map should be included.

(D) Description of Improvements. Provide a thorough description and analysis of the improvements including size (net rentable area, gross building area, etc.), number of stories, number of buildings, type/quality of construction, condition, actual age, effective age, exterior and interior amenities, items of deferred maintenance, etc. All applicable forms of depreciation should be addressed along with the remaining economic life.

(E) Fair Housing. It is recognized appraisers are not an expert in such matters and the impact of such deficiencies may not be quantified; however, the report should disclose any potential violations of the Fair Housing Act of 1988, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 and/or report any accommodations (e.g., wheelchair ramps, handicap parking spaces, etc.) which have been performed to the property or may need to be performed.

(F) Environmental Hazards. It is recognized appraisers are not an expert in such matters and the impact of such deficiencies may not be quantified; however, the report should disclose any potential environmental hazards (e.g., discolored vegetation, oil residue, asbestos-containing materials, lead-based paint etc.) noted during the inspection.

(14) Highest and Best Use. Market Analysis and feasibility study is required as part of the highest and best use. The highest and best use analysis should consider subsection (d)(13)(A) through (F) of this section as well as a supply and demand analysis.

(A) The appraisal must inform the reader of any positive or negative market trends which could influence the value of the appraised property. Detailed data must be included to support the appraiser's estimate of stabilized income, absorption, and occupancy.

(B) The highest and best use section must contain a separate analysis "as if vacant" and "as improved" (or "as proposed to be improved/renovated"). All four elements in appropriate order as outlined in the Appraisal of Real Estate (legally permissible, physically possible, feasible, and maximally productive) must be sequentially considered.

(15) Appraisal Process. The Cost Approach, Sales Comparison Approach and Income Approach are three recognized appraisal approaches to valuing most properties. It is mandatory that all three approaches are considered in valuing the property unless specifically instructed by the Department to ignore one or more of the approaches; or unless reasonable appraisers would agree that use of an approach is not applicable. If an approach is not applicable to a particular property, then omission of such approach must be fully and adequately explained.

(A) Cost Approach. This approach should give a clear and concise estimate of the cost to construct the subject improvements. The type of cost (reproduction or replacement) and source(s) of the cost data should be reported.

(i) Cost comparables are desirable; however, alternative cost information may be obtained from Marshall & Swift Valuation Service or similar publications. The section, class, page, etc. should be referenced. All soft costs and entrepreneurial profit must be addressed and documented.

(ii) All applicable forms of depreciation must be discussed and analyzed. Such discussion must be consistent with the description of the improvements analysis.

(iii) The land value estimate should include a sufficient number of sales which are current, comparable, and similar to the subject in terms of highest and best use. Comparable sales information should include address, legal description, tax assessor's parcel number(s), sales price, date of sale, grantor, grantee, three year sales history, and adequate description of property transferred. The final value estimate should fall within the adjusted and unadjusted value ranges. Consideration and appropriate cash equivalent adjustments to the comparable sales price for subclauses (I) though (VII) of this clause should be made when applicable.

(I) Property rights conveyed.

(II) Financing terms.

(III) Conditions of sale.

(IV) Location.

(V) Highest and best use.

(VI) Physical characteristics (e.g., topography, size, shape, etc.).

(VII) Other characteristics (e.g., existing/proposed entitlements, special assessments, etc.).

(B) Sales Comparison Approach. This section should contain an adequate number of sales to provide the reader with the current market conditions concerning this property type. Sales data should be recent and specific for the property type being appraised. The sales must be confirmed with buyer, seller, or an individual knowledgeable of the transaction.

(i) Minimum content of the sales should include address, legal description, tax assessor's parcel number(s), sale price, financing considerations, and adjustment for cash equivalency, date of sale, recordation of the instrument, parties to the transaction, three year sale history, complete description of the property and property rights conveyed, and discussion of marketing time. A scaled distance map clearly identifying the subject and the comparable sales must be included.

(ii) Several methods may be utilized in the Sale Comparison Approach. The method(s) used must be reflective of actual market activity and market participants.

(I) Sale Price/Unit of Comparison. The analysis of the sale comparables must identify, relate and evaluate the individual adjustments applicable for property rights, terms of sale, conditions of sale, market conditions and physical features. Sufficient narrative analysis must be included to permit the reader to understand the direction and magnitude of the individual adjustments, as well as a unit of comparison value indicator for each comparable. The appraiser(s) reasoning and thought process must be explained.

(II) Potential Gross Income/Effective Gross Income Analysis. If used in the report, this method of analysis must clearly indicate the income statistics for the comparables. Consistency in the method for which such economically statistical data was derived should be applied throughout the analysis. At least one other method should accompany this method of analysis.

(III) NOI/Unit of Comparison. If used in the report, the net income statistics for the comparables must be calculated in the same manner and disclosed as such. It should be disclosed if reserves for replacement have been included in this method of analysis. At least one other method should accompany this method of analysis.

(C) Income Approach. This section is to contain an analysis of both the actual historical and projected income and expense aspects of the subject property.

(i) Market Rent Estimate/Comparable Rental Analysis. This section of the report should include an adequate number of actual market transactions to inform the reader of current market conditions concerning rental units. The comparables must indicate current research for this specific property type. The rental comparables must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The minimum content of the individual data sheets should include property address, lease terms, description of the property (e.g., unit type, unit size, unit mix, interior amenities, exterior amenities, etc.), physical characteristics of the property, and location of the comparables. Analysis of the Market Rents should be sufficiently detailed to permit the reader to understand the appraiser's logic and rationale. Adjustment for lease rights, condition of the lease, location, physical characteristics of the property, etc. must be considered.

(ii) Comparison of Market Rent to Contract Rent. Actual income for the subject along with the owner's current budget projections must be reported, summarized and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. The contract rents should be compared to the market-derived rents. A determination should be made as to whether the contract rents are below, equal to, or in excess of market rates. If there is a difference, its impact on value must be qualified.

(iii) Vacancy/Collection Loss. Historical occupancy data for the subject should be reported and compared to occupancy data from the rental comparable and overall occupancy data for the subject's Primary Market.

(iv) Expense Analysis. Actual expenses for the subject, along with the owner's projected budget, must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. Historical expenses should be compared to comparables expenses of similar property types or published survey data (e.g., IREM, BOMA, etc.). Any expense differences should be reconciled. Historical data regarding the subject's assessment and tax rates should be included. A statement as to whether or not any delinquent taxes exist should be included.

(v) Capitalization. Several capitalization methods may be utilized in the Income Approach. The appraiser should present the method(s) reflective of the subject market and explain the omission of any method not considered in the report.

(I) Direct Capitalization. The primary method of deriving an overall rate (OAR) is through market extraction. If a band of investment or mortgage equity technique is utilized, the assumptions must be fully disclosed and discussed.

(II) Yield Capitalization (Discounted Cash Flow Analysis). This method of analysis should include a detailed and supportive discussion of the projected holding/investment period, income and income growth projections, occupancy projections, expense and expense growth projections, reversionary value and support for the discount rate.

(16) Reconciliation and Final Value Estimate. This section of the report should summarize the approaches and values that were utilized in the appraisal. An explanation should be included for any approach which was not included. Such explanations should lead the reader to the same or similar conclusion of value. Although the values for each approach may not "agree", the differences in values should be analyzed and discussed. Other values or interests appraised should be clearly labeled and segregated. Such values may include FF&E, leasehold interest, excess land, etc. In addition, rent restrictions, subsidies and incentives should be explained in the appraisal report and their impact, if any, needs to be reported in conformity with the Comment section of USPAP Standards Rule 1-2(e), which states, "Separation of such items is required when they are significant to the overall value." In the appraisal of subsidized housing, value conclusions that include the intangibles arising from the programs will also have to be analyzed under a scenario without the intangibles in order to measure their influence on value.

(17) Marketing Period. Given property characteristics and current market conditions, the appraiser(s) should employ a reasonable marketing period. The report should detail existing market conditions and assumptions considered relevant.

(18) Photographs. Provide good quality color photographs of the subject property (front, rear, and side elevations, on-site amenities, interior of typical units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should be included. An aerial photograph is desirable but not mandatory.

(f) Additional Appraisal Concerns. The appraiser(s) must recognize and be aware of the particular TDHCA program rules and guidelines and their relationship to the subject's value. Due to the various programs offered by the Department, various conditions may be placed on the subject which would impact value. Furthermore, each program may require that the appraiser apply a different set of specific definitions for the conclusions of value to be provided. Consequently, as a result of such criteria, the appraiser(s) should be aware of such conditions and definitions and clearly identify them in the report.

§1.35. Environmental Site Assessment Rules and Guidelines

Environmental Site Assessment Guidelines. The environmental assessment required under Section 50.7(e) of this title should be conducted and reported in conformity with the standards of the American Society for Testing and Materials (ASTM) and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The environmental assessment shall be conducted by an environmental or professional engineer and be prepared at the expense of the Development Owner.

(1) The report must include, but is not limited to:

(A) A review of records, interviews with people knowledgeable about the property;

(B) A certification that the environmental engineer has conducted an inspection of the property, the building(s), and adjoining properties, as well as any other industry standards concerning the preparation of this type of environmental assessment;

(C) A copy of a current survey or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the environmental site assessment or identified during the physical inspection;

(D) A copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map. A determination of the flood risk for the proposed Development described in the narrative of the report includes a discussion of the impact of the 100-year floodplain on the proposed Development based upon a review of the current site plan; and

(E) A statement that clearly states that the person or company preparing the environmental assessment will not materially benefit from the Development in any other way than receiving a fee for the environmental assessment.

(2) A noise study is recommended for property located adjacent to or in close proximity to industrial zones, major highways, active rail lines, and civil and military airfields.

(3) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site but would nonetheless affect the Property, the Development Owner must act on such a recommendation or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(4) For Developments which have had a Phase II Environmental Assessment performed and hazards identified, the Development Owner is required to maintain a copy of said assessment on site available for review by all persons which either occupy the Development or are applying for tenancy.

(5) Developments whose funds have been obligated by TxRD will not be required to supply this information; however, the Development Owners of such Developments are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(6) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms with the requirements of this subsection.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208507
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 9, 2003
Proposal publication date: September 27, 2002
For further information, please call: (512) 475-3726

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER E. CERTIFICATION, LICENSING AND REGISTRATION

16 TAC §25.113

The Public Utility Commission of Texas (commission) adopts new §25.113 relating to Municipal Registration of Retail Electric Providers (REPs) with changes to the proposed text as published in the September 27, 2002 *Texas Register* (27 TexReg 9065). The commission also adopts a standard registration form for the optional "safe-harbor" municipal registration of REPs under §25.113. Project Number 25963 is assigned to this proceeding.

The new §25.113 is adopted in order to establish an optional "safe-harbor" process for municipal registration of REPs; and incorporates threshold legal/policy decisions relating to the scope of registration, re-registration of a REP, the reasonableness of registration fees, reasonableness of sanctions against a REP, definition of "residents of the municipality," discrimination against REPs or types of REPS, REP reporting requirements, notice requirements, and suspension and revocation procedures. The new section and standard form simplify and provide certainty to the registration process, thereby facilitating the development of a competitive retail electric market in Texas.

The new §25.113 optional "safe-harbor" municipal registration of REPs provides for a one-time registration process, not an annual registration, and standardizes filing procedures, deadlines, registration information, and fees. A municipality that adopts the "safe-harbor" process is prohibited from excluding any REP or type of REP from its registration requirement; is required to file a

copy of its ordinance with the commission; and the new §25.113 establishes standard suspension and revocation procedures for a municipality that adopts the safe-harbor process. A REP that provides service only to the municipality's own electric accounts and not to its residents may be excluded from the municipality's registration requirements.

The commission solicited draft rule language on June 24, 2002 and received comments from interested stakeholders on July 9, 2002. The proposed rule and registration form were published in the Texas Register on September 27, 2002. Comments were received on October 28, 2002 and reply comments were received on November 4, 2002.

A public hearing on the proposed rule and registration form was held at the commission offices on November 12, 2002 at 1:30 p.m. Representatives from Green Mountain Energy, TXU Energy Retail, Constellation NewEnergy, Strategic Energy, Reliant Resources, Inc. (Reliant), American Electric Power Retail Electric Providers (AEP REPs), City of Heath, and TXU Business Services attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received written comments on the proposed rule and registration form from Constellation New Energy, Inc. and Strategic Energy LLC (Non-Residential REPs), AEP REPs, TXU Energy Retail Company (TXU), the Alliance for Retail Markets (ARM), Reliant, the City of Austin d/b/a Austin Energy (Austin Energy), and the City of Houston (Houston).

The commission requested comments on the following question: Should the commission develop an online registration procedure? Such a procedure would allow REPs to register once on the commission website and allow registration information to be electronically forwarded to those municipalities adopting ordinances that comply with this rule. Please submit implementing rule language.

Houston, Reliant, AEP REPs, and ARM stated that the commission should develop an online registration procedure whereby a REP would register once on the commission's website and then the commission would electronically forward the information to all municipalities that adopt a safe-harbor registration ordinance. The AEP REPs argued that an online registration procedure would fulfill the commission's obligation under the Administrative Procedure Act to quantify the costs and benefits of the proposed rule on state and local governments. The AEP REPs contended that if the commission develops an online registration procedure, it would be a cost-effective method of complying with the Public Utility Regulatory Act (PURA) §39.358. However, Reliant and ARM stated that traditional methods of registration should be allowed in addition to online registration for those municipalities that cannot access the information electronically. ARM also noted that even with an online registration process, REPs would still have to mail their registration fees to each municipality. ARM and the AEP REPs recognized that the development of an online electronic process would take time to implement. ARM proposed that the online registration begin January 1, 2004 and that REPs manually register with safe-harbor municipalities in the meantime.

TXU opposed the suggestion that the commission develop an online registration process. TXU stated that it would be better to register with municipalities directly. Since REPs would still have to send a paper registration payment to each safe-harbor municipality, TXU indicated that it would be just as easy to attach the registration check to a hard copy of the registration form and mail them together. TXU further commented that if there is a dispute over registration, the commission could have to determine where the problem occurred and might be liable for late registration fees if the problem occurred because of the commission's online process. TXU stated that it was unclear how quickly an electronic process could be implemented and what the registration process would be in the interim. In reply comments TXU said, in the alternative, this rule should adopt permissive language that allows, rather than requires, the commission to develop an online registration procedure. TXU did not want implementation of an online process to slow adoption of the rule, and noted that parties could meet afterward to discuss development of the online system.

Reliant and the AEP REPs supported expanding the concept to include electronic payment of a safe-harbor municipality's registration fee. Reliant stated that electronic payments would allow for prompt payment and would potentially avoid late-payment fees. The AEP REPs' reply comments supported Reliant's proposal to include electronic registration payments while cautioning that it would complicate implementation of the electronic registration system. The AEP REPs suggested a phased approach to implementation of the online registration and electronic payment system.

The commission declines to adopt an online registration process at this time. The commission agrees with TXU that REPs should register with municipalities directly. Allowing REPs to electronically register once with the commission would put the commission in a position of being responsible for complying with a safe-harbor municipality's registration ordinance on behalf of the registering REP. Further, under such a process, REPs and/or municipalities might contend that the commission was liable for late registration fees if there is a dispute over the timeliness of registration.

With the adoption of this section, the commission seeks to provide a central location in which municipalities may obtain up-to-date information about REPs operating within their boundaries and by which REPs may easily comply with those cities' registration requirements. Municipalities that adopt a safe-harbor REP registration ordinance will benefit because REPs will know that the ordinance has been adopted and will be able to timely register with the municipality. The commission's role is to facilitate registration, not to become responsible for registering REPs with cities. On its website, the commission already maintains an updated list of REPs, including all of the information allowed under subsection (g). The commission encourages REPs to provide a reference to this website to municipalities that require registration. In addition, the commission will maintain information on its website regarding the municipalities that file "safe-harbor" registration ordinances with the commission. The commission will also maintain on its website information regarding municipality e-mail addresses for those municipalities willing to accept completed registration forms by e-mail.

The commission also declines to require online payment of registration fees. This would require extensive coordination between the commission and the staff of various municipalities. The cost to the commission to implement and maintain such a program could significantly outweigh the benefits. In addition, it would place the burden on the commission to ensure that a REP's payment was sent to the appropriate municipality in a timely manner so that the REP did not incur a late fee. Also, the commission

has not been authorized by the legislature to expend state resources to collect fees on behalf of municipalities.

Substantive Rule §25.113--Municipal Registration of Retail Electric Providers (REPs)

ARM recommended, and TXU and the Non-Residential REPs agreed, that the rule require mandatory, rather than optional, compliance from municipalities that choose to adopt a REP registration ordinance. The parties stated that requiring municipalities to comply with a standardized registration process meets the municipalities' needs of having access to REP contact information while minimizing the reporting burden to REPs. TXU stated that there would be little cost to municipalities to comply with the provisions in this section. According to TXU, the only additional expense to municipalities is to file a copy of their registration ordinance with the commission. TXU argued that this minimal cost is far outweighed by the litigation expenses saved by both municipalities and REPs by avoiding appeals of ordinances at the commission.

ARM argued that if the rule does not require municipalities to have a standard registration process, the added burden and cost of complying with an individualized, decentralized municipal REP registration process would be very costly to REPs and consequently could impede the development of a competitive retail electric market.

Green Mountain, at the public hearing, estimated that a typical REP's costs would be more than twice as high under a voluntary rule than under a mandatory one--mostly due to significantly increased personnel time required to track down ordinances, compile required data, and complete individual forms for municipalities that do not adopt the optional "safe-harbor" registration process. In addition to these costs, Green Mountain noted that a voluntary rule would leave open the likelihood for further expensive, time-consuming litigation before the commission concerning ordinances of municipalities that have chosen not to use the commission's "safe-harbor" process.

ARM stated that REPs would still have to comply with potentially hundreds of differing municipal registration ordinances. ARM stated that such an outcome is directly contrary to the policy goals stated in PURA §39.001, which limits the ability of a regulatory authority to regulate competitors and the degree of regulatory controls that they can impose. ARM stated that the Legislature's intent to limit unnecessary regulatory controls on competition would be subverted if each municipality were able to enact its own unique ordinances without parameters imposed by the commission.

The Non-Residential REPs argued that cities may not regulate businesses that extend beyond their municipal boundaries, except as specifically provided for in PURA §39.358. REPs provide service according to a utility's service area, or ERCOT wide, which is beyond any one municipality's boundaries. The Non-Residential REPs therefore argued that this rule should be mandatory because only the commission has statewide jurisdiction over REPs operating within the state.

Further, ARM argued that the commission has the duty to adopt a standardized set of rules for municipal REP registration that is mandatory for all municipalities. ARM stated that PURA §17.001(b) gives the commission the "authority to adopt and enforce rules to protect retail customers from fraudulent, unfair, misleading, deceptive, or anticompetitive practices" and that PURA §17.051 requires the commission to "adopt rules relating to certification, registration, and reporting requirements for a...retail electric provider." ARM contends that this extensive grant of authority is evidence that the Legislature intended for a single set of rules regulating REP behavior, including a single set of rules for REP registration.

Reliant stated that the safe-harbor approach strikes the appropriate balance between the need for REP registration for those municipalities that require it and a successful competitive retail electric market. Reliant believes that a safe-harbor rule will eliminate potential appeals even though there is no guarantee that municipalities will adopt the safe-harbor option.

Houston disagreed that the commission's jurisdiction extends to every exercise of a municipality's authority to require registration of REPs.

The commission is concerned that an individualized, decentralized municipal REP registration process could be burdensome for REPs and may consequently impede the development of a robust competitive retail electric market. The commission agrees with the REPs that requiring municipalities to comply with a standardized registration process meets the municipalities' needs of having access to REP contact information while minimizing REPs' reporting burden. The commission declines, however, to make any portion of the rule mandatory at this time because the commission believes that most municipalities will choose to adopt a safe-harbor ordinance to avoid further litigation before the commission. The commission concludes that it is appropriate to assess the impact of a safe-harbor rule before adopting a mandatory rule, considering such factors as the number of municipalities that adopt registration requirements that are different from the safe-harbor registration and the burden those registration rules will impose on REPs. The commission may, at a later date, consider amending the rule to incorporate mandatory registration requirements for municipalities.

The Non-Residential REPs argued that the word "resident" in PURA §39.358 includes only residential electric customers. They stated that "residents of the community" is a unique usage in §39.358 not found elsewhere in PURA or the remainder of the Texas Utilities Code. They stated that REPs that sell electricity to only non-residential customers should be exempt from municipal REP registration ordinances. Accordingly, they suggested the commission amend the definition of resident in subsection (c)(1) and the purpose statement in subsection (b). The AEP REPs supported this interpretation in the REP registration appeal cases, Docket Numbers 24906, et al. before the commission. The AEP REPs stated that if the commission does not adopt this interpretation, the registration burden on REPs that serve non-residential customers should be minimal.

The commission disagrees with the Non-Residential REPs that the word "resident" in PURA §39.358 includes only residential electric customers. The commission finds that the definition of "resident" in the context of PURA Chapter 39 includes any entity that is located within the municipality, regardless of customer classification. The purpose of registration is to allow a municipality to contact a REP directly or to assist a resident in contacting the REP. Limiting the definition of resident to residential customers would exclude small businesses, churches, schools, and other non-residential customers. Further, this interpretation is consistent with the provision prohibiting discrimination in PURA §39.001(c), by making all REPs serving within one municipality subject to the same registration requirements.

Reliant and the AEP REPs suggested adding a sentence in subsection (e) stating that notice will be deemed to have been given

when the municipality's ordinance has been posted by the commission on its website.

The commission declines to add this provision. Notice is deemed to have been given when a municipality files its ordinance in the commission's Central Records Division. The commission has added clarifying language to that effect. Such filings are time and date stamped and posted on the commission's daily filings list, which is easily accessible from the commission's website or from Central Records.

Reliant suggested modifying subsections (f)(1) and (h)(2) to include situations where the REP may not have prior knowledge of an ordinance. Reliant argued that a REP could unknowingly serve residents of a city more than 30 days after an ordinance becomes effective, but not realize that such an ordinance has passed; as a result, the REP may fail to timely register. Reliant, therefore, recommended changing the proposed rule to allow a REP to register within 30 days of receiving notice of an ordinance.

The commission declines to make these changes. Contrary to Reliant's intended purpose, this proposed change would actually have the effect of shortening the time a REP has to register. The rule, as written, requires a safe-harbor municipality to file a copy of its registration ordinance with the commission at least 30 days before the effective date of the ordinance (subsection (e)). This filing serves as notice to REPs and provides a central location for REPs to easily find safe-harbor registration ordinances. The ordinance would then be effective no earlier than the 30 days after it is filed with the commission. A REP is then required to comply with that municipality's ordinance within 30 days after it becomes effective--no earlier than 60 days after the ordinance is filed at the commission. Reliant's proposed change would require a REP to register with a municipality within 30 days after the safe-harbor ordinance is filed with the commission. The commission understands that there will likely be municipalities that adopt registration ordinances outside of the safe-harbor process and that REPs may unknowingly violate an ordinance they do not know about. However, Reliant's suggested change would not alleviate this problem because such an ordinance would fall outside the parameters of this rule.

ARM and Reliant recommended amending subsection (f)(2) to delete the verification of the registration form because it is unnecessary and may complicate the implementation of a web-based registration process. Reliant stated that REPs have already verified to the commission in their certification applications the same information that is contained on the proposed registration form. Also, Reliant stated that subsection (f)(3) should be amended to allow REPs 20 days to cure any deficiencies in its registration, rather than ten days.

The commission agrees that verification is unnecessary. Staff currently maintains up-to-date contact information for all REPs on its website, including the docket number under which a REP's certification was granted. Any municipality may access this information online, or request a copy from Central Records. Again, the commission encourages REPs to provide a reference to the REP's certification information listed on the commission's website. The commission adopts Reliant's suggestion to allow REPs 20 days to cure any deficiencies in their registration.

TXU, Reliant, and the AEP REPs recommended that the requirement in subsection (g)(7) for REPs to list a contact person located within the municipality be deleted. They explained that as part of the commission's certification process, a REP is required to have an office located in Texas and this information is already required by subsection (g)(3).

The requirement in subsection (g)(7) applies only if a REP has an office located within the boundaries of the municipality. If no office is located within the municipality, the REP will leave this section of the registration form blank. Therefore, the commission finds that the requested change is unnecessary.

TXU and Reliant recommended that the first sentence of subsection (h)(1) be changed so that the fee would be based upon the cost of the registration process, rather than the cost to administer the statute. TXU stated that the proposed language is overly broad, because it suggests that the registration fee can take into account the cost a city might incur with respect to suspension or revocation of a registration under PURA §39.358(b).

The commission agrees and makes the suggested change. The only costs that will be considered with respect to §25.113(h)(1) are those involved with the actual registration process.

Houston proposed that the following sentence be added to subsection (h)(1): "This statement shall be admissible in any proceeding which results in a commission finding that the REP has committed a significant violation of PURA Chapter 39 or rules adopted under that chapter." Reliant, ARM, and TXU stated that Houston's proposed addition to this section should be rejected. They argued that any costs incurred by a municipality in a "significant violation" proceeding have nothing to do with costs incurred in processing REP registrations addressed in §25.113(h)(1). TXU argued that admissibility of evidence is already addressed in PUC Procedural Rule §22.221 and the Texas Rules of Evidence; thus, there is no need for any type of special treatment for this statement of costs.

The commission agrees with the REPs and declines to add the sentence suggested by Houston.

Reliant, ARM, and TXU proposed removing the last sentence of subsection (h)(1), which allows a safe-harbor municipality to file a statement of costs if they exceed $25. Reliant and ARM argued that this provision seems to create the opportunity for disagreement within what is supposed to be a clear-cut "safe-harbor." ARM further contended that, to the extent that a "safe-harbor" approach is adopted by the commission, it should eliminate opportunities for disagreement about what is required of a municipality seeking to avail itself of the "safe-harbor." Reliant stated that a municipal ordinance that provided for fees greater than $25 would be outside the parameters of the safe-harbor; thus, such fees should be subject to separate action by the commission. ARM asserted that the proposed rule failed to explain whether any such municipality's ordinance would fall outside the parameters of the "safe-harbor," or the mechanism for addressing the reasonableness of the municipality's fee. TXU asserted that it was unclear whether a statement of costs was to be filed even if the city decides to charge a registration fee of $25 or less, or only if the registration fee exceeds $25. Furthermore, TXU stated that if the commission retains this provision, it should clarify that this statement of costs is public information so that the REPs can examine the claimed cost before deciding whether to pay the fee or appeal the registration ordinance.

The commission agrees with TXU, Reliant, and ARM that the provisions under a "safe-harbor" rule should be clear. In order for this section to truly provide a "safe-harbor," it must be specific as to the requirements of the parties involved. The $25 fee was deemed to be reasonable for the sole purpose of administering registration of REPs by the cities that choose to adopt ordinances

for such registration. The addition of the language to provide for fees in excess of $25 serves only to muddy the waters as to whether a "safe-harbor" exists at all, and opens the door to confusion, conflict, and further litigation between the parties as to what amount is reasonable--the very things that this rule was designed to avoid. Therefore, this provision is deleted so that safe-harbor municipalities may require a registration fee of no more than $25.

Houston also suggested deleting the prohibition on taking any action other than suspension or revocation of a REP's registration or imposition of a late fee in accordance with subsection (h)(2) because it unnecessarily prohibits action by the municipality even though it might be found to be appropriate by the commission.

The commission declines to delete this provision. PURA §39.358(b) expressly authorizes a municipality to suspend or revoke a REP's registration and authority to operate within the municipality's boundaries for a violation of PURA Chapter 39 or related rules. Unlike PURA §39.357, which authorizes the commission to impose financial penalties on REPs, there is no mention of fines that could be imposed by municipalities in PURA §39.358 or any other section of PURA. In the limited regulatory scheme created as part of the new competitive market, suspension or revocation provide sufficient remedy for municipalities to ensure REP compliance with PURA Chapter 39 and related rules.

Reliant, AEP REPs, and ARM stated that the rule should clarify that a safe-harbor municipality may charge a REP only one late fee for failure to timely register.

The commission agrees and makes the suggested change.

Houston stated that the prohibition on suspending or revoking the registration of an affiliated REP or provider of last resort (POLR) serving residents of the municipality in subsection (j) should be deleted. Houston argued that this provision could be read to unnecessarily limit the ability of the commission to take appropriate enforcement action against an affiliated REP or POLR because a municipality adopting the safe-harbor registration process may only suspend or revoke a REP's registration upon a commission finding that the REP has committed significant violations. The AEP REPs disagreed with this suggestion. They argued that residential and small commercial customers are guaranteed access to the price-to-beat rate through 2007 and to a POLR offering electricity at a standard, non-discountable rate. The AEP REPs further argued that the commission has the authority to impose penalties other than suspension or revocation. The AEP REPs indicated that the commission may order an affiliated REP or POLR to pay administrative fees as appropriate discipline, which would not interfere with customers' rights to access to their services.

The commission agrees with the AEP REPs and declines to delete this provision. Both the price-to-beat and POLR services are essential to the proper development of the electric market in this state. The affiliated REP serves most of the residential and small commercial customers in areas open to competition. In addition, the price-to-beat, which must be offered by the affiliated REP, is a necessary pricing signal for other market participants that seek to enter the market. POLR service is a fail-safe for those customers whose REP leaves the market and who cannot find another REP to provide service. Customers cannot be denied this protection for essential service. Because the statute gives the affiliated REP and POLR vital roles in the competitive market, a safe-harbor municipality may not suspend or revoke the registration of the affiliated REP or the POLR.

Reliant stated that it is more reasonable to amend subsection (j)(2) to require a municipality to give a REP 30 calendar days, rather than 20 days, written notice of its intent to suspend or revoke the REP's registration.

The commission agrees that this suggestion is reasonable and has amended the rule to incorporate this change.

Reliant suggested amending subsection (j)(6), which allows a REP to appeal a municipality's suspension or revocation order to the commission, so that in the event a REP appeals a municipality's order of suspension or revocation, the order would be stayed pending the appeal at the commission. Houston and Austin Energy suggested deleting this subsection. They argued that because a municipality may suspend or revoke a REP's registration only after the commission has already determined the REP has committed significant violations, this provision would allow the REP a "second pass" at the commission. Further, they argued, allowing an appeal of a "safe-harbor" municipality's suspension or revocation order would delay implementation of the commission's findings in exchange for providing an opportunity for the commission to second-guess itself.

The commission declines to delete subsection (j)(6) because a REP should have the right to appeal the terms of a municipality's order to suspend or revoke its registration and authority to operate. For example, a REP might argue that the length of a municipality's suspension is too long for its violations or it might argue that suspension is a more appropriate punishment when a municipality orders revocation. REPs should have the right to bring such issues before the commission.

TXU, Reliant, and the AEP REPs recommended deleting subsection (j)(7), which entitles a municipality to recover from the REP costs reasonably expended in revoking or suspending a REP's registration. TXU stated that attorney's fees and expenses may not be recovered from an opposing party unless such recovery is expressly provided for by statute or contract between the parties. For example, PURA §§16.001 - 16.004 authorizes the commission assessment, PURA §33.023 allows for the reimbursement by utilities of municipal ratemaking proceeding expenses, and PURA §39.358(a) allows municipalities to collect an administrative fee for registration of REPs. TXU argues that the only expenses that a municipality may recover from a REP are the costs associated with the registration process, as explicitly authorized by PURA §39.358(a) because there is no similar provision in PURA §39.358(b) authorizing recovery of expenses for any other reason.

Finally, AEP REPs stated the commission has already ruled on this issue in the Supplemental Preliminary Order issued on June 21, 2002 in the Appeal Dockets. The commission determined that municipalities have no authority to impose other penalties, including fines, late-filing fees, or any other charges that are imposed as a penalty.

The commission agrees with the REPs that there is no legal basis to allow a municipality to recover from a REP its costs of revoking or suspending that REP's registration. Accordingly, the commission deletes subsection (j)(7).

Houston suggested that the words "significant violations" be changed to "a significant violation."

The commission declines to make this change because the language in this section is consistent with PURA §39.358(b), which

grants municipalities the authority to suspend or revoke a REP's registration for "significant violations."

All comments were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent, i.e., "registering party" is changed to "registering REP" and the last two sentences in the introductory paragraph to subsection (f) are now new subsection (f)(4) and (5).

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2003) (PURA), which authorizes the Public Utility Commission to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §17.051(a) which directs the commission to implement rules relating to the registration for a retail electric provider; and PURA §39.358, Local Registration of Retail Electric Providers.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.051, 39.001, 39.002, 39.352, 39.356, and 39.358.

§25.113. Municipal Registration of Retail Electric Providers (REPs).

(a) Applicability. This section applies to municipalities that require retail electric providers (REPs) to register in accordance with the Public Utility Regulatory Act (PURA) §39.358 and to all REPs with a certificate granted by the commission pursuant to PURA §39.352(a) and §25.107 of this title (relating to Certification of Retail Electric Providers).

(b) Purpose. A municipality may require a REP to register as a condition of serving residents of the municipality, in accordance with PURA §39.358. This section establishes an optional "safe-harbor" process for municipal registration of REPs to standardize notice and filing procedures, deadlines, and registration information and fees. The "safe-harbor" registration process simplifies and provides certainty to both municipalities and REPs, thereby facilitating the development of a competitive retail electric market in Texas. If a municipality enacts a registration ordinance that is consistent with this section, the ordinance shall be deemed to comply with PURA §39.358. A municipality may exercise its authority under PURA §39.358 and adopt an ordinance that is not consistent with this section; however, such ordinance could be subject to an appeal to the commission under PURA §32.001(b).

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

(1) Resident--Any electric customer located within the municipality, except the municipality itself, regardless of customer class.

(2) Revocation--The cessation of all REP business operations within a municipality, pursuant to municipal order.

(3) Suspension--The cessation of all REP business operations within a municipality associated with obtaining new customers, pursuant to municipal order.

(d) Non-discrimination in REP registration requirements. A municipality shall not establish registration requirements that are different for any REP or type of REP or that impose any disadvantage or confer any preference on any REP or type of REP. However, a municipality may exclude from its registration requirement a REP that provides service only to the municipality's own electric accounts and not to any residents of the municipality.

(e) Notice. A municipality that enacts an ordinance adopting the standard registration process under this section shall file only the ordinance or section of ordinance, including the effective date, with the commission at least 30 days before the effective date of the ordinance. The filing shall not exceed ten pages. The filing of such a municipality's ordinance in accordance with §22.71 of this title (relating to Filing of Pleadings, Documents, and Other Materials) shall serve as notice to all REPs of the requirement to submit a registration to the municipality.

(f) Standards for registration of REPs. A municipality that adopts a "safe-harbor" ordinance in accordance with this section shall process a REP's registration request as follows:

(1) A REP shall register with a municipality that adopts an ordinance in accordance with this section within 30 days after the ordinance requiring registration becomes effective or 30 days after providing retail electric service to any resident of the municipality, whichever is later.

(2) A REP shall register with a municipality that adopts an ordinance in accordance with this section by completing a form approved by the commission, and signed by an owner, partner, officer, or other authorized representative of the registering REP. Forms may be submitted to a municipality by mail, facsimile, or online where online registration is available. Registration forms may be obtained from the commission's Central Records division during normal business hours, or from the commission's website.

(3) The municipality shall review the REP's submitted form for completeness, including the remittance of the registration fee. Within 15 business days of receipt of an incomplete registration, the municipality shall notify the registering REP in writing of the deficiencies in the registration. The registering REP shall have 20 business days from the issuance of the notification to cure the deficiencies. If the deficiencies are not cured within 20 business days, the municipality shall immediately send a rejection notice to the registering REP that the registration is rejected without prejudice. Absent such notification of rejection, the registration shall be deemed to have been accepted.

(4) A municipality shall not deny a REP's request for registration based upon investigations into the fitness or capability of a REP that has a current certificate from the commission.

(5) A municipality shall not require a REP to undergo a hearing before the municipality for the purposes of registration, nor require the REP to send a representative to the municipality for purposes of processing the registration form.

(g) Information. A municipality may require a REP to provide only the information set forth below. A REP shall provide all of the following information on the commission's prescribed form to a municipality that has adopted a "safe-harbor" ordinance under this section:

(1) The legal name(s) of the retail electric provider and all trade or commercial names;

(2) The registering REP's certificate number, as approved under §25.107 of this title and the docket number under which the certification was granted by the commission;

(3) The Texas business address, mailing address, and principal place of business of the registering REP. The business address provided shall be a physical address that is not a post office box;

(4) The name, physical business address, telephone number, fax number, and e-mail address for a Texas regulatory contact person and for an agent for service of process, if a different person;

(5) Toll-free telephone number for the customer service department or the name, title and telephone number of the customer service contact person;

(6) The types of electric customer classes that the REP intends to serve within the municipality; and

(7) The location of each office maintained by the registering REP within the municipal boundaries, including postal address, physical address, telephone number, hours of operation, and listing of the services available through each office.

(h) Registration fees. A municipality adopting the "safe-harbor" registration process may require REPs to pay a reasonable administrative fee for the purpose of registration only.

(1) A one-time registration fee of not more than $25 shall be deemed reasonable.

(2) A municipality may require a REP to pay a one-time late fee, which shall not exceed $15, only if the REP fails to register within 30 days after the ordinance requiring registration becomes effective or 30 days after providing retail electric service to any resident of the municipality, whichever is later.

(i) Post-registration requirements and re-registration.

(1) A REP shall notify municipalities adopting the "safe-harbor" registration within 30 days of any change in information provided in its registration. In addition, a REP shall notify a municipality within ten days if it discontinues offering service to residents of the municipality.

(2) A municipality shall not require REPs to file periodic reports regarding complaints, or any other matter, as part of the registration process.

(3) A municipality shall not require a periodic re-registration process or fee.

(4) A municipality shall not require a REP to re-register unless a REP's registration is revoked and the REP subsequently cures its defects and resumes operations. In that circumstance, the REP may register in the same manner as a new REP.

(j) Suspension and revocation. A municipality may suspend or revoke a REP's registration and authority to operate within the municipality only upon a commission finding that the REP has committed significant violations of PURA Chapter 39 or rules adopted under that chapter. A municipality shall not suspend or revoke the registration of the affiliated REP or provider of last resort (POLR) serving residents in the municipality. A municipality shall not take any action against a REP other than suspension or revocation of a REP's registration and authority to operate in the municipality, or imposition of a late fee in accordance with subsection (h)(2) of this section.

(1) A municipality may provide a REP with a warning prior to seeking to suspend or revoke a REP's registration.

(2) A municipality seeking to suspend or revoke a REP's registration shall provide the REP with at least 30 calendar days written notice, informing the REP that its registration and authority to operate shall be suspended or revoked. The notice shall specify the reason(s) for such suspension or revocation.

(3) A municipality may order that the REP's registration be suspended or revoked only after the notice period has expired.

(4) In its suspension order, a municipality shall specify the reasons for the suspension and provide a date certain or provide conditions that a REP must satisfy to cure the suspension. Once the suspension period has expired or the reasons for the suspension have been rectified, the suspension shall be lifted.

(5) In its revocation order, a municipality shall specify the reasons for the revocation.

(6) A REP may appeal a municipality's suspension or revocation order to the commission.

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

Filed with the Office of the Secretary of State on December 23, 2002.

TRD-200208508
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: January 12, 2003
Proposal publication date: September 27, 2002
For further information, please call: (512) 936-7308

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS
SUBCHAPTER P. TEXAS UNIVERSAL SERVICE FUND

16 TAC §26.403

The Public Utility Commission of Texas (commission) readopts §26.403, relating to the Texas High Cost Universal Service Plan (THCUSP), with changes to the text as adopted in the August 2, 2002 *Texas Register* (27 TexReg 6836). This readoption is in accordance with the Agreed Final Judgment issued October 17, 2002 by the Travis County District Court, *Southwestern Bell Telephone L.P. v. Public Utility Commission of Texas et. al*, No. GN2-02654 (345th Dist. Ct., Travis County, Tex., October 17, 2002); therefore, no comments were filed regarding this readoption. This readoption also incorporates the minor changes adopted in Project Number 26135, *Rulemaking Proceeding to Amend Rules Referencing Tel-Assistance* (November 22, 2002 *Texas Register* 27 TexReg 10915). Specifically, the prior allocation formula in §26.403(e)(3)(C) regarding the adjustment for basic local telecommunications service provided solely and partially through the purchase of unbundled network elements (UNEs) is readopted and references to the Tel-Assistance program eliminated as of September 1, 2001 pursuant to House Bill (HB 2156) are deleted from §26.403. These changes are adopted under Project Number 24526.

Procedural History

The changes to the allocation formula were originally proposed in the February 8, 2002 *Texas Register* (27 TexReg 851) and adopted at the open meeting on July 11, 2002. The commission adopted amendments to §26.403(e)(3)(C)(i) and (ii) and new subsection (e)(3)(C)(iii) and (iv) relating to the adjustment for basic local telecommunications service provided solely and partially through the purchase of unbundled network elements (UNEs). These amendments to §26.403 became effective on August 8, 2002.

On August 9, 2002, Southwestern Bell Telephone, L.P. (SWBT) filed suit in District Court seeking temporary and permanent injunctive relief and declaratory relief with respect to the adopted amendments to §26.403. The parties and SWBT entered into

an agreement on August 21, 2002. In this agreement, SWBT agreed not to go forward with its request for temporary injunction based upon specific conditions regarding the disbursement of its THCUSP support. On October 17, 2002, the District Court issued an Agreed Final Judgment vacating the amendments to §26.403 adopted by the commission without prejudice to reconsideration. The District Court reinstated the USF allocation methodology relating to the UNE sharing mechanism that existed prior to the amendments that became effective on August 8, 2002. The District Court remanded the proceeding back to the commission to consider whether and in what manner the allocation methodology in §26.403(e)(3)(C) should be modified.

Section 26.403 is readopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2003) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; specifically, PURA §56.021 which required the commission to adopt and enforce rules requiring local exchange companies to establish a universal service fund; §56.023 which requires the commission to adopt rules for the administration of the universal service fund; §56.026 which permits the commission to establish an equitable allocation formula for the disbursement of universal service funds if a local end-user customer of an electing company switches to another local service provider that provisions service solely or partially through UNEs; and the Agreed Final Judgment in Cause No. GN2-02654.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 56.021- 56.028.

§26.403. Texas High Cost Universal Service Plan (THCUSP).

(a) Purpose. This section establishes guidelines for financial assistance to eligible telecommunications providers (ETPs) that serve the high cost rural areas of the state, other than study areas of small and rural incumbent local exchange companies (ILECs), so that basic local telecommunications service may be provided at reasonable rates in a competitively neutral manner.

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

(1) Benchmark--The per-line amount above which THCUSP support will be provided.

(2) Business line--The telecommunications facilities providing the communications channel that serves a single-line business customer's service address. For the purpose of this definition, a single-line business line is one to which multi-line hunting, trunking, or other special capabilities do not apply.

(3) Eligible line--A residential line and a single-line business line over which an ETP provides the service supported by the THCUSP through its own facilities, purchase of unbundled network elements (UNEs), or a combination of its own facilities and purchase of UNEs.

(4) Eligible telecommunications provider (ETP)--A telecommunications provider designated by the commission pursuant to §26.417 of this title (relating to Designation as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF)).

(5) Residential line--The telecommunications facilities providing the communications channel that serves a residential customer's service address. For the purpose of this definition, a residential line is one to which multi-line hunting, trunking, or other special capabilities do not apply.

(c) Application. This section applies to telecommunications providers that have been designated ETPs by the commission pursuant to §26.417 of this title.

(d) Service to be supported by the THCUSP. The THCUSP shall support basic local telecommunications services provided by an ETP in high cost rural areas of the state and is limited to those services carried on all flat rate residential lines and the first five flat rate single-line business lines at a business customer's location. Local measured residential service, if chosen by the customer and offered by the ETP, shall also be supported.

(1) Initial determination of the definition of basic local telecommunications service. Basic local telecommunications service shall consist of the following:

(A) flat rate, single party residential and business local exchange telephone service, including primary directory listings;

(B) tone dialing service;

(C) access to operator services;

(D) access to directory assistance services;

(E) access to 911 service where provided by a local authority;

(F) telecommunications relay service;

(G) the ability to report service problems seven days a week;

(H) availability of an annual local directory;

(I) access to toll services; and

(J) lifeline service.

(2) Subsequent determinations.

(A) Timing of subsequent determinations.

(i) The definition of the services to be supported by the THCUSP shall be reviewed by the commission every three years from September 1, 1999.

(ii) The commission may initiate a review of the definition of the services to be supported on its own motion at any time.

(B) Criteria to be considered in subsequent determinations. In evaluating whether services should be added to or deleted from the list of supported services, the commission may consider the following criteria:

(i) the service is essential for participation in society;

(ii) a substantial majority, 75% of residential customers, subscribe to the service;

(iii) the benefits of adding the service outweigh the costs; and

(iv) the availability of the service, or subscription levels, would not increase without universal service support.

(e) Criteria for determining amount of support under THCUSP. The TUSF administrator shall disburse monthly support payments to ETPs qualified to receive support pursuant to this section. The amount of support available to each ETP shall be calculated using the base support amount available as provided under paragraph (1) of

this subsection and as adjusted by the requirements of paragraph (3) of this subsection.

(1) Determining base support amount available to ETPs. The monthly per-line support amount available to each ETP shall be determined by comparing the forward-looking economic cost, computed pursuant to subparagraph (A) of this paragraph, to the applicable benchmark as determined pursuant to subparagraph (B) of this paragraph. The monthly base support amount is the sum of the monthly per-line support amounts for each eligible line served by the ETP, as required by subparagraph (C) of this paragraph.

(A) Calculating the forward-looking economic cost of service. The monthly cost per-line of providing the basic local telecommunications services and other services included in the benchmark shall be calculated using a forward-looking economic cost methodology.

(B) Determination of the benchmark. The commission shall establish two benchmarks for the state, one for residential service and one for single-linebusiness service. The benchmarks for both residential and single-line businesses will be calculated using the statewide average revenue per line as described in clauses (i) and (ii) of this subparagraph for all ETPs participating in the THCUSP.

(i) Residential revenues per line are the sum of the residential revenues generated by basic and discretionary local services, as well as a reasonable portion of toll and access services, for the year ending December 31, 1997, divided by the average number of residential lines served for the same period, divided by 12.

(ii) Business revenues per line are the sum of the business revenues generated by basic and discretionary local services for single-line business lines, as well as a reasonable portion of toll and access services for the year ending December 31, 1997, divided by the average number of single-line business lines served for the same period, divided by 12.

(C) Support under the THCUSP is portable with the consumer. An ETP shall receive support for residential and the first five single-line business lines at the business customer's location that it is serving over eligible lines in such ETP's THCUSP service area.

(2) Proceedings to determine THCUSP base support.

(A) Timing of determinations.

(i) The commission shall review the forward-looking cost methodology, the benchmark levels, and/or the base support amounts every three years from September 1, 1999.

(ii) The commission may initiate a review of the forward-looking cost methodology, the benchmark levels, and/or the base support amounts on its own motion at any time.

(B) Criteria to be considered in determinations. In considering the need to make appropriate adjustments to the forward-looking cost methodology, the benchmark levels, and/or the base support amount, the commission may consider current retail rates and revenues for basic local service, growth patterns, and income levels in low-density areas.

(3) Calculating amount of THCUSP support payments to individual ETPs. After the monthly base support amount is determined, the TUSF administrator shall make the following adjustments each month in order to determine the actual support payment that each ETP may receive each month.

(A) Access revenues adjustment. If an ETP is an ILEC that has not reduced its rates pursuant to §26.417 of this title, the base support amount that such ETP is eligible to receive shall be decreased by such ETP's carrier common line (CCL), residual interconnection charge (RIC), and toll revenues for the month.

(B) Adjustment for federal USF support. The base support amount an ETP is eligible to receive shall be decreased by the amount of federal universal service high cost support received by the ETP.

(C) Adjustment for service provided solely or partially through the purchase of unbundled network elements (UNEs). If an ETP provides supported services over an eligible line solely or partially through the purchase of UNEs, the THCUSP support for such eligible line may be allocated between the ETP providing service to the end user and the ETP providing the UNEs according to the methods outlined below.

(i) Solely through UNEs.

(I) USF cost > (UNE rate + retail cost additive (R)) >revenue benchmark (RB). USF support should be explicitly shared between the ETP serving the end user and the ILEC selling the UNEs in the instance in which the area-specific USF cost/line exceeds the sum of (combined UNE rate/line + R), and the latter exceeds the RB. Specifically, the ILEC would receive the difference between USF cost and (UNE rate + R), while the ETP would receive the difference between (UNE rate + R) and RB. Splitting the USF support payment in this way allows both the ILEC and the ETP to recover, on average, the costs of serving the subscriber at rates consistent with the benchmark. Moreover, this solution is competitively neutral in an additional respect: the ILEC, as the carrier of last resort (COLR), is indifferent between directly serving the average end user and indirectly doing so through the sale of UNEs to a competing ETP. Also, facilities-based competition is encouraged only if it is economic, i.e., reflective of real cost advantages in serving the customer; or

(II) USF cost > RB > (UNE rate + R). The ILEC would receive the difference between USF cost and RB. In this case, where USF cost > RB > (UNE rate + R), giving (USF cost - RB) to the ILEC is necessary to diminish the undue incentive for the ETP to provide service through UNE resale, and to lessen the harm done to the ILEC in such a situation. Allowing the ILEC to recover (USF cost - RB) would minimize financial harm to the ILEC; or

(III) (UNE rate + R)> USF cost > RB. The ETP would receive the difference between USF cost and RB. Where (UNE rate + R)> USF cost > RB, giving (USF cost - RB) to the ETP is necessary to diminish the undue incentive for the ETP not to serve the end user by means of UNE resale. Allowing the ETP to recover (USF cost - RB) would minimize financial harm to the ETP.

(ii) Partially through UNEs. For the partial-provision scenario, THCUSP support shall be shared between the ETP and the ILEC based on the percentage of total per-line cost that is self-provisioned by the ETP. Cost-category percentages for each wire center shall be derived by adding a retail cost additive and the HAI model costs for five UNEs (loop, line port, end-office usage, signaling, and transport). The ETP's retail cost additive shall be derived by multiplying the ILEC-specific wholesale discount percentage by the appropriate (residential or business) revenue benchmark.

(f) Reporting requirements. An ETP eligible to receive support pursuant to this section shall report the following information to the commission or the TUSF administrator.

(1) Monthly reporting requirements. An ETP shall report the following to the TUSF administrator on a monthly basis:

(A) information regarding the access lines on the ETP's network including:

(i) the total number of access lines on the ETP's network,

(ii) the total number of access lines sold as UNEs,

(iii) the total number of access lines sold for total service resale,

(iv) the total number of access lines serving end use customers, and

(v) the total number of eligible lines for which the ETP seeks TUSF support;

(B) the rate that the ETP is charging for residential and single-line business customers for the services described in subsection (d) of this section; and

(C) a calculation of the base support computed in accordance with the requirements of subsection (e)(1) of this section showing the effects of the adjustments required by subsection (e)(3) of this section.

(2) Annual reporting requirements. An ETP shall report annually to the TUSF administrator that it is qualified to participate in the THCUSP.

(3) Other reporting requirements. An ETP shall report any other information that is required by the commission or the TUSF administrator, including any information necessary to assess contributions to and disbursements from the TUSF.

(g) Review of THCUSP after implementation of federal universal service support. The commission shall initiate a project to review the THCUSP within 90 days of the Federal Communications Commission's adoption of an order implementing new or amended federal universal service support rules for rural, insular, and high cost areas.

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

Filed with the Office of the Secretary of State on December 23, 2002.

TRD-200208518
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: January 12, 2003
Proposal publication date: February 8, 2002
For further information, please call: (512) 936-7308

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 1. EXECUTIVE ADMINISTRATION

The General Land Office (GLO) adopts, without changes, the repeal of 31 TAC Chapter 1, Subchapter A, relating to Vacancies, §1.4; the repeal of 31 TAC Chapter 1, Subchapter E, relating Vacancies Listing Service, §1.51 and §1.52; and the repeal of 31 TAC Chapter 1, Subchapter F, relating to Procedures for Hearings, §§1.61-1.79, without changes, as published in the November 1, 2002, issue of the *Texas Register* (27 TexReg 10333) and will not be republished.

The GLO adopts the repeal Subchapter A, relating to Vacancies, as the GLO has consolidated all its rules relating to Vacancies into 31 TAC Chapter 13, relating to Land Resources, and this subchapter is no longer needed and with the adopted repeal of §1.4 this subchapter no longer contains any rules. The GLO adopts the repeal of §1.4, relating to Adopt-A-Beach Volunteer Program, because the Adopt-A-Beach Volunteer Program has been reorganized and this section now is not relevant.

The GLO adopts the repeal Subchapter E, relating to Vacancy Listing Service, including §1.51 and §1.52 because the listing service is outdated as this services is now available on-line at the GLO web-site and is free of charge.

The GLO adopts the repeal of Subchapter F, relating to Procedures for Hearings. Sections 1.61 - 1.78 are simultaneously being adopted in a separate rulemaking action, as new Chapter 2, Subchapter B relating to Procedures for Non-Contested Case Hearings. Chapter 2 contains rules for the GLO's contested and non-contested case hearings. The GLO adopts this repeal in order to consolidate its hearing procedures under one chapter. The consolidation of all the GLO hearing rules into one chapter creates more logically organized and easier to use rules.

Section 1.79, relating to Procedures for Formal Protests of Purchase Contracts, is adopted for repeal and simultaneously is adopted in a separate rulemaking action as new Chapter 3, Subchapter E, §3.50, relating Procedures for Formal Protests of Purchase Contracts. Section 1.79 is located in a subchapter relating to hearings; this section is adopted for repeal and simultaneously being adopted as §3.50 in order to consolidate rules that govern general services, activities and procedures that the GLO provides. This change creates more logically organized rules and clarifies the legal procedures available to persons protesting the GLO process for awarding purchase contracts.

No comments were received regarding the adoption of these proposed repeals.

SUBCHAPTER A. VACANCIES

31 TAC §1.4

The repeal of Chapter 1, Subchapter A is adopted under §51.174 and §51.175 of the Texas Natural Resources Code that authorizes the GLO to promulgate rules relating to Vacancies. The repeal of Chapter 1, §1.4 is adopted under §61.067 of the Texas Natural Resources Code which provides the GLO the authority to promulgate rules regarding the Adopt-A-Beach program.

Texas Natural Resources Code Chapter 51, §§51.171-51.192 and Chapter 61, §61.067 are affected by the repeal of this subchapter and section.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208480
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER E. VACANCY LISTING SERVICE

31 TAC §1.51, §1.52

The repeal of Chapter 1, Subchapter E, §1.51 and §1.52 is adopted under §31.051 of the Texas Natural Resources Code that authorizes the GLO to promulgate and enforce rules consistent with the law.

Texas Natural Resources Code Chapter 51, §§51.171-51.192 are affected by the repeal of this subchapter and sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208481
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER F. PROCEDURES FOR HEARING

31 TAC §§1.61 - 1.79

The repeal of Chapter 1, Subchapter F, §§1.61-1.78 is adopted under §2001.004 of the Texas Government Code that requires state agencies to adopt rules of practice for formal and informal hearing procedures. The repeal of Chapter 1, §1.79 is adopted under Texas Government Code, §2155.076 that requires state agencies to develop and adopt procedures for resolving vendor protests relating to purchase issues.

Texas Natural Resources Code Chapter 31, §31.1611, §31.166, Chapter 34, §34.0135 and Texas Government Code, Chapter 2155, Subchapter B are affected by the repeal of this subchapter and sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208482
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

CHAPTER 2. RULES OF PRACTICE AND PROCEDURE

31 TAC §§2.1 - 2.28

The General Land Office (GLO) adopts the repeal of 31 TAC Chapter 2, relating to Rules of Practice and Procedure, §§2.1-2.28, without changes, as published in the November 1, 2002, issue of the *Texas Register* (27 TexReg 10335) and will not be republished.

Sections 2.1-2.28 govern the procedures for contested case hearings before the GLO including those hearing that the GLO refers to the State Office of Administrative Hearings (SOAH). New sections are simultaneously being adopted in a separate rulemaking action as a new Chapter 2, Subchapter A, relating to Procedures for Contested Case Hearings.

Texas Government Code, §2001.004, relating to Requirement to Adopt Rules of Practice and Index Rules, Orders and Decisions, requires the GLO to adopt rules for its hearing procedures. The GLO currently has rules governing its hearing procedures in several chapters in 31 Texas Administrative Code Part 1, relating to the General Land Office. The GLO is consolidating its hearing procedures into one chapter, Chapter 2, relating to Rules of Practice and Procedure through the concurrent repeals and adoptions of several subchapters and sections. The GLO adopts the repeal of §§2.1-2.28 and simultaneously adopts in a separate rulemaking action new Chapter 2, Subchapter A, relating to Procedures for Contested Case Hearings, §§2.1-2.28, to consolidate its rules governing contested case hearings into one chapter. This consolidation will create rules that are more logically organized and easier to use.

No comments were received regarding the proposed repeal of Chapter 2, §§2.1-2.28.

The repeal of Chapter 2, §§2.1-2.28, is adopted under Texas Government Code, §2001.004 that requires state agencies to adopt rules of practice for formal and informal hearing procedures.

Texas Natural Resources Code Chapter 31, Chapter 40, Chapter 51, §51.076, and Chapter 52, §52.135 are affected by the repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208483
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

CHAPTER 2. RULES OF PRACTICE AND PROCEDURE

The General Land Office (GLO) adopts new 31 TAC Chapter 2, Subchapter A, relating to Procedures for Contested Case Hearings, including §2.1, relating to Applicability, §2.2, relating to Definitions, §2.3, relating to Jurisdiction, §2.4, relating to the Powers and Duties of the Administrative Law Judge, §2.5, relating to Substitution of Administrative Law Judge, §2.6, relating to Appearance of Parties at Hearings; Representation, §2.7, relating to Filings, §2.8, relating to Discovery, §2.9, relating to Prehearing Conferences, §2.10, relating to Orders, §2.11, relating to Settlement Conferences §2.12, relating to Stipulations, §2.13, relating to Form of Pleadings, §2.14, relating to Motions, §2.15, relating to Waiver of Right to Appear, §2.16, relating to Conduct of Hearings, §2.17, relating to Telephone Hearings, §2.18, relating to Evidence, §2.19, relating to The Record, §2.20, relating to Proposal for Decision, §2.21, relating to the Filing of Exceptions and Replies, §2.22, relating to Commissioner's Orders, §2.23, relating to Rehearing, §2.24, relating to Judicial Review, §2.25, relating to Administrative Finality, §2.26, relating to Effective Date of Order, §2.27, relating to Emergency Order, and §2.28, relating to Show Cause Orders and Complaints, without changes to the text as published in the November 1, 2002 issue of the *Texas Register* (27 TexReg 10335) and will not be republished. The GLO is adopting the simultaneous repeal of §§2.1-2.28 in a separate rulemaking action.

The GLO adopts new 31 TAC Chapter 2, Subchapter B, relating to Procedures for Non-Contested Case Hearings, including §2.31, relating to Applicability, §2.32, relating to Definitions, §2.33, relating to Hearings, §2.34, relating to Public Decorum and Participation, §2.35, relating to Effect of Notice, and §2.36, relating to Order of Proceedings and Submissions without changes to the text as published in the November 1, 2002 issue of the *Texas Register* (27 TexReg 10335) and will not be republished. The rules related to these hearing procedures are being simultaneously adopted for repeal in a separate rulemaking action under Chapter 1, Subchapter F, relating to Procedures for Hearings.

The GLO proposes for adoption new 31 TAC Chapter 2, Subchapter C, relating to the Procedures for Special Board of Review Hearings, including §2.40, relating to Purpose, §2.41, relating to Terms, §2.42, relating to Applicability of Rules, §2.43, relating to Request for Board Hearings, §2.44, relating to Political Subdivision Authority, §2.45, relating to Notice, §2.46, relating to Hearings, §2.47, relating to Quorum, §2.48, relating to Orders, §2.49, relating to Binding Effect of Orders and Development Plans, and §2.50, relating to Time Periods without changes to the text as published in the November 1, 2002 issue of the *Texas Register* (27 TexReg 10335) and will not be republished. The rules related to these hearing procedures are being simultaneously adopted for repeal in a separate rulemaking action under Chapter 13, Subchapter C, relating to Special Board of Review Hearings.

Texas Government Code, §2001.004, relating to Requirement to Adopt Rules of Practice and Index Rules, Orders and Decisions, requires the GLO to adopt rules for hearing procedures. Currently, several chapters in 31 Texas Administrative Code contain the GLO's hearing procedures. The GLO adopts these new subchapters and sections in order to consolidate its hearing procedures under one chapter, Chapter 2, relating to Rules of Practice and Procedure. The consolidated Chapter 2 contains the rules governing all GLO Contested Case Hearings and other hearings required by Texas Natural Resources Code Chapter 31, §31.1611, relating to Public Hearing Before Preparation of Development Plan, Chapter 31, §31.166, relating Hearing, and Chapter 34, §34.0135, relating to Policies on Public Hearings. The consolidation of all the GLO hearing procedures into one chapter creates more logically organized and easier to use rules.

The GLO adopts new Chapter 2, Subchapter A, relating to Procedures for Contested Case Hearings, for administrative reasons in order to better organize the rules contained within this chapter. Only non-substantive and grammatical changes have been made to the adopted sections.

Adopted Chapter 2, Subchapter B, relating to Procedures for Non-Contested Case Hearings, applies to hearings before the GLO, Boards for Lease and the Special Board of Review. These adopted rules better reflect the actual hearing process before the boards and clarify the hearing procedures for non-contested case hearings.

Adopted §2.31, relating to Applicability, provides that the procedures in this subchapter apply to hearings that are not contested case hearings before the GLO, the Boards for Lease and the Special Board of Review.

Adopted §2.32, relating to Definitions, defines the terms used in this subchapter.

Adopted §2.33, relating to Hearings, provides that hearings under this subchapter shall comply with the Texas Opens Meeting Act, Government Code Chapter 551, that hearings will be recorded in a manner at the discretion of the chairman of the hearing and the Board will determine the fees for the hearing's transcripts.

Adopted §2.34, relating to Public Decorum and Participation, governs conduct for attendants and participants. Any person may be represented by an attorney or other person authorized to speak on their behalf.

Adopted §2.35, relating to Effect of Notice, provides that notice for the hearings under this subchapter will be given in accordance with the Texas Open Meetings Act, Government Code Chapter 551 and that persons failure to attend does not invalidate the proceedings. Proposed §2.36, relating to Order of Proceedings and Submissions, provides the general requirements for the hearing process and the receipt of material for the record.

The Special Board of Review will conduct its hearings in accordance with the procedures provided in the adopted Chapter 2, Subchapter B, relating to Procedures for Non-Contested Case Hearings. However, the Special Board of Review has specific procedural requirements that are not provided by the rules contained in this adopted subchapter; therefore, the GLO adopts new Chapter 2, Subchapter C, relating to Procedures for Special Board, of Review Hearings, in order to maintain these procedural requirements.

No comments were received regarding the adoption of 31 TAC Chapter 2, Subchapter A, §§2.1-2.28, Subchapter B §§2.31-2.36 and Subchapter C §§2.40-2.50 31 TAC §§2.1 - 2.28

SUBCHAPTER A. PROCEDURES FOR CONTESTED CASE HEARINGS

31 TAC §§2.1 - 2.28

The new Chapter 2, Subchapter A, relating to Procedures for Contested Case Hearings, §§2.1-2.28 is adopted under Texas Government Code, §2001.004 that requires state agencies to adopt rules of practice for formal and informal hearing procedures.

Texas Natural Resources Code Chapter 31, Chapter 40, Chapter 51, §51.076, §51.3021, and Chapter 52, §52.135 are affected by these adopted rulemaking actions.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208484
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER B. PROCEDURES FOR NON-CONTESTED CASE HEARINGS

31 TAC §§2.31 - 2.36

The new Chapter 2, Subchapter B, relating to Procedures for Non-Contested Case Hearings, §§2.31-2.36 is adopted under Texas Government Code §2001.004 that requires state agencies to adopt rules of practice for formal and informal hearing procedures. Texas Natural Resources Code Chapter 31, §31.1611 and §31.166, Chapter 34, §34.0135, Chapter 40, Chapter 51, §51.076, §51.3021, and Chapter 52, §52.135 are affected by these adopted rulemaking actions.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208485
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER C. PROCEDURES FOR SPECIAL BOARD OF REVIEW HEARINGS

31 TAC §§2.40 - 2.50

The new Chapter 2, Subchapter C, relating to Procedures for Special Board of Review Hearings, §§2.40-2.50 is adopted under Texas Natural Resources Code §31.166(b) that provides the GLO the authority to promulgate rules regarding the Special Board of Review hearings. Texas Natural Resources Code, Chapter 31, §31.1611 and §31.166, Chapter 34, §34.0135, Chapter 40, Chapter 51, §51.3021 and Chapter 52, §52.135 are affect by these adopted rulemaking actions.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208486
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

CHAPTER 3. GENERAL PROVISIONS SUBCHAPTER E. PURCHASING

31 TAC §3.50

The General Land Office (GLO) adopts new 31 TAC Chapter 3, Subchapter E, relating to Purchasing, including §3.50, related to Procedures for Formal Protest of Purchase Contracts, without changes to the text, as published in the November 1, 2002, issue of the *Texas Register* (27 TexReg 10346) and will not be republished. The adopted Chapter 3, Subchapter E, relating to Purchasing, contains rules that relate to GLO's purchasing procedures. The adopted §3.50 provides the procedures any bidder, offeror or contractor uses to formally protest the solicitation, evaluation, or award of a purchase contract by the GLO. This section provides the information that must be contained in a properly submitted formal protest and the process that will be followed after the formal protest submission. The adopted §3.50 also provides the procedures the commissioner of the GLO shall follow to make a final determination in a properly submitted formal protest, provides the retention period for all documents received as part of the formal protest, and specifies the outcome of a protest that fails to meet the requirements of this rule. The rules governing these procedures contained in Chapter 1, Subchapter F, §1.79, related to Procedures for Formal Protests of Purchase Contracts, are simultaneously adopted for repeal in a separate rulemaking action.

Under Texas Government Code, §2155.076 the GLO is required to develop and adopt protest procedures for resolving vendor protests relating to purchasing issues. Adopted §3.50 fulfills this requirement. Chapter 3, relating to General Provisions, contains rules governing general services, activities and procedures the GLO provides. Adopted §3.50 applies to all contracts the agency awards and therefore it contains general provisions similar to those contained in other sections of this chapter. The adoption of §3.50 creates more logically organized rules and clarifies the legal procedures available to parties protesting the GLO procedures for awarding purchase contracts.

No comments were received regarding the adoption of new 31 TAC Chapter 3, Subchapter E, §3.50.

31 TAC Chapter 3, Subchapter E, §3.50 is adopted under §2155.076 of the Texas Government Code that requires each state agency to develop and adopt protest procedures for resolving vendor protests relating to purchasing issues.

Texas Government Code Chapter 2155, Subchapter B is affected by this adopted rulemaking action.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208487
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

CHAPTER 4. GENERAL RULES OF PRACTICE AND PROCEDURE

The General Land Office (GLO) adopts the repeal of 31 TAC Chapter 4, relating to General Rules of Practice and Procedure, including Subchapter A, §§4.11-4.16; Subchapter B, §§4.21-4.25; Subchapter C, §§4.41-4.43; Subchapter D, §§4.51-4.55; Subchapter E, §§4.61-4.69; Subchapter F, §§4.81-4.83; Subchapter G, §§4.91-4.99; Subchapter H, §§4.111-4.120; Subchapter I, §§4.130-4.137, Subchapter J, §§4.151-4.153; Subchapter K, §§4.161-4.166; and Subchapter L, §§4.171-4.175, without changes, as published in the November 1, 2002, issue of the *Texas Register* (27 TexReg 10347) and will not be re-published. Chapter 4 governs the procedures of a contested case hearing relating to royalty audits.

The GLO adopts the repeal of Chapter 4, relating to General Rules of Practice and Procedure, in order to consolidate its rules relating to contested case hearings into one chapter, Chapter 2, relating to Rules of Practice and Procedure. Generally, the GLO's contested case hearings are held at the State Office of Administrative Hearings. Texas Government Code, §2001.004 requires adoption of rules for formal proceedings. The GLO adopts the repeal of Chapter 4 as these rules are duplicative of the contested case hearing rules in the simultaneously adopted Chapter 2, Subchapter A related to Procedures for Contested Case Hearings. These rules contain the contested case hearing procedures that apply to the hearings for royalty audits. Consolidating the hearing rules into one chapter creates rules that are more logically organized and easier to use.

Comments:

One comment was received from an individual regarding the proposed repeal of 31 TAC Chapter 4. The person asked how §4.115, relating to Reporters and Transcripts, dealt with court reporters and transcripts and why it is being repealed?

Response: Section 4.115(a) provides that all contested cases were to be recorded on audio tape or cassette or by an official or licensed court reporter. The transcripts of the hearings are to be available upon written request by any party and that party is responsible for the cost of the transcript. The transcript must be purchased from the official reporter. Section 4.115(b) governs the procedures to be used when an error is claimed in the transcript.

As explained above, 31 TAC Chapter 4 is being repealed because it is duplicative of the rules in 31 TAC Chapter 2 proposed Subchapter A, as these rules apply to the royalty audit hearings in Chapter 4. The rules in Chapter 2 supplement the procedures required by the Administrative Procedures Act, Chapter 2001, Government Code. Specifically §2001.059 provides for written transcripts of the contested case hearings. Additionally, the rules created under this chapter, 31 TAC Chapter 155, §155.43 provide for transcripts of the contested case hearings. Therefore the repealed provisions in 31 TAC Chapter 4 are provided for in the legislation and rules that govern contested case hearings applicable to royalty audit hearings.

SUBCHAPTER A. DEFINITIONS AND GENERAL PROVISIONS

31 TAC §§4.11 - 4.16

The repeal of Chapter 4, Subchapter A relating to Definitions and General Provisions is adopted under of the Texas Natural Resources Code §31.051(3), that authorizes the GLO to promulgate rules for the agency that are consistent with the law; §52.135 that allows a lessee under this statute to request a hearing for re-determination of the audit billing notice and §52.137 that provides that a lessee may bring suit against the commissioner in Travis County if the lessee has waived the right to request a hearing or who disagrees with the commissioners final order following such a hearing.

Texas Natural Resource Code Chapter 52, §§52.131-52.140, is affected by the adoption of the repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208488
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER B. INITIATION OF GENERAL LAND OFFICE ACTION

31 TAC §§4.21 - 4.25

The repeal of Chapter 4, Subchapter B relating to Initiation of General Land Office Action is adopted under of the Texas Natural Resources Code §31.051(3), that provides the GLO with the authorization to promulgate rules for the agency that are consistent with the law; §52.135 that allows a lessee under this statute to request a hearing for re-determination of the audit billing notice and §52.137 that provides that a lessee may bring suit against the commissioner in Travis County if the lessee has waived the right to request a hearing or who disagrees with the commissioners final order following such a hearing.

Texas Natural Resource Code Chapter 52, §§52.131-52.140, is affected by the adoption of the repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208489
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER C. REQUEST FOR HEARING AND STATEMENT OF GROUNDS

31 TAC §§4.41 - 4.43

The repeal of Chapter 4, Subchapter C relating to Request for Hearing and Statement of Grounds is adopted under of the Texas Natural Resources Code §31.051(3), that authorizes the GLO to promulgate rules for the agency that are consistent with the law; §52.135 that allows a lessee under this statute to request a hearing for re-determination of the audit billing notice and §52.137 that provides that a lessee may bring suit against the commissioner in Travis County if the lessee has waived the right to request a hearing or who disagrees with the commissioners final order following such a hearing.

Texas Natural Resource Code Chapter 52, §§52.131-52.140, is affected by the adoption of the repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208490
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER D. PARTIES

31 TAC §§4.51 - 4.55

The repeal of Chapter 4, Subchapter D relating to Parties is adopted under of the Texas Natural Resources Code §31.051(3), that provides the GLO with the authorization to promulgate rules for the agency that are consistent with the law; §52.135 that allows a lessee under this statute to request a hearing for re-determination of the audit billing notice and §52.137 that provides that a lessee may bring suit against the commissioner in Travis County if the lessee has waived the right to request a hearing or who disagrees with the commissioners final order following such a hearing.

Texas Natural Resource Code Chapter 52, §§52.131-52.140, is affected by the adoption of the repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208491
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER E. PLEADINGS

31 TAC §§4.61 - 4.69

The repeal of Chapter 4, Subchapter E relating to Pleadings is adopted under of the Texas Natural Resources Code §31.051(3), that provides the GLO with the authorization to promulgate rules for the agency that are consistent with the law; §52.135 that allows a lessee under this statute to request a hearing for re-determination of the audit billing notice and §52.137 that provides that a lessee may bring suit against the commissioner in Travis County if the lessee has waived the right to request a hearing or who disagrees with the commissioners final order following such a hearing.

Texas Natural Resource Code Chapter 52, §§52.131-52.140, is affected by the adoption of the repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208492
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER F. DOCKETING AND NOTICE

31 TAC §§4.81 - 4.83

The repeal of Chapter 4, Subchapter F relating to Docketing and Notice is adopted under of the Texas Natural Resources Code §31.051(3), that provides the GLO with the authorization to promulgate rules for the agency that are consistent with the law; §52.135 that allows a lessee under this statute to request a hearing for re-determination of the audit billing notice and §52.137

that provides that a lessee may bring suit against the commissioner in Travis County if the lessee has waived the right to request a hearing or who disagrees with the commissioners final order following such a hearing.

Texas Natural Resource Code Chapter 52, §§52.131-52.140, is affected by the adoption of the repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208493
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER G. PREHEARING PROCEEDINGS

31 TAC §§4.91 - 4.99

The repeal of Chapter 4, Subchapter G relating to Prehearing Proceedings is adopted under of the Texas Natural Resources Code §31.051(3), that provides the GLO with the authorization to promulgate rules for the agency that are consistent with the law; §52.135 that allows a lessee under this statute to request a hearing for re-determination of the audit billing notice and §52.137 that provides that a lessee may bring suit against the commissioner in Travis County if the lessee has waived the right to request a hearing or who disagrees with the commissioners final order following such a hearing.

Texas Natural Resource Code Chapter 52, §§52.131-52.140, is affected by the adoption of the repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208494
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER H. HEARINGS

31 TAC §§4.111 - 4.120

The repeal of Chapter 4, Subchapter H relating to Hearings is adopted under of the Texas Natural Resources Code §31.051(3), that provides the GLO with the authorization to promulgate rules for the agency that are consistent with the law; §52.135 that allows a lessee under this statute to request a hearing for re-determination of the audit billing notice and §52.137 that provides that a lessee may bring suit against the commissioner in Travis County if the lessee has waived the right to request a hearing or who disagrees with the commissioners final order following such a hearing.

Texas Natural Resource Code Chapter 52, §§52.131-52.140, is affected by the adoption of the repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208495
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER I. EVIDENCE

31 TAC §§4.130 - 4.137

The repeal of Chapter 4, Subchapter I relating to Evidence is adopted under of the Texas Natural Resources Code §31.051(3), that provides the GLO with the authorization to promulgate rules for the agency that are consistent with the law; §52.135 that allows a lessee under this statute to request a hearing for re-determination of the audit billing notice and §52.137 that provides that a lessee may bring suit against the commissioner in Travis County if the lessee has waived the right to request a hearing or who disagrees with the commissioners final order following such a hearing.

Texas Natural Resource Code Chapter 52, §§52.131-52.140, is affected by the adoption of the repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208496
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER J. EXAMINER'S PROPOSALS FOR DECISION AND RELATED ACTIONS

31 TAC §§4.151 - 4.153

The repeal of Chapter 4, Subchapter J relating to Examiner's Proposal for Decision and Related Actions is adopted under of the Texas Natural Resources Code §31.051(3), that provides the GLO with the authorization to promulgate rules for the agency that are consistent with the law; §52.135 that allows a lessee under this statute to request a hearing for redetermination of the audit billing notice and §52.137 that provides that a lessee may bring suit against the commissioner in Travis County if the lessee has waived the right to request a hearing or who disagrees with the commissioners final order following such a hearing.

Texas Natural Resource Code Chapter 52, §§52.131-52.140, is affected by the adoption of the repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208497
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER K. COMMISSIONER'S ORDERS

31 TAC §§4.161 - 4.166

The repeal of Chapter 4, Subchapter K relating to Commissioner's Orders is adopted under of the Texas Natural Resources Code §31.051(3), that provides the GLO with the authorization to promulgate rules for the agency that are consistent with the law; §52.135 that allows a lessee under this statute to request a hearing for re-determination of the audit billing notice and §52.137 that provides that a lessee may bring suit against the commissioner in Travis County if the lessee has waived the right to request a hearing or who disagrees with the commissioners final order following such a hearing.

Texas Natural Resource Code Chapter 52, §§52.131-52.140, is affected by the adoption of the repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208498
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

♦ ♦ ♦

SUBCHAPTER L. ANCILLARY PROCEEDINGS AND PROCEEDINGS BEYOND THE ORDER

31 TAC §§4.171 - 4.175

The repeal of Chapter 4, Subchapter L relating to Ancillary Proceedings and Proceedings Beyond the Order is adopted under of the Texas Natural Resources Code §31.051(3), that provides the GLO with the authorization to promulgate rules for the agency that are consistent with the law; §52.135 that allows a lessee under this statute to request a hearing for re-determination of the audit billing notice and §52.137 that provides that a lessee may bring suit against the commissioner in Travis County if the lessee has waived the right to request a hearing or who disagrees with the commissioners final order following such a hearing.

Texas Natural Resource Code Chapter 52, §§52.131-52.140, is affected by the adoption of the repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208499
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

CHAPTER 13. LAND RESOURCES

The General Land Office (the GLO) adopts the repeal of 31 TAC Chapter 13, Subchapter C, relating to Special Board of Review Hearings, §§13.30-13.40; the repeal of Subchapter D, relating to Administration and Management of Public Free School Land and Coastal Public Lands, §§13.51-13.54; and the repeal of Subchapter E, relating to Land Sales-Preferential Right to Purchase Certain Former SuperConducting Super Collider Tracts, §§13.60-13.67, without changes, as published in the November 1, 2002, issue of the *Texas Register* (27 TexReg 10351) and will not be republished.

Texas Government Code, §2001.004, relating to Requirement to Adopt Rules of Practice and Index Rules, Orders and Decisions, requires the GLO to adopt rules for its hearing procedures. The GLO is consolidating its hearing procedures into one chapter, Chapter 2, relating to Rules of Practice and Procedure, through concurrent repeals and adoptions of several subchapters and sections. The GLO adopts the repeal of Chapter 13, Subchapter C, relating to Special Board of Review Hearings and is simultaneously adopting in a separate rulemaking action, a new Chapter 2, Subchapter C, relating to Procedures for Special Board of Review Hearings, §§2.40-2.50, to consolidate its hearing procedures. This consolidation creates rules that are more logically organized and easier to use.

The GLO is adopting the repeal of Chapter 13, Subchapter D, relating to Administration and Management of Public Free School Land and Coastal Public Lands, to consolidate hearing procedures under the simultaneously adopted new Chapter 2, Subchapter B, relating to Procedures for Non-Contested Case Hearings. The adopted Chapter 2, Subchapter B provides the procedures for hearings and meetings before the School Land Board, the Boards for Lease and the Special Board of Review that are not contested case hearings. The GLO adopts the repeal of Chapter 13, Subchapter D, as these rules are duplicative of the rules adopted in Chapter 2, Subchapter B. The hearing procedures in the adopted Chapter 2, Subchapter B are applicable to the public hearings governed by the rules currently contained in Chapter 13, Subchapter D and these sections are no longer necessary.

The GLO is adopting the repeal of Chapter 13, Subchapter E, relating to Land Sales-Preferential Right to Purchase Certain Former Superconducting Super Collider Tracts in order to eliminate unnecessary rules. The GLO has completed all of its sales of land that were previously conveyed to the state for use as the superconducting super collider research facililty under Texas Natural Resources Code, §31.309. These rules are no longer necessary as there will be no other land sales governed by these rules.

No comments were received regarding the adoption of the repeals of 31 TAC Chapter 13, §§13.30-13.40, §§13.51-13.54, §§13.60-13.67 31 TAC §§13.30 - 13.40

SUBCHAPTER C. SPECIAL BOARD OF REVIEW HEARINGS

31 TAC §§13.30 - 13.40

The repeal of Chapter 13, Subchapter C, relating to Special Board of Review Hearings is adopted under §31.166(b) of the Texas Natural Resources Code that authorizes the GLO to promulgate rules regarding the Special Board of Review hearings.

Texas Natural Resources Code §§31.161-31.167 are affected by the adopted repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208500
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER D. ADMINISTRATION AND MANAGEMENT OF PUBLIC FREE SCHOOL LANDS AND COASTAL PUBLIC LANDS

31 TAC §§13.51 - 13.54

The repeal of Chapter 13, Subchapter D, relating to Administration and Management of Public Free School Land and Coastal Public Lands is adopted under §31.051 that authorizes the GLO to make and enforce rules consistent with the law.

Texas Natural Resources Code §32.016 and §33.055 are affected by the adopted repeal of these sections.

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

Filed with the Office of the Secretary of State on December 20, 2002.

TRD-200208501
Larry Soward
Chief Clerk
General Land Office
Effective date: January 9, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

SUBCHAPTER E. LAND SALES--PREFERENTIAL RIGHT TO PURCHASE CERTAIN FORMER SUPERCONDUCTING SUPER COLLIDER TRACTS

31 TAC §§13.60 - 13.67

The repeal of Chapter 13, Subchapter E, relating to Land Sales-Preferential Right to Purchase Certain Former Superconducting and Super Collider Tracts is adopted under §31.309(d) that authorizes the commissioner to adopt rules necessary to implement Texas Natural Resources Code, Chapter 31, Subchapter G, §§31.301-31.309.

Texas Natural Resources Code §§31.301-31.309 are affected by the adopted repeal of these sections.

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

Filed with the Office of the Secretary of State on December 31, 2002.

TRD-200208584
Larry Soward
Chief Clerk
General Land Office
Effective date: January 20, 2003
Proposal publication date: November 1, 2002
For further information, please call: (512) 305-9129

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Commission on Environmental Quality

Title 30, Part 1

The Texas Commission on Environmental Quality (commission) files this notice of intention to review and proposes the readoption of Chapter 3, Definitions.

This review of Chapter 3 is proposed in accordance with the requirements of Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist.

CHAPTER SUMMARY

Chapter 3 provides definitions of certain words and terms used in commission rules. The meanings for each word and term defined provide a basis for consistent usage throughout the commission rules unless the context clearly indicates otherwise. This rules review proposes to readopt the rules without any changes. PRELIMINARY ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review and determined that the reasons for the rules in Chapter 3 continue to exist. The rules are needed to define key terms used in commission rules and to provide citations to state and federal statutes referenced in commission rules.

During the review of Chapter 3, the commission identified a number of changes to citations needed in §3.2. The commission intends to consider correction of these items in a separate rulemaking in the future.

PUBLIC COMMENT

This proposal is limited to the review in accordance with the requirements of Texas Government Code, §2001.039. The commission invites public comment on this preliminary review of the rules in Chapter 3. Comments may be submitted to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2002-021-003-AD. Comments must be received in writing by 5:00 p.m., February 10, 2003. For further information or questions concerning this proposal, please contact Clifton Wise, Policy and Regulations Division, at (512) 239-2263.

TRD-200208569
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 30, 2002

♦ ♦ ♦

The Texas Commission on Environmental Quality (commission) files this notice of intention to review and proposes the readoption of Chapter 70, Enforcement.

This review of Chapter 70 is proposed in accordance with the requirements of Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist.

CHAPTER SUMMARY

Chapter 70 provides for general rules governing enforcement actions before the commission and consists of three subchapters.

Subchapter A, Enforcement Generally, states the purpose of the chapter; defines terms used in the chapter; authorizes the use of enforcement guidelines that announce the manner in which the agency expects to exercise its discretion in future proceedings; authorizes the use of information demonstrating possible violations from private individuals and provides the criteria for evaluating the value and credibility of information received; describes the remedies available to the commission in enforcement actions; authorizes the executive director to institute legal proceedings to enforce and compel compliance; provides for exemption from enforcement violations caused solely by an act of God, war, strike, riot, or other catastrophe; states that a party asserting inability to pay a recommended penalty shall have the burden of establishing that a lesser penalty is justified; authorizes the use of installment payments of an administrative penalty; authorizes the use of agreed orders and requires certain procedures for public notice and comment; and requires that parties are given notice of rulings, orders, or decisions.

Subchapter B, Mandatory Enforcement Hearings, requires the executive director to monitor compliance with all permits and licenses issued by the commission and requires certain actions if the evidence available indicates substantial noncompliance.

Subchapter C, Enforcement Referrals to State Office of Administrative Hearings (SOAH), authorizes the use of an Executive Director's Preliminary Report to initiate enforcement action; spells out the procedures for pleadings other than the Executive Director's Preliminary Report; authorizes the executive director to file a petition as the instrument for initiating an enforcement action; requires the executive director to give written notice of the Executive Director's Preliminary Report to the respondent and spells out procedures; authorizes a respondent to file with the chief clerk a written response to the Executive Director's Preliminary Report or a pleading which may deny the alleged violations and/or the amount of the penalty; authorizes the use of and spells out the procedures for default orders if any respondent to an Executive

Director's Preliminary Report or petition initiating an enforcement action fails to timely file an answer; requires that, if required by law, an enforcement hearing shall be held before any final enforcement order is issued and, if an enforcement hearing is not required, authorizes the commission to hold a hearing on its own motion, or upon the request of the executive director, before issuing a final enforcement order or to direct SOAH to hold such a hearing; provides that 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; and spells out the procedures for referring to SOAH.

PRELIMINARY ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review and determined that the basis for the rules in Chapter 70 continue to exist. The rules are needed to implement the commission's enforcement authority under Texas Water Code (TWC), §7.002 to enforce the laws within the commission's jurisdiction. The commission is required to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state, and to adopt reasonable procedural rules to be followed in a commission hearing (TWC, §5.103). The commission is required to adopt rules of practice stating the nature of all available formal and informal procedures (Texas Government Code, §2001.004). The rules also authorize the executive director to pursue an enforcement matter through court action (by referring the matter to the Texas Attorney General), as is contemplated in TWC, §5.230.

This review revealed that revisions are needed to improve clarity, consistency, and readability. The commission intends to consider correction of these items in a separate rulemaking (Rule Log Number 2002-063-070-AD).

PUBLIC COMMENT

This proposal is limited to the review in accordance with the requirements of Texas Government Code, §2001.039. The commission invites public comment on this preliminary review of the rules in Chapter 70. Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2002-023-070-AD. Comments must be received in writing by 5:00 p.m., February 10, 2002. For further information or questions concerning this proposal, please contact Richard O'Connell, Litigation Division, at (512) 239-5528; or Debra Barber, Policy and Regulations Division, at (512) 239-0412.

TRD-200208573
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 30, 2002

The Texas Commission on Environmental Quality (commission) files this notice of intention to review and proposes the readoption of Chapter 285, On-Site Sewage Facilities.

This review of Chapter 285 is proposed in accordance with the requirements of Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist.

CHAPTER SUMMARY

Chapter 285 provides the requirements for on-site sewage facilities (OSSF). Subchapter A contains the general provisions of the rules including purpose and applicability, definitions, general requirements, facility planning requirements, submittal requirements for planning materials, cluster systems requirements, maintenance requirements, and multiple OSSF systems on one large tract of land requirements. Subchapter B includes the requirements for the local administration of the OSSF program. Subchapter C includes the requirements for the commission's administration of the OSSF program in areas where no authorized agent exists. Subchapter D contains the planning, construction, and installation standards for OSSFs. Subchapter E contains the requirements for OSSFs in the Edwards Aquifer recharge zone. Subchapter F contains the licensing and registration requirements for installers, apprentices, designated representatives, and site evaluators. Subchapter G contains the criteria for enforcement. Subchapter H contains the requirements for treatment and disposal of greywater. Subchapter I contains the Appendices.

PRELIMINARY ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review and determined that the reasons for the rules in Chapter 285 continue to exist. The rules in this chapter protect the public health and welfare by providing a comprehensive regulatory program for the management of OSSFs, as prescribed by Texas Health and Safety Code (THSC), Chapter 366, On-Site Sewage Disposal Systems. Additionally, the rules are needed to implement THSC, Chapter 366, including THSC, §366.001, which provides the policy and purpose of Chapter 366; THSC, §366.011, which provides for the commission's general supervision and authority over the location, design, construction, installation, and proper functioning of the OSSF; THSC, §366.012, which provides the commission authority to adopt rules concerning on-site sewage disposal systems; THSC, §366.053, which provides the commission authority to adopt rules and procedures relating to the submission, review, and approval or rejection of permit applications; THSC, §366.058, which requires the commission to adopt rules addressing permit fees; THSC, §366.059, as amended by House Bill 2912, §3.09, 77th Legislature, 2001, which allows the commission to assess a reasonable and appropriate charge-back fee; and THSC, §366.072, which provides the authority for the commission to adopt rules for registration.

PUBLIC COMMENT

This proposal is limited to the review in accordance with the requirements of Texas Government Code, §2001.039. The commission invites public comment on this preliminary review of the rules in Chapter 285. Comments may be submitted to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2002-025-285-WT. Comments must be received in writing by 5:00 p.m., February 10, 2003. For further information or questions concerning this proposal, please contact Kathy Ramirez, Policy and Regulations Division, at (512) 239-6757.

TRD-200208570
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 30, 2002

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 22 TAC §183.8(f)(9)

TEXAS STATE BOARD OF ACUPUNCTURE EXAMINERS

P.O. Box 2018
Austin, Texas 78768-2018

PROFESSIONAL LIABILITY CLAIMS REPORT

FILE ONE REPORT FOR EACH DEFENDANT ACUPUNCTURIST.

PART I. COMPLETE FOR ALL CLAIMS OR COMPLAINTS AND FILE WITH THE TEXAS STATE BOARD OF ACUPUNCTURE EXAMINERS WITHIN 30 DAYS FROM RECEIPT OF COMPLAINT OR CLAIM. INCLUDE COPY OF CLAIM LETTER AND/OR PLAINTIFF'S COMPLAINT.

1. Name and address of insurer:

____

____

2. Defendant acupuncturist:

____

License number:_________________

3. Plaintiff's name:

____

4. Policy number:

____

5. Date claim reported to insurer/self-insured acupuncturist:

____

6. Type of complaint:___________ claim only ____________ lawsuit

7. Initial reserve amount after investigation:

____

(If this is not determined within 30 days, report this data within 105 days of filing the Part I report with T.S.B.A.E.)

___________________________________ ____________________
Person completing this report Phone number

PART II. COMPLETE AFTER DISPOSITION OF THE CLAIM AS DEFINED IN 22 TAC §183.8(f), INCLUDING DISMISSALS OR SETTLEMENTS. FILE WITH T.S.B.A.E. WITHIN 105 DAYS AFTER DISPOSITION OF THE CLAIM. A COPY OF COURT ORDER OR SETTLEMENT AGREEMENT MAY BE USED AS PROVIDED IN 22 TAC §183.8(f).

8. Date of disposition:________________

9. Type of Disposition:

_______ (1) Settlement

_______ (2) Judgment after trial

_______ (3) Other (please specify)

____

10. Amount of indemnity agreed upon or ordered on behalf of this defendant:

$ _______________________. Note: If percentage of fault was not determined by the court or insurer in the case of multiple defendants, the insurer may report the total amount paid for the claim followed by a slash and the number of insured defendants. (Example: $100,000/3)

11. Appeal, if known: _____Yes _____ No. If yes, which party:

____

_______________________________   ________________________
Person completing this report   Phone number

Figure 1: 22 TAC §183.10(a)(11)

Form to be Completed by Patient, Notifying the Acupuncturist of Whether He/She Has Been Evaluated by a Physician, and Other Information.

(Pursuant to the requirements of 22 TAC §183.7 of the Texas State Board of Acupuncture Examiners' rules (relating to Scope of Practice and Tex. Occ. Code Ann., §205.351, governing the practice of acupuncture.)

I (patient's name) ____, am notifying the

acupuncturist (practitioner's name), ________________________________ of the following:

___ Yes ___ No I have been evaluated by a physician or dentist for the condition being treated within 12 months before the acupuncture was performed. I recognize that I should be evaluated by a physician or dentist for the condition being treated by the acupuncturist.

_____ (initials of patient) Date: ____________

___ Yes ___ No I have received a referral from my chiropractor within the last 30 days for acupuncture.

After being referred by a chiropractor, if after two months or 20 treatments, whichever comes first, no substantial improvement occurs in the condition being treated, I understand that the acupuncturist is required to refer me to a physician. It is my responsibility and choice whether to follow this advice.

Signature ________________________________ Date ____________

Figure 2: 22 TAC §183.10(a)(11)

Optional Form to be Completed by Patient,
Attesting that the Acupuncturist Has Referred Him/Her

(Pursuant to the requirement of 22 TAC §183.7 of the Texas State Board of Acupuncture Examiners' rules (relating to Scope of Practice) and Tex. Occ. Code Ann. §205.351, governing the practice of acupuncture.)

The acupuncturist has referred me to see a physician. It is my responsibility and choice whether to follow his or her advice.

Patient's signature ______________________________________ Date ____________

Acupuncturist's signature ________________________________ Date ____________

Figure: 22 TAC §183.16(b)

ACUPUNCTURE TRAINING ADVISORY STATEMENT

You are advised that the practice of acupuncture in Texas requires licensure by the Texas State Board of Acupuncture Examiners and is governed by Chapter 205 of the Texas Occupations Code and the rules of the Texas State Board of Medical Examiners, 22 TAC §§183.1 et. seq.

You are further advised that for an acupuncture school located in the United States or Canada to be considered to be an approved acupuncture school by the Texas State Board of Acupuncture Examiners for purposes of meeting the educational requirements for obtaining an acupuncture license, the school must comply and must meet the requirements set forth below:

Acceptable approved acupuncture school - Effective January 1, 1996, and in addition to and consistent with the requirements of §205.206 of the Tex. Occ. Code and with the exception of the provisions outlined in §183.4(h) of this title (relating to Exceptions),

(A) a school of acupuncture located in the United States or Canada which, at the time of the applicant's graduation, was a candidate for accreditation by the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM), offered no more than a certificate upon graduation, and had a curriculum of 1,800 hours with at least 450 hours of herbal studies which at a minimum included the following:

(i) basic herbology including recognition, nomenclature, functions, temperature, taste, contraindications, and therapeutic combinations of herbs;

(ii) herbal formulas including traditional herbal formulas and their modification/variations based on traditional methods of herbal therapy;

(iii) patent herbs including the names of the more common patent herbal medications and their uses; and

(iv) clinical training emphasizing herbal uses; or

(B) a school of acupuncture located in the United States or Canada which, at the time of the applicant's graduation, was accredited by ACAOM, offered a masters degree upon graduation, and had a curriculum of 1,800 hours with at least 450 hours of herbal studies which at a minimum included the following:

(i) basic herbology including recognition, nomenclature, functions, temperature, taste, contraindications, and therapeutic combinations of herbs;

(ii) herbal formulas including traditional herbal formulas and their modifications or variations based on traditional methods of herbal therapy;

(iii) patent herbs including the names of the more common patent herbal medications and their uses; and

(iv) clinical training emphasizing herbal uses; or

(C) a school of acupuncture located outside the United States or Canada that is determined by the board to be substantially equivalent to a Texas acupuncture school or a school defined in subparagraph (B) of this paragraph through an evaluation by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).

You are additionally advised that ______________________ (name of institution) is not currently a candidate for accreditation by the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM) and is not currently accredited by ACAOM. If such candidate status or accreditation is not obtained by this institution by the time of your graduation, under the current rules of the Texas State Board of Acupuncture Examiners you will not be eligible for a Texas acupuncture license based on training received at this institution.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were deemed administratively complete for the following projects(s) during the period of December 13, 2002, through December 19, 2002. The public comment period for these projects will close at 5:00 p.m. on January 24, 2003.

FEDERAL AGENCY ACTIONS: Applicant: Duane H. Lowe; Location: The project is located on Trinity Bay adjacent to Northpoint in Trinity Bay Subdivision, Lot No. 8, Beach City, Chambers County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled Umbrella Point, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 321950; Northing: 3290300. Project Description: The applicant proposes to place riprap adjacent to an existing bulkhead and existing wooden groins to protect the 200-foot-long shoreline from erosion and to construct a boat ramp for recreational use. Approximately 150 cubic yards of broken concrete, bricks, and sacrete would be placed below the high tide line at a maximum distance of 10 feet from the bulkhead. Approximately 9 cubic yards of brick, concrete, and sacrete would be place below the high tide line for construction of the 18-foot-long by 10-foot-wide boat ramp. CCC Project No.: 02-0417-F1; Type of Application: U.S.A.C.E. permit application #22543 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §125-1387).

Applicant: Oly Galveston General Partnership; Location: The project is located north of Lafitte's Cove, adjacent to Eckerts Bayou in Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled Lake Como, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 311611; Northing: 3233902. Project Description: The applicant proposes to construct a 29-homesite harbor residential area which would include a community pavilion, 5 boatslips, and onsite boat storage. The location of all proposed building pads are on uplands. However, for lots 22, 23, 24, and 28 where the building footprint is less than sixty feet in depth, the applicant requests authorization to place three pilings into adjacent wetlands to support overhead decks. The harbor would be created by the upland excavation of 33,000 cubic yards (CY) of sand to be placed on upland areas and the removal of 1,238.6 square feet of grasses. To connect the harbor to the existing channel, roughly 3,300 CY's of sand (from a 0.46 acre surface area location) would be dredged from open-water through hydraulic means. The 3,300 CY's of sand excavated during the construction of the channel would be beneficially used to create 2 barrier islands along the existing shoreline. The construction of the 2 islands would result in approximately 0.275 acres of water surface to be filled. CCC Project No.: 02-0418-F1; Type of Application: U.S.A.C.E. permit application #22790 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §125-1387).

Applicant: Kinder Morgan Ship Channel Pipeline, L.P.; Location: The project is located in Galveston Bay off of Dollar Point in Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled Texas City, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 316851; Northing: 3257473. Project Description: The applicant proposes to install concrete mats (Submar mat) over two portions of their concrete-coated 18-inch natural gas pipeline to provide additional structural protection. The mats would be placed along the pipeline in two sections totaling 660 feet. Location 1 would be in Galveston Bay, approximately 750 feet from Dollar Point, and would involve the installation of 460 linear feet of mats along the pipeline. Location 2 would be approximately 1 mile from Dollar Point and would involve the installation of 200 linear feet of mats. The maps would be capped with limestone to aid in the restoration of oyster reefs at both locations. CCC Project No.: 02-0419-F1; Type of Application: U.S.A.C.E. permit application #22876 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §125-1387).

Applicant: El Paso Production Oil and Gas Company; Location: The project is located in the Outer Continental Shelf (OCS) Federal Waters in the Gulf of Mexico in the Gulf Safety Fairway, Matagorda Island Area, OCS Block 651 and 652, Offshore Texas. The project can be located using the Texas State Plane Coordinate system, South Zones. The proposed pipeline would enter the fairway at XY Coordinates X=2,849,708.70'; Y=84522.10' and exit the fairway at XY Coordinates X=2,860,240'; Y=77,482'. Project Description: The applicant proposes to install a 6-inch natural gas and condensate flowline which would originate from a wellhead at Matagorda Island Block 652, Caisson No. 1 and terminate at Platform "A" located in Matagorda Island Block 651. Water depths for the proposed project area are approximately 100 feet. CCC Project No.: 02-0420-F1; Type of Application: U.S.A.C.E. permit application #22886 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

FEDERAL AGENCY ACTIVITIES:

Applicant: U.S. Army Corps of Engineers; Location: The project is located in the Houston-Galveston Navigation Channel in upper Galveston Bay between Redfish Island and Morgans Point in Harris, Chambers, and Galveston counties, Texas. Project Description: This is an Environmental Assessment to describe environmental impacts of the addition of barge lanes to the Houston-Galveston Navigation Channels, Texas Project. Each of the 15-mile-long barge lanes would be 125 feet wide and dredged to a depth of -12 feet Mean Low Tide (MLT) plus 1-foot of allowable overdepth. Approximately 1.2 million cubic yards of dredged material would be necessary over the 50-year economic life of the project. Dredged material would be placed into the existing Mid Bay Beneficial Use Site and the Atkinson Island Beneficial Use Site. This project would cause the loss of 54 acres of oyster reef and scattered oysters which would be mitigated by creating or restoring oyster reefs

at a 1:1 ratio. Four mitigation reef locations (Tern Reef, Mid Galveston Bay, Gas Pipe Reef, and Stevenson Reef) were chosen based on considerations of water quality, human health concerns, substrate type, past problems with oyster predators and diseases, and conflicts with other bay users. CCC Project No.: 02-0381-F2; Type of Application: Environmental Assessment prepared in accordance with the National Environmental Policy Act (NEPA).

Applicant: Gulf of Mexico Fishery Management Council; Location: Gulf of Mexico; Project Description: "Secretarial Amendment 2 to the Reef Fish Fishery Management Plan to Set Greater Amberjack Sustainable Fisheries Act Targets and Thresholds and to set a Rebuilding Plan (includes Environmental Assessment and Regulatory Impact Review)". The proposed actions of the council are to specify maximum sustainable yield, optimum yield, maximum fishing mortality threshold, and minimum stock size threshold levels for greater amberjack that are in compliance with current fishery management standards and also to establish a rebuilding plan for greater amberjack in the Gulf of Mexico. CCC Project No.: 02-0408-F2; Type of Application: Secretarial amendment. NOTE: The CMP consistency review for this project may be conducted by the Texas Parks & Wildlife Department.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Diane P. Garcia, Council Secretary, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at 512/475-0680.

TRD-200208567
Larry Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: December 30, 2002

♦ ♦ ♦

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003 and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 12/30/02 -- 01/05/03 is 18% for Consumer [1]/Agricultural/Commercial [2]/credit thru $250,000.

The weekly ceiling as prescribed by Sections 303.003 and 303.09 for the period of 12/30/02 -- 01/05/03 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200208534
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 27, 2002

♦ ♦ ♦

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003, 303.005, 303.008, 303.009, 304.003, and 346.101. Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and 303.009 for the period of 01/06/03 - 01/12/03 is 18% for Consumer [1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sec. 303.003 and 303.009 for the period of 01/06/03 - 01/12/03 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by Sec. 303.005 and 303.009[3]for the period of 01/01/03 - 01/31/03 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The monthly ceiling as prescribed by Sec. 303.005 and 303.009 for the period of 01/01/03 - 01/31/03 is 18% for Commercial over $250,000.

The standard quarterly rate as prescribed by Sec. 303.008 and 303.009 for the period of 01/01/03 - 03/31/03 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard quarterly rate as prescribed by Sec. 303.008 and 303.009 for the period of 01/01/03 - 03/31/03 is 18% for Commercial over $250,000.

The retail credit card quarterly rate as prescribed by Sec. 303.009 [1] for the period of 01/01/03 - 03/31/03 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The lender credit card quarterly rate as prescribed by Sec. 346.101 Tex. Fin. Code[1]for the period of 01/01/03 - 03/31/03 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard annual rate as prescribed by Sec. 303.008 and 303.009 [4] for the period of 01/01/03 - 03/31/03 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard annual rate as prescribed by Sec. 303.008 and 303.009 for the period of 01/01/03 - 03/31/03 is 18% for Commercial over $250,000.

The retail credit card annual rate as prescribed by Sec. 303.009[1]for the period of 01/01/03 - 03/31/03 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 01/01/03 - 01/31/03 is 10% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed Sec. 304.003 for the period of 01/01/03 - 01/31/03 s 10% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

[4]Only for open-end credit as defined in Sec. 301.002(14), Tex. Fin. Code.

TRD-200208587
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 31, 2002

♦ ♦ ♦

Texas Department of Criminal Justice

Corrected Notice to Bidders

PLEASE NOTE THAT MANDATORY PRE-BID DATE HAS BEEN CHANGED

The Texas Department of Criminal Justice invites bids for the construction of Dialysis Water Treatment System Upgrades at Huntsville, Texas. The project consists of new construction to upgrade the Central Regional Medical Facility Dialysis Treatment Center water treatment system at the existing Estelle Unit in Huntsville, Texas. The work includes removal and reconfiguration of some portions of the existing system, preparation of a new 1st floor treatment room, modification of the existing 2nd floor water treatment room (RO room), all related plumbing, electrical, water and gas utilities, mechanical and architectural work as further shown in the Contract Documents prepared by Kevin McCue, P.E., TDCJ Facilities Engineering.

The successful bidder will be required to meet the following requirements and submit evidence within five days after receiving notice of intent to award from the Owner:

A. Contractor must have a minimum of five (5) consecutive years of experience as a General Contractor and provide references for at least three projects that have been completed of a dollar value and complexity equal to or greater than the proposed project.

B. Contractor must be bondable and insurable at the levels required.

C. Contractor must obtain a FDA 510K letter of compliance for the new system.

All Bid Proposals must be accompanied by a Bid Deposit in the amount of 5% of greatest amount bid. Performance and Payment Bonds in the amount of 100% of the contract amount will be required upon award of a contract. The Owner reserves the right to reject any or all bids, and to waive any informality or irregularity.

Bid Documents can be purchased from TDCJ at a cost $50.00 (Fifty dollars), non-refundable, per set, inclusive of mailing/delivery costs, or they may be viewed at various plan rooms. Payment checks for documents should be made payable to Texas Department of Criminal Justice and sent to:

TDCJ Contracts and Procurement Department, Two Financial Plaza, Suite 525 Huntsville, Texas 77340, Contact: Paul Fitts, CTPM; Phone: (936) 437-7158; Fax: (936) 437-7009

A Mandatory Pre-Bid Conference will be held at 10:00 a.m. on January 21, 2003 at the Estelle Unit in Huntsville, Texas, followed by a site-visit. ONLY ONE SCHEDULED SITE VISIT WILL BE HELD FOR REASONS OF SECURITY AND PUBLIC SAFETY; THEREFORE, BIDDERS ARE REQUIRED TO ATTEND. Bids will be publicly opened and read at 2:00 p.m. on February 6, 2003, in the Contracts and Procurement Conference Room located in the West Hill Mall, Suite 525, Two Financial Plaza, Huntsville, Texas.

Attention is called to the fact that not less than the minimum wage rates prescribed in the Special Conditions must be paid on these projects.

TRD-200208586
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: December 31, 2002

East Texas Council of Governments

Request for Qualifications on Legal Counsel

The East Texas Workforce Development Board is soliciting a request for qualifications (RFQ) for general legal counsel services. The East Texas Workforce Development Board was established under Texas House Bill 1863 and the federal Workforce Investment Act of 1998. The Board oversees the integration and coordination of more than twenty separate employment and training programs in the 14 county Workforce Development Area (WDA). The WDA consists of Anderson, Camp, Cherokee, Gregg, Harrison, Henderson, Marion, Panola, Rains, Rusk, Smith, Upshur, Van Zandt, and Wood counties.

The Workforce Board is comprised of representatives of business, labor, education, and community organizations appointed by local elected officials. Operational and programmatic funding to the Workforce Board is provided by a variety of state and federal sources through the Texas Workforce Commission.

Legal counsel services consist of administrative counseling, contract review and preparation, and organizational advocacy in formal and informal proceedings before judicial and quasi-judicial bodies.

Potential respondents may obtain a copy of the RFQ by contacting Glynn Knight, Executive Director, East Texas Council of Governments, 3800 Stone Road, Kilgore, Texas 75662, or by calling 903.984.8641. The deadline for RFQ submission is 5:00 p.m., Friday, January 31, 2003.

TRD-200208588
Glynn Knight
Executive Director
East Texas Council of Governments
Filed: December 31, 2002

Texas Education Agency

Request for Applications Concerning Texas 21st Century Community Learning Centers Cycle 1 Grant Program

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-02-035 from local educational agencies (LEAs), including public school districts, open- enrollment charter schools, and regional education service centers; community-based organizations (CBOs); other public or private entities, non-profit or for profit; or a consortium of two or more agencies, organizations, or entities to establish or expand community learning centers. A shared service arrangement of two or more LEAs is also eligible to apply.

An application must designate the specific campus(es) that meet the eligibility requirements of the grant in order to determine the students and families to be served in the 21st Century Community Learning Center. Each application submitted will be limited to not more than five community learning centers.

Description. The purpose of the Texas 21st Century Community Learning Centers Cycle 1 grant program is to provide opportunities for communities to establish or expand activities in community learning centers that: (1) provide opportunities for academic enrichment, including providing tutorial services to help children, particularly students who attend low-performing schools, to meet state and local student academic achievement standards in core academic subjects, such as reading and mathematics; (2) offer students a broad array of additional services, programs, and activities such as youth development activities; drug and violence prevention programs; counseling programs; art, music, and physical education and fitness programs; and technology education programs that are designed to reinforce and complement the regular academic programs of participating students; and (3) offer families

of students served by community learning centers opportunities for literacy and related educational development. Program services must be offered only when schools are not in session (before or after school, during holidays, or during summer recess). Centers can be located in elementary or secondary schools or other similarly accessible facilities. The program must be carried out in active collaboration with the schools the students attend. Applications must provide for partnerships between a LEA, a CBO, and other public or private organizations, if appropriate.

Dates of Project. Applicants should plan for a starting date of no earlier than May 1, 2003, and an ending date of no later than May 31, 2004.

Project Amount. A total of $22,832,618 is available for funding approximately 60 to 80 grants during the summer of 2002 and during the 2003-2004 school year. The grant request may not be less than $50,000 or greater than $175,000 per center, not exceeding $875,000 for a total of five centers. Each community learning center may serve students on more than one campus, but a campus may be served through only one community learning center. Project funding in the second and third years will be based on satisfactory progress of the first- and second-year objectives and activities, respectively, on general budget approval by the U. S. Congress, the number of centers established, the number of students and campuses served by each center, and on the activities to be implemented during out-of-school time throughout the grant period. This project is funded 100% from CFDA #84.287C federal funds.

Selection Criteria. Applications will be selected based on the independent reviewers' assessment of each applicant's ability to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each statutory requirement as specified in the RFA to be considered for funding. The TEA will not award a grant to an application receiving an average score of below 70. The TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA and that are most advantageous to the project. The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit the TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate the TEA to award a grant or pay any costs incurred in preparing a response.

Applicants' Conference. Prospective applicants will be provided an opportunity to receive general and clarifying information from the TEA about the scope of the Texas 21st Century Community Learning Centers, Cycle 1 grant program on Wednesday, February 5, 2003, from 1:00 p.m. until 4:00 p.m. on the Texas Educational Telecommunication Network (TETN) available at each regional education service center and some of the larger school districts. The conference will be both videotaped and scripted. Pre-conference questions may be sent to gkidwell@tea.state.tx.us prior to January 31, 2003. Each person attending will be required to sign a register setting out the representative's name, the applicant organization represented and its name, address, and telephone number. Prospective applicants who are not able to attend the applicants' conference may request a copy of the videotape at no charge from the Division of Curriculum and Professional Development of the TEA.

Requests for Additional Information. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any additional information that is different from or is in addition to information provided in the RFA or at the applicants' conference will be provided only in response to written inquiries. Copies of all such inquiries and the written answers thereto will be provided to each person or entity to which a RFA has been sent or downloaded from the Grants Administration website. Unless otherwise noted, all inquiries for information must be made in writing to the Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701-1494. The RFA number, located in the lower right corner of the front cover of this RFA, must be identified in the written request for information.

Requesting the Application. A complete copy of RFA #701-02-035 may be obtained by writing the: Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tea.state.tx.us. Please refer to the RFA number and title in your request. Provide your name, complete mailing address, and telephone number including area code. The announcement letter and complete RFA will also be posted on the TEA website at http://www.tea.state.tx.us/grant/announcements/grants2.cgi for viewing and downloading.

Further Information. For clarifying information about the RFA, contact Geraldine Kidwell, Division of Curriculum and Professional Development, TEA, (512) 463-9581.

Deadline for Receipt of Applications. Applications must be received in the Document Control Center of the TEA by 5:00 p.m. (Central Time), Tuesday, April 1, 2003, to be considered for funding.

TRD-200208590
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: December 31, 2002

♦ ♦ ♦

Texas Commission on Environmental Quality

Notice of Availability and Requests for Comments

The Texas Commission on Environmental Quality (TCEQ) is providing an opportunity for public comment and will conduct a public meeting to receive testimony concerning the proposed amendments to the standard permit for concrete batch plants proposed for issuance under the Texas Clean Air Act, Texas Health and Safety Code, §382.05195, and Texas Administrative Code (TAC), Chapter 116, Subchapter F.

PROPOSED AMENDED STANDARD PERMIT

The proposed amendments to the standard permit for concrete batch plants are applicable to an owner or operator of a temporary concrete plant that has been previously registered with the commission for this standard permit, supplies concrete to a public works project, and is located in or adjacent to the public right-of-way. In lieu of the current registration requirement, these temporary facilities will be required to notify the appropriate regional office in writing at least 30 calendar days prior to locating at the site. General requirements concerning distance limits, emission limits, control requirements, and recordkeeping have not changed.

The New Source Review Program under Chapter 116 requires any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of the state to obtain a permit in accordance with §116.111, or satisfy the conditions of a standard permit, a flexible permit, or a permit by rule before any actual work is begun on the facility. A standard permit authorizes the construction or modification of new or existing facilities which are similar in terms of operations, processes, and emissions.

An amendment to a standard permit is subject to the procedural requirements of §116.605, which includes a 30-day public comment period and a public meeting to provide an additional opportunity for public comment. Any person who may be affected by the emission of air pollutants from facilities that may be registered under the standard permit is entitled to submit written or verbal comments regarding the proposed standard permit.

PUBLIC MEETING

A public meeting on the standard permit for concrete batch plants will be held in Austin, Texas. The meeting will be 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 with the audience will not occur during the meeting; however, TCEQ staff will be available to discuss the standard permit for concrete batch plants 30 minutes prior to the meeting and staff will also answer questions after the meeting. The public meeting will be held on February 13, 2003 at 10:00 a.m., at the Texas Commission on Environmental Quality in Building E, Room 254S, 12100 Park 35 Circle, Austin.

PUBLIC COMMENT AND INFORMATION

Copies of the standard permit for concrete batch plants may be obtained from the TCEQ Web site at *http://www.tnrcc.state.tx.us/permitting/airperm/nsr_permits/files/amendcbp.pdf* or by contacting the Texas Commission on Environmental Quality, Office of Permitting, Remediation, and Registration, Air Permits Division, at (512) 239-1240. Comments may be mailed to Blake Stewart, Texas Commission on Environmental Quality, Office of Permitting, Remediation, and Registration, Air Permits Division, MC 163, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1070. All comments should reference the standard permit for concrete batch plants. Comments must be received by 5:00 p.m. on February 13, 2003. To inquire about the submittal of comments or for further information, contact Mr. Stewart at (512) 239-6931.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-1240. Requests should be made as far in advance as possible.

TRD-200208581
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 31, 2002

Notice of Comment Period and Announcement of Public Meeting on Draft Standard Permit for Hot Mix Asphalt Plants

The Texas Commission on Environmental Quality (TCEQ) is providing an opportunity for public comment and will conduct a public meeting to receive testimony concerning a draft standard permit for hot mix asphalt plants proposed for issuance under the Texas Clean Air Act, Texas Health and Safety Code, §382.05195, and Texas Administrative Code (TAC), Chapter 116, Subchapter F.

DRAFT STANDARD PERMIT

The draft standard permit for hot mix asphalt plants is applicable to those facilities and associated equipment which produce standard hot mix asphalt, asphalt mixes made with performance grade binders, asphalt mixes made with crumb rubber, and pre-coat aggregate; and for which throughput is limited to no more than 400 tons per hour. General requirements concerning distance limits, emission limits, control requirements, notification, registration requirements, and recordkeeping are contained in the standard permit.

The New Source Review Program under Chapter 116 requires any person who plans to construct any new facility, or to engage in the modification of any existing facility which may emit air contaminants into the air of the state, to obtain a permit in accordance with §116.111, or satisfy the conditions of a standard permit, a flexible permit, or a permit by rule before any actual work is begun on the facility. A standard permit authorizes the construction or modification of new or existing facilities which are similar in terms of operations, processes, and emissions.

A draft standard permit is subject to the procedural requirements of §116.603, which includes a 30-day public comment period and a public meeting to provide an additional opportunity for public comment. Any person who may be affected by the emission of air pollutants from facilities that may be registered under the standard permit is entitled to submit written or verbal comments regarding the proposed standard permit.

PUBLIC MEETING

A public meeting on the draft standard permit for hot mix asphalt plants will be held in Austin. The meeting will be 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 with the audience will not occur during the meeting; however, TCEQ staff will be available to discuss the draft standard permit for hot mix asphalt plants 30 minutes prior to the meeting and staff will also answer questions after the meeting. The public meeting will be held on February 13, 2003 at 1:30 p.m., at the Texas Commission on Environmental Quality, Building E, Room 254S, 12100 Park 35 Circle, Austin, Texas.

PUBLIC COMMENT AND INFORMATION

Copies of the draft standard permit for hot mix asphalt plants may be obtained from the TCEQ Web site at *http://www.tnrcc.state.tx.us/permitting/airperm/nsr_permits/files/prophmap.pdf* or by contacting the Texas Commission on Environmental Quality, Office of Permitting, Remediation, and Registration, Air Permits Division at (512) 239-1240. Comments may be mailed to Blake Stewart, Texas Commission on Environmental Quality, Office of Permitting, Remediation, and Registration, Air Permits Division, MC 163, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1070. All comments should reference the draft standard permit for hot mix asphalt plants. Comments must be received by 5:00 p.m. on February 13, 2003. To inquire about the submittal of comments or for further information, contact Mr. Stewart at (512) 239-6931.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-1240. Requests should be made as far in advance as possible.

TRD-200208583
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 31, 2002

Notice of Intent to Take No Further Action at the Barlow's Wills Point Proposed State Superfund Site and to Delete the Site from the State Registry

The executive director (ED) of the Texas Commission on Environmental Quality (TCEQ or commission) is issuing this public notice of intent to take no further action at the Barlow's Wills Point Proposed State Superfund site (the Site) and to delete the Site from its proposed-for-listing status on the state registry. This is a list of state Superfund sites which may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment. The commission is proposing this deletion because the ED has determined that due to removal and remedial actions that have been performed, the Site no longer presents such an endangerment. This combined notice was also published in the legal notice sections of the *Canton Herald* and *Edgewood Enterprise* on January 9, 2003, and in the *Wills Point Chronicle* on January 10, 2003.

The Site was proposed for listing on the state registry in the November 12, 1996 edition of the *Texas Register* (21 TexReg 11126). The Site, including all land, structures, appurtenances, and other improvements, is located in an unincorporated area of Van Zandt County, Texas on the south side of US Highway 80, 3.4 miles east of the intersection of US Highway 80 and State Highway 64 in Wills Point, Texas. The Site was operated as an electroplating facility from April 1987 to March 1990. In March 1990, the Site was abandoned. The Site was investigated under the state Superfund program. The investigation indicated an area of nickel contaminated soil and detectible nickel concentrations from wipe samples collected from the slab of the on-site building. No contamination was detected in the groundwater. The contaminated soil was removed to meet residential clean-up criteria established by 30 Texas Administrative Code (TAC), Chapter 350 (Texas Risk Reduction Program, TRRP). The slab was decontaminated using the established method of pressure washing with water. The subsurface of the concrete building foundation contains nickel above the protective concentration levels required for residential property. To prevent exposure to such levels of this chemical of concern, the integrity of the concrete building foundation on the property must not be disturbed.

In accordance with Texas Health and Safety Code, §361.190 and TRRP, §350.335, no person may take any action to substantially change the manner in which this property is used without first notifying the ED of the TCEQ and receiving written approval for the change. The notice must be in writing, addressed to the ED, sent by certified mail (return receipt requested), and include a brief description of the proposed change in use. A deed notice was placed in the Van Zandt County records to provide information of this requirement.

As a result of the removal and remedial actions that have been performed at the Site, the ED has determined that the Site no longer presents an imminent and substantial endangerment to public health and safety and the environment. Therefore, no further remedial action is necessary at the Site and the Site is eligible for deletion from the state registry as provided by 30 TAC §335.344(c).

The commission will hold a public meeting to receive comment on the proposed deletion of the Site and the determination to take no further action. This public meeting will be legislative in nature and is not a contested case hearing under Texas Government Code, Chapter 2001. The public meeting is scheduled for 7:00 p.m. on Thursday, February 20, 2003, in Council Chambers of Wills Point City Hall, 120 North 5th Street, Wills Point, Texas. After comments from the meeting are received, monitoring wells installed to investigate the groundwater will be plugged and abandoned in accordance with applicable TCEQ guidelines. The fence that was installed as part of the investigation will be left in place. The lock on the gate of the fence will be removed. Following a deletion from the Superfund registry, responsibility for maintenance of the Site reverts back to the Site owner.

All persons desiring to make comments may do so prior to or at the public meeting. All comments submitted **prior** to the public meeting must be received by 5:00 p.m., February 20, 2003. **Comments should be sent in writing** to Mr. Dan Switek, Project Manager, Texas Commission on Environmental Quality, Remediation Division, MC-143, P. O. Box 13087, Austin, Texas 78711-3087, or by facsimile to (512) 239-2450. The public comment period for this action will end at the close of the public meeting on February 20, 2003.

A portion of the record for this Site, including documents pertinent to the proposed deletion of the Site, is available for review during regular business hours at the Van Zandt County Library, 317 First Monday Lane, Canton, Texas, telephone number (903) 567-4276. Copies of the complete public record file may be obtained during business hours at the commission's Records Management Center, Building E, First Floor, Records Customer Service, 12100 Park 35 Circle, MC-199, Austin, Texas 78753, telephone number (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee. Handicapped parking is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

For further information regarding this meeting on the Site, please call Mr. Bruce McAnally, Texas Commission on Environmental Quality Community Relations, at (800) 633-9363.

TRD-200208582
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 31, 2002

Notice of Opportunity to Comment on a Default Order of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Order (DO). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director (ED) of the commission in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **February 3, 2003**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate a proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on February 3, 2003**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434.

The commission's attorneys are available to discuss the DO and/or the comment procedure at the listed phone numbers; however, comments on the DO should be submitted to the commission in **writing**.

(1) COMPANY: Beltway Express, Inc. dba Beltway Express Food Mart; DOCKET NUMBER: 2001-0347-PST-E; TCEQ ID NUMBER: 74225; LOCATION: 11002 South Sam Houston Parkway, Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.245(1) and Texas Health and Safety Code (THSC), §382.085(b), by failing to successfully perform the initial compliance test for stage II vapor recovery equipment; 30 TAC §115.246(7) and THSC, §382.085(b), by failing to maintain and make available the stage II records for the vapor recovery equipment installed at the station; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training and instruction in the operation and maintenance of stage II vapor recovery systems; 30 TAC §334.7, by failing to register its underground storage tanks (USTs) with the agency on authorized agency forms; PENALTY: $5,000; STAFF ATTORNEY: Kelly W. Mego, Litigation Division, MC R- 12, (713) 422-8916; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200208510
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 23, 2002

Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **February 3, 2003**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on February 3, 2003**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO should be submitted to the commission in **writing**.

(1) COMPANY: BP Products North America, Inc.; DOCKET NUMBERS: 2001-0329-AIR-E and 2001-1088-AIR-E; TCEQ ID NUMBER: GB-0004-L; LOCATION: 2401 5th Avenue South, Texas City, Galveston County, Texas; TYPE OF FACILITY: petroleum refinery; RULES VIOLATED: 30 TAC §§101.4, 112.31, and 112.32, and Texas Health and Safety Code (THSC), §382.085(a) and (b), by discharging one or more air contaminants in such concentration and of such duration as are or may tend to be injurious to human health or welfare; 30 TAC §101.20(1), 40 Code of Federal Regulations (CFR), §60.105(a)(4), and THSC, §382.085(b), by failing to continuously monitor the fuel gas; 30 TAC §101.20(1), 40 CFR §60.13(a), and THSC, §382.085(b), by failing to include cylinder gases certified valves in the continuous emission monitoring systems report; 30 TAC §115.112(a)(2)(A) and THSC, §3822.085(b), by failing to close the sampling hatch; 30 TAC §115.131(a) and THSC, §382.085(b), by failing to control emissions from the Pipestill 3A water separator during a maintenance activity; 30 TAC §101.6(a)(2)(F), §101.6(b)(5) and (6) and THSC, §382.085(b), by failing to include all the required information in the initial notification and final report for the upset; THSC, §382.085(a), by failing to prevent unauthorized emissions resulting from a corroded pipeline rupture; 30 TAC §101.6(a) and THSC, §382.085(b), by failing to report a reportable upset within 24 hours of discovery; 30 TAC §116.115(c), Permit Number 8810, Special Condition 4, and THSC, §382.085(b), by exceeding the allowable hourly emission rate; 30 TAC §101.6(a)(2)(F), §101.6(b)(6), and THSC, §382.085(b), by failing to include an estimate of the catalyst emissions in the initial and final reports; 30 TAC §§101.4, 101.20, 111.111(a)(1)(B), and 116.115(c), Permit Number 2384, Special Conditions 1 and 7, and THSC, §382.085(a) and (b), by failing to control excess opacity and catalyst emissions from an upset resulting in nuisance conditions; PENALTY: $225,000; STAFF ATTORNEY: David Speaker, Litigation Division, MC 175, (512) 239-2548; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Flat Creek Cove Water Supply; DOCKET NUMBER: 2002-1358-PWS-E; TCEQ ID NUMBER: 16568; LOCATION: FM 315 on the west side of Lake Palestine, Henderson County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.109(c)(2) and §290.109(g), and THSC §341.033(d) by failing to collect and submit routine monthly bacteriological samples and failing to provide notice of the sampling deficiencies; 30 TAC § 290.109(c)(3) and §290.109(g), by failing to collect and submit the appropriate number of repeat bacteriological samples following coliform-positive sample results and failing to provide notice of the failure to conduct the repeat sampling; § 290.51(a) by failing to pay the public health service fees; PENALTY: $1,400; STAFF ATTORNEY: Shannon Strong, Litigation Division, MC 175, (512) 239- 6201; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(3) COMPANY: Hadeel Corporation dba H and H Food Mart Texaco; DOCKET NUMBER: 2002-0047-PST-E; TCEQ ID NUMBER: 05593; LOCATION: 5001 Trail Lake Drive, Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to perform the annual pressure decay test; 30 TAC § 115.242(4) and (5), and THSC, § 382.085(b), by failing to repair or replace leaking Stage II vapor recovery equipment; 30 TAC §334.21, by failing to pay the underground storage tank (UST) registration annual fee for fiscal year 2000; PENALTY: $2500; STAFF ATTORNEY: Lisa Lemanczyk, Litigation Division, MC 175, (512) 239-5915; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2301 Gravel Drive, Forth Worth, Texas 76118-6951, (817) 588- 5800.

(4) COMPANY: Samuel Holcomb dba Holcomb Oil Recycling; DOCKET NUMBER: 2002- 1049-MSW-E; TCEQ ID NUMBER: A85038; LOCATION: 6228 Osprey, Houston, Harris County, Texas; TYPE OF FACILITY: oil recycling; RULES VIOLATED: 30 TAC §324.22 and §37.2015, by failing to demonstrate the soil remediation financial assurance required for used oil handlers; PENALTY: $400; STAFF ATTORNEY: Diana Grawitch, Litigation Division, MC 175, (512) 239- 0939; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200208509
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 23, 2002

♦ ♦ ♦

Office of the Governor

Request for Grant Applications (RFA) for Rural Domestic Violence and Child Victimization Enforcement Grant Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications from local rural projects that enhance the safety of victims of domestic violence, dating violence, and child abuse under the fiscal year 2004 grant cycle.

Purpose: The primary purpose of the Rural Program is to enhance the safety of victims of domestic violence, dating violence, and child abuse by supporting projects uniquely designed to address and prevent these crimes.

Available Funding: Federal funding is authorized under the Victims of Trafficking and Violent Prevention Act of 2000; Omnibus Crime Control and Safe Streets Act of 1968, as amended, §1001, 42 U.S.C. §13971 and §3796bb(b). All grants awarded from this fund must comply with the requirements contained therein.

Standards: Grantees must comply with the applicable grant management standards adopted under Texas Administrative Code §3.19, which are hereby adopted by reference. In addition, projects must comply with one or more of the following statutory purpose areas: (1) implement, expand, and establish cooperative efforts and project between law enforcement officers, prosecutors, victim advocacy groups, and other related parties to investigate and prosecute incidents of domestic violence, dating violence, and child abuse; (2) provide treatment, counseling and assistance to victims of domestic violence, dating violence, and child abuse, including immigration matters; and (3) work in cooperation with the community to develop education and prevention strategies directed toward such issues

Prohibitions: Grantees may not use grant funds or program income for proselytizing or sectarian worship.

Eligible Applicants: (1) native American tribal governments; (2) rural counties; (3) cities in rural counties; (4) non-profit corporations located in rural counties; (5) faith-based organizations located in rural counties. Faith-based organizations must be tax-exempt nonprofit entities as certified by the Internal Revenue Service. Rural counties is defined as counties with 52 or less people per square mile.

Project Period: The award period for these grants will be 24 months.

Application Process: Interested parties can access the Federal Application Kit through the Office on Violence Against Women web site address located at http://www.ojp.usdoj.gov/vawo/applicationkits.htm

Closing Date for Receipt of Applications: All applications must be submitted directly to CJD via fascimile at (512) 475-2440, or by mail at P.O. Box 12428, Austin, Texas 78711-2428, and must be received by CJD by 10:00 a.m. , Wednesday, January 15, 2003.

Selection Process: Completed applications will be reviewed for eligibility and cost effectiveness by CJD and rated competitively by a committee selected by the director of CJD. One or more applications will then be sent on to the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice, for final funding decisions.

Contact Person: If additional information is needed, contact Angie Martin at CJD at (512) 463-1884.

TRD-200208531
David Zimmerman
Assistant General Counsel
Office of the Governor
Filed: December 23, 2002

♦ ♦ ♦

Texas Groundwater Protection Committee

Correction of Error

The Texas Commission on Environmental Quality (TCEQ) on behalf of the Texas Groundwater Protection Committee (TGPC) published a Notice of Public Comment Opportunity on the Draft Texas State Groundwater Protection Strategy. The notice, which appeared in the December 13, 2002, *Texas Register* (27 TexReg 11836), should have been under the heading for the Texas Groundwater Protection Committee rather than the Texas Commission on Environmental Quality.

On page 11836, in the paragraph entitled *How to Obtain a Copy* there is an incorrect web site address. The correct address is http://www.tnrcc.state.tx.us/admin/topdoc/as/188.pdf

TRD-200300007

♦ ♦ ♦

Texas Department of Health

Correction of Error

The Texas Department of Health (department) adopted final rules under 25 TAC Chapter 297, Indoor Air Quality, (TRD-200207978), which were published in the *Texas Register* December 13, 2002, (27 TexReg 11759).

Corrections are necessary for clarification and due to department errors.

On page 11759, the preamble states that §297.1 was adopted without changes. But, in the proposed rules published in the August 9, 2002 issue of the *Texas Register*, on page 7022, there was an error in §297.1(b), the 2nd sentence should state "...extend from the floor..." instead of "...extend from the door...".

The first paragraph of the preamble should state that §297.1 is adopted with changes as follows.

The Texas Department of Health (department) adopts the repeal of existing§§297.1-297.6, and adopts new §§297.1-297.10, concerning voluntary guidelines for indoor air quality (IAQ) in government buildings. Sections 297.1, and 297.3- 297.10 are adopted with changes to the proposed text as published in the August 9, 2002 issue of the*Texas Register* (27 TexReg7022). New §297.2 and the repeal of §§297.1-297.6 are adopted without changes, and the sections will not be republished in the *Texas Register*.

On page 11767, §297.4(b)(11), the 2nd sentence should state "...discarded to avoid the potential..." instead of "...discarded to avoid to potential...".

On page 11769,§297.5(g)(5), the 4th sentence should begin with "Additional..." instead of "Addition...".

On page 11772, §297.8(b)(1), the 3rd sentence should state "The references in subsection (b) of this section..." instead of "The references in subsection (6) of this section...".

On page 11772, §297.8(b)(3) should state "...milligrams per cubic meter (mg/m^3)..." instead of "...milligrams per cubic meter (mg/m^3)...".

On page 11826-11827, Table 1., Figure 25 TAC §297.8(b)(4), re: Fungi, Comfort/Health Effects column, "...(i.e., aches, fever, fatigue, and central nervous system problems). The word "system" was inserted after "nervous". In the MRL Guidelines column, "...<60% (preferably 50%) year round" was corrected to "...<60% (preferably <50%) year round".

On page 11828, Table 1., Figure 25 TAC §297.8(b)(4), re: Pesticides, Comfort/Health Effects column, the spelling of "organophophorus" was corrected to "organophosphorus". In the MRL Guidelines column, Chloropyrifos 0.002 mg/m3 and Dursban 0.002 mg/m3 were deleted as being individually listed and have been combined as Chlorpyrifos (Dursban) 0.002 mg/m3. In the Comments column, the spelling of "diedrin" was corrected to "dieldrin", and "Chloropyrifos" was corrected to "Chlorpyrifos".

On page 11829,Table 1., Figure 25 TAC §297.8(b)(4), re: Volatile Organic Compounds, MRL Guidelines column, "Alkanes C4-C16..." was corrected to "Alkanes C_4-C_{16}...", and "Alkanes C16" was corrected to Alkanes C_{16}...". In the Comments column, "...greater than 0.5 mg/m^3..." was corrected to "...greater than 0.5 mg/m^3...".

On page 11830, Table 1., Figure 25 TAC §297.8(b)(4), re: Footnotes under Table (1), "ppm = parts of contaminants per parts of air..." was corrected to "ppm = parts of contaminant per million parts of air...".

Figure: 25 TAC §297.8(b)(4)

TABLE 1. Common Indoor Air Conditions/Contaminants in Government Buildings

Condition or Contaminant	Major Sources	Comfort/Health Effects	MRL Guidelines [1]	Comments
Temperature	Weather, occupants, equipment, and HVAC systems.	Normally a comfort and productivity issue; high temperature may cause heat stress.	72 to 76 degrees Fahrenheit in the summer and 70 to 75 degrees Fahrenheit in the winter. Control within range of ± 2 degrees Fahrenheit for a given day.	Comfort related to temperature, relative humidity (RH), air velocity, and occupant preferences, activity and attire.
Relative Humidity (RH)	Moisture produced from weather, occupants, and other water sources.	Normally a comfort and productivity issue; high RH may cause “sticky feeling”, and moisture damage to building contents; low RH may cause dry/itchy eyes, mucous membranes and skin.	30-60 % 30-50 % preferred for better mold prevention. For low RH regions: <30% acceptable if no occupant discomfort.	Comfort related to temperature, RH, air velocity, activity and attire. Below 50% prevents most mold growth.
Air Velocity	HVAC systems, individual and equipment fans, significant area pressure changes.	Being too hot or too cold within the recommended temperature and relative humidity ranges, dry eyes, sore throats and nasal irritation.	25 to 55 feet per min (fpm).	Comfort related to temperature, RH, air velocity, activity and attire.
Allergens (allergy is a hypersensitivity to a substance that does not normally cause a reaction)	Allergies may be caused by protein or an antigen. Animal dander, cockroach droppings, dust mite fecal matter, insects and insect parts, dust, latex.	Sneezing, runny or congested nose, coughing, wheezing, postnasal drip, sore throat, watering eyes, itching eyes, nose and throat, and allergic shiners (dark circles under the eyes).	Allergens: Cat: 8 μg/g Dust Mite: 2 μg/g Cockroach: 5 μg/g	According to National Institute of Health as many as 50 million Americans are affected by allergic diseases.
Asbestos (fibrous material)	Building materials such as ceiling textures, wall compounds, resilient floor covering, pipe insulation.	Lung cancer, asbestosis, dyspnea, interstitial fibrosis, restricted pulmonary function and eye irritation.	0.01 fibers per cubic centimeter (f/cc)	Asbestos containing materials should not be used or installed in building.

Condition or Contaminant	Major Sources	Comfort/Health Effects	MRL Guidelines [1]	Comments
Carbon Dioxide (CO_2) (Odorless gas)	Occupants' respiration; unvented or poorly vented indoor combustion sources; vehicle exhaust via traffic and parking garages; and outside air.	Indicator of amount of outside air in area. High levels may result in complaints of odors, "stuffy air", sleepiness, fatigue, and headaches.	700 ppm above outdoor level - should trigger concern over adequate fresh air.	Acceptable levels should prevent complaints of odors (body odors) and stuffy air.
Carbon Monoxide (CO) (Odorless gas)	Outside air, unvented or poorly vented indoor combustion sources, such as gas heaters and appliances; and vehicle exhaust in parking garages.	Headaches, dizziness, and nausea. At moderate concentrations, angina, impaired vision and reduced brain function. High levels can be fatal.	9 ppm for 8 hrs. 35 ppm for 1 hr If the inside CO level exceeds the outside CO level, look for a possible inside source.	If high levels of CO suspected, remove occupants. Blood analysis can verify exposure if done within an hour.
Environmental Tobacco Smoke	Tobacco combustion.	Group A carcinogen by EPA, respiratory effects, multiple effects on children.	No level is considered acceptable, particularly for children and non-smokers.	Surgeon General recommends smoking only be allowed inside buildings if smoking area has separate ventilation system.
Formaldehyde (HCHO) (pungent odor)	Pressed-wood products (e.g. furniture and furnishings), embalming fluid, textiles and foam insulation.	Irritant of eyes, and respiratory tract, sensitizer, and possible carcinogen.	0.04 ppm Odor Threshold: 0.05-1.0 ppm	Tobacco smoke and other combustion sources are secondary sources.

Condition or Contaminant	Major Sources	Comfort/Health Effects	MRL Guidelines (1)	Comments
Fungi (mold, mildew, yeasts) (biological)	Outdoor air-not normally a major source in building with good air filtration systems. Wet/damp building materials and furnishings, particularly after 24 hours. Air handling systems. Poorly maintained indoor plants. Spoiling food.	Allergies (most common) - Sneezing, runny or congested nose, coughing, wheezing, and postnasal drip, sore throat, watering eyes, and itching eyes, nose and throat. Difficulty breathing. Nose, throat, skin and eye irritation, rashes, headaches, and less common symptoms (i.e., aches, fever, fatigue, and central nervous system problems).	Visible mold on surfaces or mold odors is unacceptable. Dry or discard water-damaged materials within 24 hours. Maintain relative humidity <60% (preferably <50%) year round.	Rely on visual inspection, odors, history of moisture problems and occupant complaints and health symptoms. Remove mold growth and eliminate source of moisture.
Hydrogen Sulfide (H_2S) (rotten egg odor)	Sewer gas Dry drain traps or broken sewer lines.	Irritant to eyes and respiratory tract, headache, dizziness, and nausea.	0.07 ppm Odor 0.001 ppm	Water must be kept in p-traps of drains that are connected to sewer lines.
Lead (Pb) (dust or fumes containing lead)	Paint, dust, welding and soldering activities and outdoor air	Brain damage, particularly in children under 6 years old, weakness, and anemia.	0.0015 mg/m^3	Flaking lead-based paint a concern. Certain lead-based paint abatement activities are regulated.
Legionella (bacteria)	Natural and man-made stagnant water sources. Warm conditions and certain pH conditions will accelerate growth.	Legionnaires' disease: form of pneumonia. Mild cough and low fever to rapidly progressive pneumonia and coma. Early symptoms include malaise, muscle pain, and headache; later symptoms include high fever, dry cough and shortness of breath.	Prevent sources of stagnant water, particularly warm sources that rapidly produce bacteria; or if not preventable, periodically chemically or thermally disinfect.	For hot water sources: holding temperature: 140° F; delivery temperature: 122° F, or monthly thermally disinfect.
Mercury (Hg) (Silver-white, heavy liquid metal)	Thermometers, barometers, batteries, fluorescent light bulbs, blood pressure devices and electrical switches.	Irritation to eyes, skin, cough, chest pain, trouble breathing depending on exposure.	0.0002 mg/m^3	

Condition or Contaminant	Major Sources	Comfort/Health Effects	MRL Guidelines [1]	Comments
Nitrogen Dioxide (NO_2) (acrid odor)	Leaking vented combustion appliances, unvented combustion appliances, outdoor air, diesel engines near loading docks. Welding, tobacco smoke.	Irritation to eyes, nose, throat. May induce cough. At higher concentrations depending on exposure time may result in chronic bronchitis, chest pain and pulmonary edema.	0.05 ppm	
Ozone (O_3) (pungent odor)	Electrostatic appliances, office machines, ozone generators, outdoor air.	Irritation to eyes and mucous membranes. Pulmonary edema and exposure times may lead to respiratory disease.	0.05 ppm	Can damage plants, some materials, particularly rubber-containing materials and certain plastics.
Particulate Matter (dust) (non-toxic particles; toxic particles covered elsewhere)	Construction and renovation activities, movement of materials, paper dust from printers, dust-producing activities and numerous outside sources.	Sneezing, coughing and itchy eyes. Some particles more hazardous than others, and can cause irritation to eyes and lungs. Respirable particles of greater hazard concern.	PM_{10} - 150 $\mu g/m^3$ (24 Hour)* $PM_{2.5}$ - 65 $\mu g/m^3$ (24 Hour) and 15 $\mu g/m^3$ (Annual Mean)*	* See 40 CFR 50.7 for definitions and additional information.
Pesticides (includes insecticides, fungicides, rodenticides, termiticide, herbicides, and fumigants.	Direct indoor application of pesticides by occupant or commercial applicator. Outside, particularly near agriculture and fogging for mosquitoes or other pests.	Irritation of eyes and mucous membranes, headache, dizziness, weakness, tingling sensation, nausea, blurred vision, vomiting, tremors, abdominal cramps, chest tightness, and liver damage. Some are possible carcinogen(s). Avoid skin contact with pesticides. Organochlorine and organophosphorus pesticides are generally more toxic than other type pesticides.	2,4-D 0.01 mg/m^3 2,4,5-T 0.10 mg/m^3 DDT 0.001 mg/m^3 Aldrin 0.0025 mg/m^3 Benomyl 0.05 mg/m^3 Chlordane 0.005 mg/m^3 Chlorpyrifos (Dursban) 0.002 mg/m^3 Dichlorvos 0.009 mg/m^3 Diazinon 0.001 mg/m^3 Heptachlor 0.0005 mg/m^3 Malathion 0.05 mg/m^3 Paraquat 0.001 mg/m^3	Avoid use of chemical pesticide treatments if possible. Chlordane, heptachlor, aldrin, and dieldrin should not be used. Chlorpyrifos (Dursban) and Diazinon should not be used indoors. Recommend use of businesses that conform to 22 Texas Administrative Code, §595.14 Reduced Impact Pest Control

Condition or Contaminant	Major Sources	Comfort/Health Effects	MRL Guidelines (1)	Comments
			Parathion 0.0005 mg/m³ Pyrethrum 0.05 mg/m³ Roundup 0.05 mg/m³ Sevin 0.050 mg/m³ Warfarin 0.001 mg/m³	Services.
Radon (Rn) (naturally occurring, odorless, radioactive gas)	Soil, rocks, and water from the natural breakdown (radioactive decay) of uranium. Radon also breaks down into radioactive decay products.	Radon and its decay products emit ionizing radiation which if inhaled can damage the lung tissue and may cause lung cancer over time.	4 picocuries per liter of air (pCi/L)	Buildings can inexpensively be tested for radon
Sulfur Dioxide (SO_2) (pungent odor)	Unvented space heaters (kerosene), other combustion sources, outdoor air.	Eye irritation, skin irritation, respiratory irritation	0.01 ppm	
Volatile Organic Compounds (VOCs) (many are odorless, some have odor)	New building materials and furnishings, consumer products, maintenance materials, outdoor air, cleaners, personal care products, tobacco smoke, paints, pesticides, solvents, combustion processes.	May cause variable responses such as irritation of eyes, nose and upper respiratory tract, headaches, lightheadedness, and nausea. A few VOCs have been directly linked to cancer in humans and others are suspected of causing cancer.	Acetone 26 ppm Alkanes C_4-C_{16} (if not listed) 2.5 mg/m³ Alkanes >C_{16} 0.07 mg/m³ Aromatic distillates, light 0.17 ppm Aromatic distillates, heavy 0.43 ppm Benzene 0.05 ppm 2-butoxyethanol 6 ppm decane 1.22 ppm Ethylbenzene 1.0 ppm* Gasoline (<0.9% benzene) 0.83 ppm n-hexane 0.6 ppm isobutane 3.4 ppm	For total VOCs: 0.3-3 mg/m³ - complaints possible; >3 mg/m³ -complaints likely. Product emission rate should not result in an indoor concentration level greater than 0.5 mg/m³ of total VOCs. * level for 14 to 364 days exposure ** level for 365 days and longer exposure

Condition or Contaminant	Major Sources	Comfort/Health Effects	MRL Guidelines [1]	Comments
Volatile Organic Compounds - continued			isopropyl alcohol 2.2 ppm Methylene chloride 0.6 ppm Naphtha, coal tar 0.62 ppm Naphthalene 0.002 ppm** Styrene 0.06 ppm** Tetrachloroethylene 0.2 ppm 1,1,1-trichloroethane 1.4 ppm Trichloroethlyene 0.175 ppm Toluene 1 ppm Xylenes (o,m,p) 1 ppm	

(1) MRL = Minimum Risk Level
Concentration units not defined in table:
mg/m^3 = milligrams of contaminant per cubic meter of air
ppm = parts of contaminant per million parts of air (on a volume per volume basis)
μg/g = micrograms of contaminant per gram of material

TRD-200300002

♦ ♦ ♦

Houston-Galveston Area Council

Public Notice

Notification of Extension of Public Comment Period for Amendment #190 to the 2002-2004 Transportation Improvement Program (TIP)

A public meeting was held at the Houston-Galveston Area Council (H-GAC) on Tuesday, December 16, 2002 to discuss proposed amendments to the 2002-2004 TIP. Based on the public comments received at the meeting, H-GAC is extending the public comment period for proposed amendment #190 to **February 5, 2003.**

This amendment would allow the Texas Department of Transportation (TxDOT) to begin right-of-way activities including right-of-way mapping and acquisition, utilities adjustments and relocation assistance for various roadway projects included in the 2022 Metropolitan Transportation Plan (MTP). Each project is shown with $1 of federal funding. The actual funding for the projects will be determined as project development progresses. This action simply allows TxDOT the ability to engage in right-of-way activities for the projects listed in the amendment.

To obtain a copy of the proposed amendment, please visit H-GAC's Web site at **www.hgac.cog.tx.us/transportation/index.html,** or call Pat Waskowiak, Transportation Senior Planner, at (713) 993-2456. Written comments may be submitted to Pat Waskowiak, Houston-Galveston Area Council, P.O. Box 22777, Houston, Texas 77227, emailed to pwaskowiak@hgac.cog.tx.us or faxed to (713) 993-4508.

TRD-200208563
Alan Clark
MPO Director
Houston-Galveston Area Council
Filed: December 30, 2002

♦ ♦ ♦

Texas Department of Insurance

Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Nationwide General Insurance Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting flex percentages from benchmark to +93 by coverage, class, and territory. The overall rate change is +17%.

Copies of the filing may be obtained by contacting the Texas Department of Insurance, P&C Actuarial Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 475-3017.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by January 23, 2003.

TRD-200208555
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 27, 2002

♦ ♦ ♦

Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Nationwide Mutual Fire Insurance Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting flex percentages from benchmark to +79 by coverage, class, and territory. The overall rate change is +7.4%.

Copies of the filing may be obtained by contacting the Texas Department of Insurance, P&C Actuarial Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 475-3017.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by January 23, 2003.

TRD-200208556
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 27, 2002

♦ ♦ ♦

Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Nationwide Mutual Insurance Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting various flex percentages from benchmark to +99 by coverage, class, and territory. The overall rate change is +6.8.

Copies of the filing may be obtained by contacting the Texas Department of Insurance, P&C Actuarial Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 475-3017.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by January 23, 2003.

TRD-200208557
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 27, 2002

♦ ♦ ♦

Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Nationwide Property and Casualty Insurance Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting flex percentages from benchmark to +99 by coverage, class, and territory. The overall rate change is +7.6%.

Copies of the filing may be obtained by contacting the Texas Department of Insurance, P&C Actuarial Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 475-3017.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by January 23, 2003.

TRD-200208558
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 27, 2002

Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by The Fidelity and Casualty Company of New York proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting the flex percentage of 80% by coverage and territory for all classes. The overall rate change is +20%.

Copies of the filing may be obtained by contacting Judy Deaver, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 322-3478.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by January 22, 2003.

TRD-200208564
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 30, 2002

Texas Department of Mental Health and Mental Retardation

Notice Announcing Pre-Application Orientation (PAO) for Enrollment of Medicaid Waiver Program Providers

The Texas Department of Mental Health and Mental Retardation (TDMHMR), pursuant to 25 TAC §419.704, will hold a Pre-Application Orientation (PAO) for persons seeking to participate as a program provider in the Home and Community-Based Services (HCS), Home and Community-Based Services-OBRA (HCS-O), or Mental Retardation Local Authority (MRLA) program.

The PAO will be held at 8:30 a.m., Monday, April 14, 2003, in Austin, Texas. Persons wanting to attend the PAO must request a registration form by letter or by fax. Requests should be addressed to Bill Fordyce, Enrollment/Sanctions Manager, Medicaid Administration, TDMHMR, PO Box 12668, Austin, Texas 78711-2668. The fax number is (512) 206-5725.

Upon receipt of a written request, TDMHMR will provide the applicant with information regarding the provider application enrollment processes and a registration form to the requestor. Completed registration forms must be returned to TDMHMR no later than 5:00 p.m., Tuesday, March 11, 2003. Written requests for a registration form received by TDMHMR after Monday, March 3, 2003, may not be timely enough to meet the March 11, 2003, registration form return date. If the registration form is not returned to TDMHMR by March 11, 2003, the form is invalid and the applicant will be required to reapply when the next PAO is announced.

Persons requiring an interpreter for the deaf or hearing impaired or other accommodation should contact Helen Rayner by calling (512) 206-5249 or the TTY phone number of Texas Relay, which is 1-800-735-2988, at least 72 hours prior to the PAO. You may also contact Helen Rayner for additional information concerning the PAO.

TRD-200300005
Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Filed: January 2, 2003

Public Utility Commission of Texas

Notice of Amendment to Interconnection Agreement

On December 20, 2002, Southwestern Bell Telephone, LP doing business as Southwestern Bell Telephone Company and AT&T Communications of Texas, LP, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27146. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 3 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27146. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by January 22, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to the commission's Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 27146.

TRD-200208585
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 31, 2002

Notice of Application for Certificate of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on December 20, 2002, to construct a transmission line and substation in southern Denton County, Texas.

Docket Style and Number: Application of Brazos Electric Cooperative for a Certificate of Convenience and Necessity for Proposed Transmission Line in Denton County. Docket No. 27144.

The Application: Brazos Electric Power Cooperative, Inc. (BEPC), the wholesale power provider for CoServ Electric (CoServ), gives notice of its intent to obtain a Certificate of Convenience and Necessity to design and construct a single-pole double circuit 138-kV transmission line and substation in southern Denton County, Texas. The Cross Timbers substation will be a 138-kV distribution substation. The substation will be fed by a double circuit 138-kV transmission line and will provide distribution power through two 138/25-kV 50 MVA substation transformers. Approximately 4 to 5 acres are required for construction of the substation; however, additional property (15-20 acres) may be acquired for future transmission improvements. The proposed transmission line will be approximately 4 miles in length. The estimated cost of the proposed project is $8,082,900.

BEPC's preferred route (route 2, site 4: M'-K-H) will begin at a newly constructed substation (Cross Timbers) located approximately 0.5 miles east of the intersection of Hwy. 377 and FM 1171 within the Town of Flower Mound, Texas. The proposed substation will be sited north of FM 1171 in the general proximity whereupon Texas Municipal Power Agency's (TMPA) 345-kV transmission line intersects Oncor Energy's (Oncor) NW Carrollton- Roanoke 345-kV transmission line. From this point, BEPC's proposed 138-kV transmission line will proceed southwest for approximately 4.0 miles paralleling Oncor's existing NW Carrolton- Roanoke 345-kV transmission line terminating at a point south of State Highway 114; whereupon, Brazos Electric will tap its existing Roanoke- IBM transmission line

The deadline for intervention in this proceeding is February 3, 2003. Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 27144.

TRD-200208580
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 30, 2002

Notice of Application for Certificate of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on December 20, 2002, to construct a transmission line in Jefferson, Liberty, Harris, and Montgomery Counties.

Docket Style and Number: Application of Entergy Gulf States, Inc. for a Certificate of Convenience and Necessity for Proposed Transmission Line in Jefferson, Liberty, Harris, and Montgomery Counties. Docket No. 27145.

The Application: Entergy Gulf States, Inc. (EGSI) gives notice of its intent to obtain a Certificate of Convenience and Necessity to install, on existing right-of-way, a double circuit 230-kV transmission line which would traverse Jefferson, Liberty, Harris and Montgomery Counties and install, on property owned by EGSI, a new substation in Montgomery County, Texas.

EGSI stated in its application that rapid growth in the above-named counties has pushed existing electric facilities to their limits, and this project is designed to ensure adequate and reliable service for the affected area in the future. The estimated cost of the project is approximately $40 million.

Description of Preferred Route: The previously certificated route (PCR) exits the China Substation to the west as a single-circuit line, goes approximately 0.2 mile, turns and continues south, crossing U.S. Highway 90 (US 90), for approximately 2.6 miles to the intersection of the right-of-way (ROW) of two 138-kV transmission lines (Lines 88 and 424). The PCR turns west and continues on the south side of the existing ROW for 31.4 miles to a point just east of the Dayton Substation. In this section, Line 88 would be rebuilt as a double circuit with the 230-kV PCR. From approximately 0.3 mile east of the Dayton substation, the PCR continues southwesterly, turns to the west, crosses State Highway 146 (SH 146), and turns to the northwest where it crosses to the north side of the transmission line corridor for 138-kV Lines 86 and 10 (a distance of approximately 1.9 miles). From the intersection with the Line 86 and Line 10 ROW, the PCR will be constructed as a double-circuit line, with Line 86 rebuilt as the second circuit. This double-circuit segment will continue for approximately 2.8 miles to the west-southwest. The PCR then turns northwest and continues as a single-circuit line for approximately 13.4 miles, paralleling Line 86 on the north side of the existing ROW. The PCR then crosses to the south side of the ROW and continues as a single circuit on the south side of the existing ROW parallel to a double-circuit transmission line (Lines 586 and 571) northwest to the Porter Substation, a distance of approximately 12.3 miles. The total length of the PCR is approximately 64.6 miles.

The deadline for intervention in this proceeding is February 4, 2003. Persons wishing to comment on the action sought should contact the

Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 27145.

TRD-200208578
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 30, 2002

Notice of Application for Certificate of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on December 27, 2002, to construct a transmission line Bell County, Texas.

Docket Style and Number: Application of Oncor Electric Delivery Company for a Certificate of Convenience and Necessity for Proposed Transmission Line in Bell County. Docket Number 27173.

The Application: Oncor Electric Delivery Company (Oncor) gives notice of Oncor's intent to obtain a Certificate of Convenience and Necessity to construct a double circuit 138-kV transmission line in Bell County, Texas. The name of this project is the Temple Pecan Creek to Temple North 138-kV Transmission Line Project.

Preferred Transmission Line Route (Route 2): The preferred transmission line route (Route 2) begins at the proposed Oncor Temple Pecan Creek Switching Station to be located north of FM 438 and approximately 3,750 feet west of Apple Cider Road, in Bell County, Texas. The new transmission line route will exit the proposed Temple Pecan Creek Switching Station and extend west, parallel and north of FM 438, for approximately 3,280 feet to an angle point located approximately 7,750 feet west of Apple Cider Road. From the angle point, the new transmission line route will proceed across FM 438 in a southwesterly direction for approximately 500 feet to an angle point located on the south side of FM 438 approximately 8,240 feet west of Apple Cider Road. From the angle point, the new transmission line route will proceed in a westerly direction for approximately 2,200 feet to an angle point located approximately 400 feet west of the intersection of East Bottoms Road and Bottoms Road. This segment of the new transmission line route will parallel the south side of FM 438, cross FM 438 then cross East Bottoms Road twice and proceed west to the intersection with a Koch natural gas pipeline. From the angle point, the new transmission line route will proceed along the south side of the existing Koch pipeline in a south/southwesterly direction for approximately 750 feet to an angle point located approximately 1,000 feet west/southwest of the intersection of East Bottoms Road and Bottoms Road. From this angle point, the new transmission line route will proceed in a southwesterly direction, parallel and south of the same existing Koch pipeline, for approximately 6,100 feet to an angle point located approximately 2,250 feet south/southwest of the intersection of Cottonwood Creek Road and Gun Club Road. This segment of the new transmission line route will cross Cottonwood Creek Road. From this angle point, the new transmission line route will proceed in a west/northwesterly direction, parallel to and south of the same existing Koch pipeline, for approximately 5,000 feet to an angle point located approximately 550 feet east of an existing Oncor transmission line and approximately 1,400 feet east of the intersection of the Loop 363 and Lower Troy Road. This segment of the new transmission line route will cross Gun Club Road. From this angle point, the new transmission line route will parallel and be south of the same existing Koch pipeline proceeding in a southwesterly direction for approximately 650 feet to an angle point located at the intersection of the same Koch pipeline with an existing Oncor transmission line. From this angle point, the new transmission line route will parallel and be east of an existing Oncor transmission line, proceeding south/southeast for approximately 1,500 feet to an angle point located at its intersection with Loop 363, approximately one mile east/southeast of the intersection of Loop 363 and IH-35. From this angle point, the new transmission line route will parallel and be southeast of an existing Oncor transmission line and will cross Loop 363, proceeding southwest for approximately 500 feet to an angle point. From this angle point, the new transmission line route will proceed in a southerly direction for approximately 600 feet to an angle point located at the intersection of two existing Oncor transmission lines. The intersection of these two Oncor transmission lines is located approximately 2,800 feet south/southwest of the intersection of Loop 363 and Lower Troy Road. From the angle point, the new transmission line route will proceed in a westerly direction for approximately 1,600 feet to a slight angle point located immediately west of Lower Troy Road. This segment of the new transmission line route will cross the north/south Oncor transmission line, be south of and parallel to an existing east/west Oncor transmission line, and will cross Lower Troy Road. From the angle point, the new transmission line route will proceed in a westerly direction for approximately 2,300 feet to the point that it enters the Temple North Switching Station site. This segment of the new transmission line route will be south of and parallel to an existing Oncor transmission line. The estimated cost of this project is $22,418,894.

The deadline for intervention in this proceeding is February 10, 2003. Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket No. 27173.

TRD-200208579
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 30, 2002

Public Notice of Amendment to Interconnection Agreement

On December 19, 2002, Dobson Cellular Systems, Inc. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supp. 2003) (PURA). The joint application has been designated Docket Number 27141. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk.

Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27141. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by January 22, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 27141.

TRD-200208527
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 23, 2002

Public Notice of Amendment to Interconnection Agreement

On December 19, 2002, AT&T Wireless Services, Inc. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supp. 2003) (PURA). The joint application has been designated Docket Number 27143. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27143. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by January 22, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 27143.

TRD-200208529
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 23, 2002

Public Notice of Interconnection Agreement

On December 19, 2002, Bullseye Telecom, Inc. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supp. 2003) (PURA). The joint application has been designated Docket Number 27137. The joint application and the underlying interconnection agreement is available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27137. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by January 22, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 27137.

TRD-200208523
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 23, 2002

Public Notice of Interconnection Agreement

On December 19, 2002, KMC Telecom V, Inc. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of adoption of existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA). The joint application has been designated Docket Number 27138. The joint application and the underlying interconnection agreement is available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27138. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by January 22, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27138.

TRD-200208524
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 23, 2002

Public Notice of Interconnection Agreement

On December 19, 2002, KMC Telecom III, Inc. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of adoption of existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA). The joint application has been designated Docket Number 27139. The joint application and the underlying interconnection agreement is available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27139. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by January 22, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27139.

TRD-200208525
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 23, 2002

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27140. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by January 22, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 27140.

TRD-200208526
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 23, 2002

Public Notice of Interconnection Agreement

On December 19, 2002, Texas RSA 8 Limited Partnership d/b/a Texas Cellular and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of adoption of existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA). The joint application has been designated Docket Number 27140. The joint application and the underlying interconnection agreement is available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

Public Notice of Interconnection Agreement

On December 19, 2002, Delta Phones, Inc. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supp. 2003) (PURA). The joint application has been designated Docket Number 27142. The joint application and the underlying interconnection agreement is available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27142. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by January 22, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 27142.

TRD-200208528
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 23, 2002

Public Notice of Request for Comments on Strawman Rule Regarding Competitive Energy Services

The staff of the Public Utility Commission of Texas (commission) will issue a strawman rule regarding competitive energy services on Monday, January 20, 2003 in Project Number 26418, *PUC Rulemaking to Address Competitive Energy Services*. The strawman rule will contain proposed amendments to the commission's substantive rules §25.341, relating to Definitions, and §25.343, relating to Competitive Energy Services.

A copy of the strawman proposal may be obtained from the commission's Central Records division, online at www.puc.state.tx.us/rules/rulemake/26418/26418.cfm, or through the commission's interchange system at www.puc.state.tx.us/interchange/index.cfm. The commission staff requests that interested persons submit comments on the strawman proposal by filing 16 copies with the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326 on or before Monday, February 10, 2003. Reply comments may be submitted on Tuesday, February 18, 2003. All responses should reference Project Number 26418.

Questions concerning the strawman proposal or this notice should be referred to Sally Talberg, Policy Development Division, at (512) 936-7006 or sally.talberg@puc.state.tx.us. Hearing and speech- impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200208516
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 23, 2002

Public Notice of Workshop on Wholesale Market Design Issues in the Electric Reliability Council of Texas

The Public Utility Commission of Texas (commission) will hold a workshop on wholesale market design issues in the Electric Reliability Council of Texas (ERCOT), on Monday, January 13, 2003, beginning at 1:00 p.m. and Tuesday, January 14, 2003, beginning at 9:30 a.m. in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 26376, *Rulemaking Proceeding on Wholesale Market Design Issues in the Electric Reliability Council of Texas*, has been established for this proceeding. This meeting will discuss the type of transmission congestion management system that ERCOT should use.

The commission expects to make available in Central Records under Project Number 26376 an agenda for the format of the workshop, seven days prior to the workshop.

Questions concerning the workshop or this notice should be directed to Eric S. Schubert, Senior Market Economist, Market Oversight Division, 512-936-7398, eric.schubert@puc.state.tx.us. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200208511
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 23, 2002

South East Texas Regional Planning Commission

Request for Qualifications for Regional Hazard Mitigation Plan

South East Texas Regional Planning Commission (SETRPC) is serving as the lead agency for collaboration among local Offices of Emergency Management in Hardin, Jefferson and Orange counties to compile a comprehensive regional plan that evaluates the nature, and extent of vulnerability of the tri-county region as it relates to natural hazards such as hurricanes, tornadoes, storms, high water, fire, drought, snow storms, wild land fires, etc and which complies with state and federal mitigation plan requirements within the established time frame. To achieve this objective, SETRPC is facilitating the procurement of a consultant to develop the South East Texas Regional Mitigation Plan (SETRMP).

Creating the SETRMP will consist of the following major tasks:

1) providing guidance, technical assistance and leadership to local jurisdictions to procure the data necessary for the hazard analysis, Annex P and mitigation Action Plan for their respective communities.

2) aggregating the individual local jurisdiction components into a comprehensive regional Hazard Mitigation Plan that is acceptable to the Federal Emergency Management Agency (FEMA) and the Texas Division of Emergency Management (DEM).

submitting the individual components and comprehensive South East Texas Regional Mitigation Plan to SETRPC in written and electronic format no later than 12:00 noon, CST, Wednesday, July 30, 2003.

Specific FEMA Requirements include:

The South East Texas Regional Mitigation Plan shall contain the following:

P-1. Identify local, state and federal legal authorities pertinent to the subject of the annex, in addition to those cited in the Basic Plan.

P-2. Include a purpose statement that describes the reason for development of the annex.

P-3. Define terms and explain acronyms and abbreviations used in the annex.

P-4. Include a situation statement related to the subject of the annex.

P-5. Include a list of assumptions that influence hazard mitigation operations.

P-6. Describe the mitigation process and pre and post-disaster operations of local hazard mitigation program.

P-7. Describe the purpose, desired composition, and organization of the local hazard mitigation team.

P-8. Describe the interaction and coordination between the local hazard mitigation team and the state hazard mitigation team.

P-9. Describe how local hazard analysis will be developed, maintained and distributed and how those who need access to it can obtain it.

P-10. Describe the relationship between the state and local hazard analysis and the uses of those documents.

P-11. Describe how the local Mitigation Action Plan will be developed, maintained, and distributed and how those who need access to it can obtain it.

P-12. Describe the relationship and consistency between the state and local hazard mitigation plans.

P-13. Describe the interaction and coordination between the local hazard mitigation team, the local hazard analysis, and the local hazard mitigation plan.

P-14. Describe and depict the organization of the local hazard mitigation team to include all agencies/organizations that provide representatives to them.

P-15. Identify by position the individual responsible to serve as the local mitigation coordinator.

P-16. Identify the specific mitigation tasks and responsibilities of the Hazard Mitigation Coordinator.

P-17. Identify the general mitigation tasks and responsibilities shared by all team members.

P-18. Assign responsibility for the development, annual review, update and distribution of the local Hazard Mitigation Action Plan.

P-19. Assign responsibility for the development, annual review, update, and distribution of the local Mitigation Action Plan.

P-20. Assign responsibility for coordinating with and assisting the state hazard mitigation team during post-disaster action.

P-21. Identify the lines of succession for the HMC and the HMT.

P-22. Identify the policies on reporting and the maintenance of records concerning mitigation actions.

P-23. Specify the individual(s) by position responsible for developing and maintaining the annex.

P-24. Identify references pertinent to the content of the annex.

P-25. Identify the current local Hazard Analysis.

P-26. Identify the current local Mitigation Action Plan.

P-27. Include a list of agencies assigned to the HMT.

P-28. Include a Hazard Mitigation Team Report format and instructions for filing the report.

P-29. Define area covered by mitigation action plan and explain relationship to area(s) covered by hazard analysis and emergency management plans.

P-30. Identify political sub-divisions within the area.

P-31. Identify river basis, watersheds, and reservoirs that affect area.

P-32. Include discussion of geography, population, industries, and trends concerning future population, economic growth, and land use/development in the area.

P-33. Identify communities designated for special consideration because of minority or economically disadvantaged populations. Explain state and/or federal designations for each identified community.

P-34. Identify date of current hazard analysis and explain scheduled review process.

P-35. Identify past emergencies and disasters affecting the area. List hazards, occurrence dates, and consequences.

P-36. Identify hazards (natural hazards and other hazards) that cause the area to be vulnerable and at risk and describe quantitative (in terms of existing and estimated numbers and types) vulnerability, risk and potential dollar loses from each identified hazard to the following:

P-36.01. People

P-36.02. Housing Units

P-36.03. Critical Facilities

P-36.04. Special Facilities

P-36.05. Infrastructure and Lifelines

P-36.06. Hazmat Facilities; and

P-36.07. Commercial Facilities

P-37. Identify membership and functions of Hazard Mitigation Team

P-38. Identify active public-private partnerships and discuss the opportunities provided and their participation in development, implementation and maintenance of the mitigation action plan and other activities to reduce vulnerabilities and risk in the area.

P-39. Describe actions to share information, invite active participation, and coordinate plan development, implementation and maintenance with neighboring local governments.

P-40. Describe public involvement and participation in the development and implementation of the mitigation action plan. Include explanation of how public comments were invited and provided.

P-41. Identify actions and methods used to inform, educate and involve the public in vulnerability and risk reduction activities.

P-42. Identify and assess the effectiveness of previously implemented mitigation measures and of current mitigation-related policies, plans, practices and programs to include the following:

P-42.01. Hazard Mitigation Grant Program (HMGP) projects

P-42.02. Public Assistance (PA) program projects

P-42.03. Corps of Engineers studies, plans and projects

P-42.04. Plans, studies, and projects that received federal funding from the Texas Water Development Board (TWDB)

P-42.05. Actions and projects that received federal funding from Project Impact (PI), the Pre-Disaster Mitigation (PDM) program, or annual Property Protection-Mitigation (PP-M) program

P-42.06. Current master drainage, and storm water management plans

P-42.07. Current comprehensive, and capital improvement plans

P-42.08. Current building and fire codes. Identify date and type of codes in use and describe inspection/permit process, number and qualifications of inspection/permit process, number and qualifications of inspectors, and number of building starts and inspections conducted during last twelve month period

P-42.09. Findings/results of Building Code Effectiveness Grading Report (BCEGS). Include date of report and score received.

P-42.10. Current floodplain management ordinance(s) court order(s). Identify dates adopted and explain inspection/permit process, numbers and qualifications of floodplain administrators and staff, number of inspections and permits approved and the number and an explanation for why permit variances were allowed during the last twelve month period; and

P-42.11. Community Assistance Visit (CAV) report(s), Flood Insurance Studies and other technical assistance reports/findings. Identify type and date of current floodplain maps, repetitive loss category, and participation in the Community Rating System (CRS).

P-43. Describe mitigation goals and long-term strategy. Explain relationship and conformance with state mitigation goals and strategies, and the National Flood Insurance Program (NFIP).

P-44. Identify a prioritized listing of proposed mitigation actions that are consistent with the local hazard analysis, and provide details concerning what benefits will be achieved, who will accomplish the action, estimated costs, how it will be funded and an implementation and work schedule.

P-45. Identify dates and documentation of approval, adoption and implementation maintenance commitment by authorized official(s) of all political jurisdictions that participated in the plan development process and are covered by the mitigation action plan.

P-46. Include requirements for conducting and reporting an annual review and updating the mitigation action plan at least every five years. Describe actions to involve the public in the plan update process.

P-47. Identify the mitigation action plan title, area covered, date adopted, and locations where current copies are available for review.

P-48. Identify the impact of emergencies and disasters that occurred during the year. Impact to floodplains, repetitive loss areas and an assessment of effectiveness of previous and on going mitigation measures.

P-49. Identify prioritized list of proposed mitigation actions from mitigation action plan and discuss implementation problems and recommended solutions.

P-50. Identify and discuss any new mitigation measures to be added to mitigation action plan.

P-51. Identify name, phone, fax and e-mail address of person(s) that conducted the review and date prepared and submitted to DEM.

Contact: Sue Landry, Regional Planner, SETRPC, 2210 Eastex Freeway, Beaumont, Texas 77703, slandry@setrpc.org , (409) 899-8444, extension 122.

Closing Dates: If your firm is interested and qualified to provide professional services to conduct the work necessary for the SETRMP, please contact Sue Landry via letter or e-mail addressed to Sue Landry, 2210 Eastex Freeway, Beaumont, Texas 77703 or slandry@setrpc.org . All responding firms will receive a complete Request for Qualifications package. Final proposals will be due by 12:00 noon, CST on Friday, January 24, 2003.

Proposals will be reviewed by a technical sub-committee based on Consultant Selection Criteria included in the Request for Qualifications package mailed to interested parties.

TRD-200208502
Chester Jourdan
Executive Director
South East Texas Regional Planning Commission
Filed: December 20, 2002

♦ ♦ ♦

Texas Department of Transportation

Public Notice - Draft Environmental Impact Statement for State Highway 121T

In accordance with Title 43, Texas Administrative Code, §2.43(e)(4)(B), the Texas Department of Transportation (TxDOT) and the North Texas Tollway Authority (NTTA) are giving public notice of the availability of the Draft Environmental Impact Statement (DEIS) for the proposed construction of a new location roadway in the City of Fort Worth, Tarrant County, Texas. The public will have 45 days following publication of this notice to submit comments.

The proposed project, known as State Highway (SH) 121T, CSJ: 0504-02-008 and 0504-02-013, consists of the construction of an approximately 15-mile long multi-lane controlled access highway extending from Interstate Highway (IH) 30 south to Farm-to-Market Road (FM) 1187. Four alternatives (referred to as the Red, Green, Blue, and Yellow) were set forth in 1988. Since that time, based on public involvement, four alternatives (referred to as A, B, C, and D) have been developed. The A, B, C, D and the no-build alternatives are presented in the DEIS.

The proposed project will primarily be a divided highway. From the northern terminus at IH 30 to IH 20, the proposed roadway will ultimately be six lanes. South of IH 20 to FM 1187, the ultimate facility will be four lanes. The portion of the proposed roadway between IH 30 to Alta Mesa Drive will operate as a toll facility. Limited frontage access will be provided along the proposed roadway where needed to accommodate local traffic circulation. All alternatives share approximately the same horizontal alignment.

The purpose of the proposed roadway is to provide a major link in the regional highway network. The proposed project is part of the North Central Texas Council of Government's (NCTCOG) Metropolitan Transportation Plan and the City of Fort Worth's Master Thoroughfare and Comprehensive Plan. The proposed roadway will provide a needed alternate relief route to the congested urban arterial roadways serving southwest Tarrant County, as well as those in the IH 30 and IH 35W freeway corridors. The social, economic, and environmental impacts of the proposed project have been analyzed in the DEIS.

The results of the DEIS, in accordance with all known public, technical, and agency input throughout planning, environmental, and financial analysis, indicates that the recommended solution to the need for a major link in the regional highway network to provide an alternate relief route to the congested urban arterial roadways serving southwest Tarrant County, as well as those in the IH 30 and IH 35 W freeway corridors, is the construction of SH 121T.

Copies of the DEIS may be obtained at the Texas Department of Transportation, Fort Worth District Office, located at 2501 S.W. Loop at McCart Street, Fort Worth, Texas 76133 (mailing address P.O. Box 6868 Fort Worth, Texas 76115-0868). For further information, please contact Randy Bowers, P.E. at 817-370-6746. Copies of the DEIS may be reviewed at the City of Fort Worth, located at 1000 Throckmorton Street, Fort Worth, Texas 76102, the NCTCOG Headquarters, located at Center Point Two, 2nd floor, 616 Six Flags Drive, Arlington, Texas 76011, and the NTTA Headquarters, located at 5900 West Plano Parkway, Plano, Texas, 75093. In addition, copies of the DEIS may be reviewed at the following City of Fort Worth libraries: Bold Branch Library, Cool Branch Library, Diamond Hill/Jarvis Branch Library, East Berry Branch Library, Meadowbrook Branch Library, Northside Branch Library, Ridglea Branch Library, Riverside Branch Library, Seminary South Branch Library, Shamblee Branch Library, Central Library, Wedgwood Branch Library, East Regional Library, Southwest Regional Library. The DEIS my also be obtained on the TxDOT Homepage via the Internet at:

www.dot.state.tx.us

Select '**Transportation Studies**' on the homepage to obtain the DEIS.

TRD-200208566
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: December 30, 2002

♦ ♦ ♦

Texas Workers' Compensation Commission

Correction of Error

The Texas Workers' Compensation Commission adopted 28 TAC §133.308, concerning Medical Dispute Resolution By Independent Review Organizations, and 28 TAC §134.600, concerning Preauthorization, concurrent Review, and Voluntary Certification of Health Care. The rules were published in the December 27, 2002, *Texas Register* (27 TexReg 12301 and 12362).

In §133.308(f)(3) there is an apostrophe at the end of the paragraph that should be deleted. The paragraphs should read as follows.

"(3) Documentation of the request for and response to reconsideration, or, if the respondent failed to respond to a request for reconsideration, convincing evidence of carrier receipt of that request;"

In §134.600(n) on page 12364, the word "surgery" should be capitalized in the phrase "(relating to Spinal Surgery Second Opinion Process)". The subsection should read as follows.

"(n) Section 133.206 of this title (relating to Spinal Surgery Second Opinion Process) will remain in effect only for recommendations or resubmissions of recommendations for spinal surgery submitted prior to the effective date of this section."

TRD-200300004

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

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

Adopted Rules - sections adopted following a 30-day public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 26 (2001) is cited as follows: 26 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "26 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 26 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC)*** is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 19, April 13, July 13, and October 12, 2001). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

40 TAC §3.704.............950, 1820

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

Texas Register
Services

The *Texas Register* offers the following services. Please check the appropriate box (or boxes).

Texas Natural Resource Conservation Commission, Title 30

❑ **Chapter 285** $25 ❑ update service $25/year *(On-Site Wastewater Treatment)*
❑ **Chapter 290** $25 ❑ update service $25/year *(Water Hygiene)*
❑ **Chapter 330** $50 ❑ update service $25/year *(Municipal Solid Waste)*
❑ **Chapter 334** $40 ❑ update service $25/year *(Underground/Aboveground Storage Tanks)*
❑ **Chapter 335** $30 ❑ update service $25/year *(Industrial Solid Waste/Municipal Hazardous Waste)*

Update service should be in ❑ printed format ❑ 3 1/2” diskette

Texas Workers Compensation Commission, Title 28

❑ Update service $25/year

Texas Register Phone Numbers	**(800) 226-7199**
Documents	(512) 463-5561
Circulation	(512) 463-5575
Marketing	(512) 305-9623
Texas Administrative Code	(512) 463-5565

Information For Other Divisions of the Secretary of State’s Office

Executive Offices	(512) 463-5701
Corporations/	
Copies and Certifications	(512) 463-5578
Direct Access	(512) 475-2755
Information	(512) 463-5555
Legal Staff	(512) 463-5586
Name Availability	(512) 463-5555
Trademarks	(512) 463-5576
Elections	
Information	(512) 463-5650
Statutory Documents	
Legislation	(512) 463-0872
Notary Public	(512) 463-5705
Uniform Commercial Code	
Information	(512) 475-2700
Financing Statements	(512) 475-2703
Financing Statement Changes	(512) 475-2704
UCC Lien Searches/Certificates	(512) 475-2705

Please use this form to order a subscription to the *Texas Register*, to order a back issue, or to indicate a change of address. Please specify the exact dates and quantities of the back issues required. You may use your VISA or Mastercard. All purchases made by credit card will be subject to an additional 2.1% service charge. Return this form to the Texas Register, P.O. Box 13824, Austin, Texas 78711-3824. For more information, please call (800) 226-7199.

☐ **Change of Address**
(Please fill out information below)

☐ **Paper Subscription**
☐ One Year $200 ☐ First Class Mail $300

☐ **Back Issue ($10 per copy)**
_______ Quantity

Volume ________, Issue #_______.
(Prepayment required for back issues)

NAME____

ORGANIZATION ______________________________________

ADDRESS ____

CITY, STATE, ZIP ____________________________________

PHONE NUMBER _____________________________________

FAX NUMBER _______________________________________

Customer ID Number/Subscription Number ________________________
(Number for change of address only)

Payment Enclosed via ☐ Check ☐ Money Order
Mastercard/VISA Number ________________________________
Expiration Date _____/_____ Signature __________________________

Please make checks payable to the Secretary of State. Subscription fees are not refundable.
Do not use this form to renew subscriptions.

Visit our home on the internet at http://www.sos.state.tx.us.

Periodical Postage

PAID

Austin, Texas
and additional entry offices