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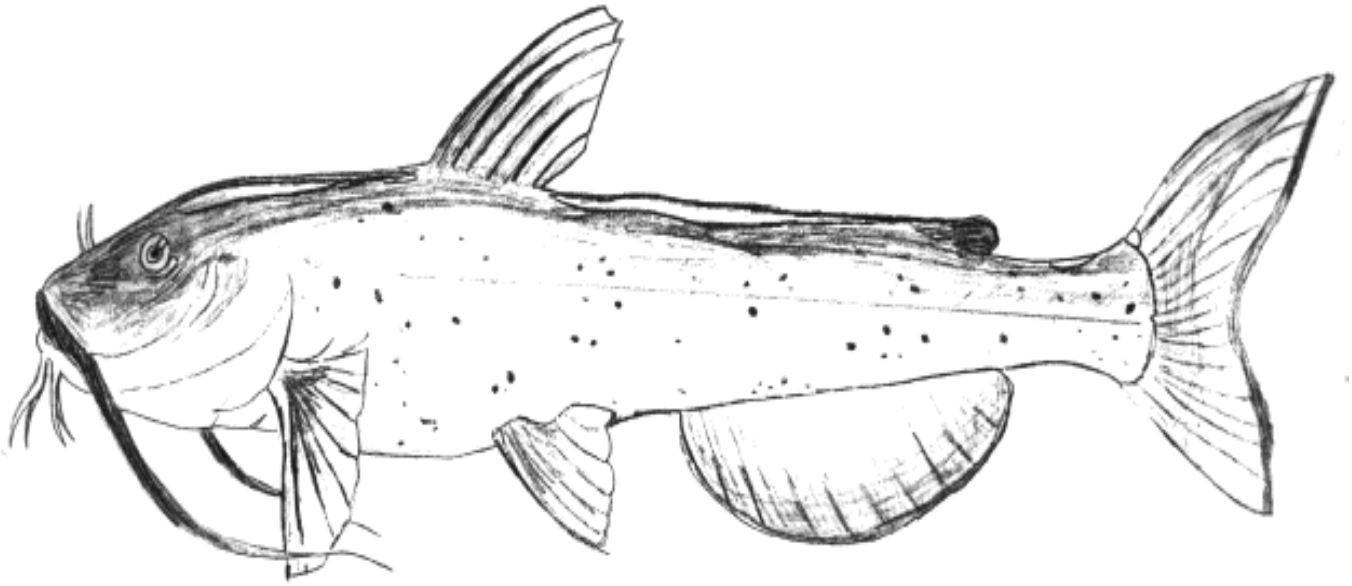

This month's front cover artwork:

Artist: *Jason Haynie*

7th Grade

W.S. Permenter Middle School

School children's artwork has decorated the blank filler pages of the *Texas Register* since 1987. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

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

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

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

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ATTORNEY GENERAL

PROPOSED RULES

WITHDRAWN RULES

ADOPTED RULES

OFFICE OF THE ATTORNEY GENERAL

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

Requests for Opinions

RQ–0005. Request from the Honorable Pete P. Gallego, Chair, Committee on General Investigating, Texas House of Representatives, P.O. Box 2910, Austin, Texas, 78768-2910, regarding whether the Open Meetings Act, Government Code, chapter 551, is applicable to the governing body of a hospital district when acting as a medical peer review committee, and related questions. Request Number 0005-JC

RQ–0006. Request from the Honorable Florence Shapiro, Chair, Senate Interim Committee on Sex Offenders, Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068, regarding Meaning of "full pay" for purposes of section 143. 073, Local Government Code, which requires a municipality to provide "leave with full pay" to a fire fighter or police officer who is absent for an illness or injury related to the person's line of duty. Request Number 0006-JC

RQ–0007. Request from the Honorable Jerry Patterson, Chair, Committee on Veteran Affairs and Military Installations, Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068, regarding whether a local government may impose restrictions on the carrying of concealed handguns by licensees. Request Number 0007-JC

RQ–0008. Request from the Honorable Jerry Patterson, Chair, Committee on Veteran Affairs and Military Installations, Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068, regarding whether a sports authority created under Local Government Code chapters 334 and 335 may exercise the power of eminent domain. Request Number 0008-JC

TRD-9900546
Elizabeth Robinson
Assistant Attorney General
Office of the Attorney General
Filed: January 26, 1999

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PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

Part V. General Services Commission

Chapter 111. Executive Administration Division

Subchapter B. Historically Underutilized Business Certification Program

1 TAC §111.13, §111.14

The General Services Commission proposes amendments to §111.13 and §111.14 concerning the Historically Underutilized Business ("HUB") Certification Program. The amendments are being proposed to clarify terminology within the current rules; eliminate the predetermined time deadlines for submission of required information; require that the General Services Commission HUB directory be utilized when locating potential HUB subcontractors; change the minimum number of required notices from five to three to align with the recommended minimum number of bids that should be obtained; and require that all data collected relating to HUB Good Faith Effort Requirements be maintained in the project file for audit purposes.

David Gragan, Director of Central Procurement Services, has determined that for the first five year period the proposed amendments are in effect there will be no effect to state or local government as a result of implementing these amendments.

David Gragan, Director of Central Procurement Services, has also determined that for each year of the first five year period that the amended sections are in effect the public benefit anticipated as a result of implementing these rules is a streamlined method for securing more goods and services from HUB vendors. There will be no effect on small business. There is no anticipated economic cost to persons who are required to comply with the rules as proposed.

Comments on the proposals may be submitted to Judy Ponder, General Counsel, General Services Commission, P.O. Box 13047, Austin, TX 78711-3047. Comments must be received no later than thirty days from the date of publication of the proposal to the *Texas Register*.

The amendments are proposed under the Texas Government Code, Title 10, Subtitle D, Chapter 2161, Section 2161.002 which provides the General Services Commission with the authority to promulgate rules under this Code.

The following statute is affected by these rules: Government Code, Title 10, Subtitle D, Chapter 2161.

§111.13. Annual Procurement Utilization Goals.

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

(c) Each agency shall make a good faith effort to meet or exceed the goals outlined in subsection (b) of this section. The percentage goals established in subsection (b) are overall annual program goals for each state agency applicable to the total annual dollar amount of an agency's contracts for each of the specific types of contracts. It may not be practicable to apply these goals to each contract. For each contract, state agencies may set higher or lower program goals than those outlined in this subsection. Agencies may consider HUB availability, HUB utilization, geographical location of the project, the contractual scope of work or other relevant factors. By implementing the following procedures, an agency shall be presumed to have made a good faith effort:

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

(6) provide potential bidders [~~contractors~~] with referenced list of certified HUBs for subcontracting;

(7) (No change.)

(d) (No change.)

§111.14. Subcontracts.

(a) (No change.)

(b) A state agency shall require a potential contractor to state whether it is a Texas certified HUB and whether [~~one or more~~] subcontractors will be used to perform the contract. After the bid opening and prior to award of the contract, bidders may be required to [~~The contractor shall~~] submit a copy of the notice described in subsection (c)(2) of this section and shall provide [~~with its offer, and shall submit a statement within seven working days following its offer that specifies~~] the expected percentage of work, if any, to be subcontracted.

(c) If the contractor plans to subcontract and is not using a HUB, the contractor [~~By implementing the following procedures, a contractor~~] shall be presumed to have made a good faith effort by having implemented the following procedure: [~~.~~]

(1) (No change.)

(2) Notify HUBs of the work that the contractor intends to subcontract. The preferable method of notice shall be in writing. The notice shall, in all instances, include a quantitative description of the subcontracting opportunities and identify the location to review contract specifications. The notice shall be made [~~provided~~] to potential subcontractors prior to submission of the contractor's bid. The contractor shall provide potential subcontractors reasonable time to respond to the contractor's notice. "Reasonable time" in this context is no less than five working days from receipt to respond unless circumstances require a different time period which is accepted by the agency , and documented in the project file.

(3) The contractor shall utilize the Commission's Centralized Master Bidders List and HUB Directory when searching for HUB subcontractors. In this effort, [~~The~~] the contractor shall provide [~~send~~] the notice described in paragraph (2) of this subsection to at least three certified HUBs [~~five businesses in the current commission directory of certified HUBs~~] that perform the type of work required in the area in which the work will be performed. Upon request, the contractor shall provide an official form of written documentation (i.e. phone logs, fax transmittals, etc.) to substantiate the notice described in paragraph (2) of this subsection. This information shall be retained as part of the project file.

(4)-(6) (No change.)

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

(f) In making a determination whether [~~that~~] a good faith effort has been made in cases where a bidder is planning to subcontract and not utilize a HUB, a state agency shall require the contractor to complete a checklist, and submit supporting documentation explaining in what ways the contractor has made a good faith effort according to each requirement, in a time frame [~~within 14 days~~] following selection but prior to award of the contract. The checklist shall include at least the following.

(1) Whether the contractor provided [~~written~~] notices to at least three [~~five~~] qualified HUBs or the contractor advertised in general circulation, trade association, and/or minority/women focus media concerning subcontracting opportunities.

(2) Whether the contractor provided [~~written~~] notice to at least three [~~five~~] qualified HUBs allowing sufficient time for HUBs to participate effectively.

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

(g) (No change.)

(h) State agencies shall review the checklist and the attached documentation submitted by the contractor to determine if a good faith effort has been made in accordance with this section or the contract specifications. If determined that a good faith effort has not been made in accordance with this section and the contract specifications, the bid will be rejected. The reasons for non-compliance shall be recorded in the project file [~~and issue a written notice of acceptance or deficiency of a good faith effort within 14 days of the agency's receipt. The notice of deficiency shall state the reasons for deficiency~~].

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 January 21, 1999.

TRD-9900389
Judy Ponder
General Counsel
General Services Commission
Earliest possible date of adoption: March 7, 1999
For further information, please call: (512) 463-3960

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Chapter 113. Central Purchasing Division

Subchapter A. Purchasing

1 TAC §113.20

The General Services Commission proposes amendments to §113.20 relating to group purchasing programs. By Act of the 75th Legislature, Chapter 1206, §8, 1997 Tex. Gen. Laws, 4632 (S. B. 1752) Section 2155.134, Texas Government Code, was amended to add state agencies to the list of institutions which may participate in group purchasing programs. The statute stipulates that for purchases in excess of $100,000 the purchasing entity must notify the commission of its intent to make the purchase. The entity may proceed with the purchase in 10 working days of the notice if the commission does not identify a better value available through the Commission. The proposed action adds state agencies to the existing §113.20 that governs group purchasing programs.

David P. Gragan, Director of Central Procurement Services, General Services Commission, has determined that for the first five year period these rules are in effect there will be no fiscal implications for state or local government as a result of implementing these amendments.

David P. Gragan 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 rules is that state agencies are permitted to use group purchasing processes in an attempt to obtain lower pricing when securing goods or services. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Judy Ponder, General Counsel, General Services Commission, P.O. Box 13047, Austin, TX 78711-3047. Comments must be received no later than thirty days from the date of publication of the proposal to the *Texas Register*.

The amendment is proposed under the Texas Government Code, Title 10, Subtitle D, Subchapter C, Chapter 2155, Section 2155.134, which provides the commission with the authority to promulgate rules to allow institutions of higher education or state agencies to make purchases through the group purchasing programs.

The following statute is affected by this rule: Texas Government Code, Title 10, Subtitle D, Chapter 2155, Section 2155.134.

§113.20. Group Purchasing Programs.

(a) An institution of higher education, as defined by Education Code, §61.003, or a state agency may purchase materials, supplies, or equipment through group purchasing programs in accordance with this section.

(b) Before making a particular purchase through a group purchasing program that costs more than $100,000, an [~~, a requesting~~] institution or state agency must notify the commission in writing that the purchase is being considered. The notification must be signed by the chief purchasing officer for the institution or state agency. The notification must include a complete description of the purchase, the vendor's name, quantity and price information, the terms and conditions of the contract, and any other information required by the commission.

(c) If the commission determines that a better value [~~lower price~~] is available through the commission, it will so inform the requesting institution or state agency within ten working days after receipt of the notification. Upon receipt of information that a better value [~~lower price~~] is available, the institution or state agency shall utilize established purchasing procedures for the purchase. If the institution or state agency does not receive such notification within ten working days, it may proceed with the purchase.

(d) An institution or state agency that participates in a group purchasing program must maintain, and compile monthly, information relating to the institution's or state agency's use, and the use by each operating division of the institution or state agency, of historically underutilized businesses, including information regarding subcontractors and suppliers. Institutions or state agencies shall require a contractor or supplier to whom [~~the institution has awarded~~] a contract has been awarded to report to the institution or state agency the identity and the amount paid to each historically underutilized business to whom the contractor or supplier has awarded a subcontract for the purchase of supplies, materials, or equipment.

(e) An institution or state agency that participates in group purchasing programs must submit a report to the commission, not later than March 15 of each year regarding the previous six-month period and September 15 of each year regarding the preceding fiscal year, of purchases from historically underutilized businesses that are made through the group purchasing programs.

(f) An institution or state agency participating in group purchasing programs shall adhere to the same ethical standards required of commission employees as set forth in §111.4 of this title (relating to Ethical Standards).

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 January 21, 1999.

TRD-9900397
Judy Ponder
General Counsel
General Services Commission
Earliest possible date of adoption: March 7, 1999
For further information, please call: (512) 463-3960

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Subchapter F. Vendor Performance and Debarment Program

1 TAC §113.100, §113.102

The General Services Commission proposes amendments to §113.100 and §113.102 concerning the Vendor Management and Debarment Program. The amendments to §113.100 add a definition for the term "responsible vendor". Amendments to §113.102 are proposed to eliminate predetermined debarment time periods; add flexible time periods to be determined administratively depending upon the seriousness of the vendor's action; establish the Director of Central Procurement as the primary agency official for implementation of the rule; and clarify various parts of the current rule. The recommended changes will render the rule more effective administratively for both the Commission, state agencies, cooperative purchasing members, the vendor community, and the public.

David P. Gragan, Director of Central Procurement, has determined that for the first five-year period these rules are in effect there will be no fiscal implications for state or local government as a result of enforcing these amendments.

David P. Gragan, Director of Central Procurement, has also determined 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 rules is that it provides a mechanism for disqualifying non-responsible vendors from doing business with the state. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with rules as proposed.

Comments on the proposals may be submitted to Judy Ponder, General Counsel, General Services Commission, P.O. Box 13047, Austin, TX 78711-3047. Comments must be received no later than thirty days from the date of publication of the proposal to the *Texas Register*.

The amendments are proposed under the authority of the Texas Government Code, Title 10, Subtitle D, Chapter 2155.077 which provides the Commission with the authority to promulgate rules for the Vendor Performance and Debarment Program.

The following statute is affected by these rules: Government Code, Title 10, Subtitle D, Chapter 2155.007.

§113.100. Definitions.

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

(1) Debarment – An exclusion from contracting or subcontracting with state agencies on the basis of any cause set forth in this chapter, commensurate with the seriousness of the offense, performance failure, or inadequacy of performance.

(2) Responsible Vendor – A vendor who has the capability to perform all contract requirements in full compliance with applicable state law, ethical standards, and applicable commission rules.

(3) Successor-in-interest – Any business entity that is substantially similar to a business entity that was previously debarred. For purposes of this chapter, it shall be presumed that a business entity that employs, or is associated with, any partner, member, officer, director, responsible managing officer, or responsible managing employee, of [~~or~~] a business entity that was previously debarred is a successor-in-interest.

§113.102. Vendor Performance and Debarment.

(a) The commission may debar a vendor for a period that is commensurate with the seriousness of the vendor's action and the damage to the state's interest and may [~~shall~~] remove a vendor's name from the commission's Centralized Master Bidders List for the

same period [no less than three months and not longer than one year for repeated complaints against the vendor]. If complaints resume after the vendor is reinstated on the bidders list, the Director of Central Procurement Services will re-evaluate the vendor's current performance and make a determination of the vendor's standing at that time [commission may bar the vendor from participating in state contracts for a period that is commensurate with the seriousness of the vendor's action and the damage to the state's interests].

(b) The Director of Central Procurement Services [commission] shall adopt a measurement system to evaluate a vendor's past performance as an indicator of a vendor's ability to perform under a state contract for purchases or other acquisitions under Government Code, Chapters 2155-2158:

(1) As a minimum, [the commission shall consider] the number and severity of a vendor's [an offeror's] performance problems in relation with volume of goods or services provided, the effectiveness of corrective actions taken by the vendor, and the age and relevance of past performance information at the time it is used shall be considered;

(2) Firms lacking relevant past performance history shall receive a neutral evaluation for past performance in state contracting except as provided for in subsection (d) of this section.

(c) The Director of [,] Central Procurement Services shall establish standard policies and procedures for vendor performance criteria used in the evaluation of delegated and non-delegated purchases. In the evaluation process for delegated purchases, agencies must accurately document the vendor performance criteria used in determining the successful bidder or offeror.

(d) When in the best interest of the State, [the commission may debar] a business entity or a successor-in-interest may be debarred for any of the following:

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

(8) Notice of debarment activities from other governmental entities.

(9) Any cause indicating that the individual or firm is not a responsible vendor.

(e) [The commission may debar a vendor for no less than one year and no longer than three years.] A proposed debarment may include all known successors-in-interest of a business entity. Each proposed decision to debar a vendor and/or successors-in-interest shall be made on a case-by-case basis after consideration of relevant facts and circumstances. A proposal to debar a vendor shall be delivered in writing to the vendor, stating the reason therefore. Vendor shall be given 10 working days to respond. Debarment does not relieve the vendor of responsibility for existing contractual obligations with the state. The commission shall establish procedures to ensure due process to vendors in the debarment process.

(1) Vendors subject to a proposed debarment may submit a written appeal to the Director of [,] Central Procurement Services within 10 days following notification of the proposed debarred status.

(2) No person who has a direct interest in the outcome of the appeal may communicate directly or indirectly upon the merits of debarment with any commission employees without notice and approval of the Director of Central Procurement Services.

(f) (No change.)

(g) State agencies shall report a vendor's performance on any purchases of $25,000 or more from contracts administered by the commission and other purchases made through an agency's delegated authority in accordance with the policy guidance contained in the Commission's Procurement Manual. [Agencies may report a vendor's performance on delegated purchases costing less than $25,000.]

[(h) The commission may consider other debarment activities from other entities as possible indicators of vendor responsibility.]

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 January 22, 1999.

TRD-9900398
Judy Ponder
General Counsel
General Services Commission
Earliest possible date of adoption: March 7, 1999
For further information, please call: (512) 463-3960

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TITLE 4. AGRICULTURE

Part III. Office of the Texas State Chemist/ Texas Feed and Fertilizer Control Service

Chapter 65. Commercial Fertilizer Rules

Subchapter C. Labeling

4 TAC §65.17

The Office of the Texas State Chemist, Feed & Fertilizer Control Service, proposes an amendment to §65.17(b)(1) concerning the listing of fertilizer components.

Dr. George W. Latimer, Jr., Asst. to the Assoc. Vice Chancellor of Agriculture, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing the rule.

Dr. Latimer has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the rule will be that the elimination of the requirement to alphabetize will not deprive the consumer of essential information and it will provide a positive benefit to the fertilizer producer. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed.

Comments on the proposed change may be submitted to Dr. George W. Latimer, Jr., by mail at Office of the Texas State Chemist, P.O. Box 3160, College Station, TX 77841-3160 or FAX (409) 845-1389.

The amendment is proposed under the Texas Agriculture Code, Chapter 63, §63.004, which provides the Texas Feed and Fertilizer Control Service with the authority to adopt rules relating to the distribution of commercial fertilizers.

The Texas Agricultural Code, Texas Commercial Fertilizer Control Act, 4 TAC Chapter 63, Subchapter D, §63.054 and Subchapter H, §63.143 are affected by the proposed amendment.

§65.17. General Requirements.

(a) (No change.)

(b) The label shall:

(1) list all components of the fertilizer [~~alphabetically~~]; or

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

(c)-(i) (No change.)

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

Filed with the Office of the Secretary of State on January 25, 1999.

TRD-9900480

Dr. George W. Latimer, Jr.

Assistant to the Associate Vice Chancellor of Agriculture

Office of the Texas State Chemist/Texas Feed and Fertilizer Control Service

Earliest possible date of adoption: March 7, 1999

For further information, please call: (409) 845-1121

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TITLE 7. BANKING AND SECURITIES

Part VI. Credit Union Department

Chapter 91. Chartering, Operations, Mergers, Liquidations

Subchapter D. Powers of Credit Unions

7 TAC §91.403

The Texas Credit Union Commission proposes new §91.403 concerning federal parity with respect to offering Guaranteed Auto Protection (GAP) programs. The new rule is being proposed to provide specific authorization for a state-chartered credit union to establish and operate a Guaranteed Auto Protection (GAP) program for its members. A GAP program protects institutions from losses resulting from inadequate or lost collateral. Also, under certain programs, borrowers may not be held responsible for deficiencies. Currently, state credit unions can offer this type of program provided they first obtain a license to offer debt cancellation contracts from the Texas Department of Insurance. Federal credit unions are not required to obtain such a license due to a determination that the Federal Credit Union Act preempts state insurance law with respect to debt cancellation contracts. This places state-chartered credit unions at a competitive disadvantage.

Lynette Pool-Harris, Deputy Commissioner, has determined that for the first five-year period the new rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Pool-Harris has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated will be to provide state credit unions parity with federal credit unions with respect to offering GAP insurance, thereby allowing state credit unions to better serve their members and to reduce their exposure to credit losses. There will be no effect on small businesses as a result of adopting this section. There is no anticipated economic cost to entities that will be required to comply with the new section, nor will there be an impact on local employment.

Written comments on the proposed rule must be submitted within 30 days after its publication in the *Texas Register* to Lynette Pool-Harris, Deputy Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas, 78752-1699.

The new section is proposed under the provisions of Texas Finance Code, Section 123.003, which allows the Credit Union Commission to adopt rules that authorize a state credit union to engage in any activity in which it could engage, exercise any power it could exercise, or make any loan or investment it could make, if it were operating as a federal credit union; and under the Texas Finance Code, Section 15.402, which authorizes the commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code.

The specific section affected by the proposed rule is Texas Finance Code, Section 123.107 pertaining to insurance for members.

§91.403 Federal Parity–Guaranteed Auto Protection (GAP) Program/Debt Cancellation Contracts

A credit union may establish and operate a GAP program for its members as if it were operating as a federal credit union. For the purposes of this section, a GAP program is defined as a program in which the credit union purchases insurance to protect itself from losses resulting when a leased vehicle or vehicle securing a loan or other extension of credit held by the credit union is declared a total loss or is stolen and the primary insurance settlement is not sufficient to cover the outstanding balance. The credit union may then, with or without a fee, enter into a debt cancellation contract, GAP waiver, or similar agreement under which the member will not be held responsible for the deficiency. If the debt cancellation contract, GAP waiver, or similar agreement is offered on a fee basis, then participation must be optional for the member.

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 January 22, 1999.

TRD-9900464

Harold E. Feeney

Commissioner

Credit Union Department

Earliest possible date of adoption: March 7, 1999

For further information, please call: (512) 837–9236

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Subchapter G. Loans

7 TAC §91.701, §91.705

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

The Texas Credit Union Commission proposes the repeal of §91.701 pertaining to loans made to credit union members, and §91.705 pertaining to loans to officials. In conjunction with the repeal of these rules, the Commission is publishing for comment proposed new rules of §§91.701-91.719 pertaining to loans.

Lynette Pool-Harris, Deputy Commissioner, has determined that for each year of the first five years the repeal is in effect, there

will be no fiscal implications for state or local government as a result of enforcing or administering the repeal of these sections.

Lynette Pool-Harris has determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repeal will be a set of new rules that (1) are more clear, (2) grant credit unions the maximum flexibility to exercise the lending authorities granted in the Texas Finance Code, and (3) set specific limitations due to safety and soundness considerations. There will be no effect on small businesses as a result of repealing these sections. There is no anticipated economic cost to entities that are currently required to comply with these sections as result of their repeal.

Written comments on the proposed repeal must be submitted within 30 days after its publication in the *Texas Register* to Lynette Pool-Harris, Deputy Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas, 78752-1699.

The repeal is proposed under the provisions of Section 15.402 of the Texas Finance Code, which authorizes the commission to adopt reasonable rules for administering the Texas Credit Union Act.

The specific sections affected by this proposed repeal are Sections 124.001, 124.003, and 124.202 of the Texas Finance Code pertaining to loans to members and credit union officials.

§91.701. Loans.

§91.705. Loans to Officials.

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 January 22, 1999.

TRD-9900467
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: March 7, 1999
For further information, please call: (512) 837–9236

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Subchapter G. Lending Powers

7 TAC §§91.701-91.719

The Texas Credit Union Commission proposes new Subchapter G, §§91.701–91.719 concerning loans and extensions of credit by or involving a credit union. In conjunction with these proposed new sections, the Commission is proposing the repeal of existing §91.701 and §91.705. Notice of the repeals is published elsewhere in this issue of the *Texas Register*.

In July 1998, the Commission identified its lending rules as an important area for updating and streamlining. Lending is a key area of credit union operations and these rules had not been comprehensively reviewed in a number of years. In order to grant credit unions the maximum flexibility to exercise the authorities granted to them by the Texas Finance Code, the Commission has determined to revise the general approach to regulating lending activities. Accordingly, Subchapter G will now address only the authority of credit unions to limit, interpret or recognize incidental authority. Credit unions may exercise all of the authority granted by the Texas Finance Code subject only to limitations contained in the rules.

Credit union rules traditionally have been lengthy, generally providing far more detail and leaving less room for the exercise of judgement by credit unions and examiners than have other financial institution lending regulations. By proposing to remove some specific lending rules and to rely more heavily on general safety and soundness standards, the Commission is in no way signaling that a credit union would not need to properly underwrite loans or maintain adequate loan documentation. Generally accepted accounting principles and principles of safety and soundness will still require these steps to be taken. In most circumstances, supervisory guidance and other sources can and should be relied upon to define safe and sound practices.

Provided both management and examiners understand the proper role of rules and guidance, and the overarching requirements for safe and sound operations and practices, a move away from detailed rules and toward greater reliance on guidance should provide credit unions with more flexibility without diminishing safety and soundness. The Commission believes that rules should be reserved for core safety and soundness requirements. Details on prudent operating practices should be relegated to guidance. Otherwise, credit unions can find themselves unable to respond to market innovations because they are trapped in a rigid regulatory framework developed in accordance with conditions prevailing at an earlier time.

This proposal represents the Commission's current best judgement about the right balance between which provisions affecting lending should be binding regulations and which should be guidance conveying the Commission's more detailed view on what generally constitutes safe and sound standards under current market conditions.

Lynette Pool-Harris, Deputy Commissioner, has determined that there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed new sections.

Ms. Pool-Harris has also determined that for each of the first five years the new sections, as proposed, are in effect, the public benefit anticipated as a result of enforcing the rules will be a greater flexibility in originating loans provided certain safety and soundness concerns are addressed, clarifications of confusing language, and greater readability. There will be no effect on small businesses as a result of enforcing this section as amended. There is no economic cost anticipated to the entities that are required to comply with the rules as proposed, nor will there be any impact on local employment.

Written comments on the proposed new sections must be submitted within 30 days after their publication in the *Texas Register* to Lynette Pool-Harrris, Deputy Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas, 78752-1699.

The new sections are proposed under the provisions of the Texas Finance Code, §124.001, which provides the Credit Union Commission with the authority to adopt rules governing loans made to credit union members; and under the Texas Finance Code, §15.402, which authorizes the commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code.

The specific sections affected by the proposed amendments are contained within Texas Finance Code, Chapter 124, Subchapter A through Subchapter G.

§91.701. Lending Powers.

(a) A credit union may originate, invest in, sell, purchase, service, or participate in loans or otherwise extend credit in accordance with the Act, these Rules, and other applicable law.

(b) Each credit union, before engaging in any lending activity, shall establish written policies approved by its board of directors that establish prudent credit underwriting and documentation standards for each specific type of lending in which the credit union will engage. The lending policies shall contain a general outline of the manner in which loans are made, serviced, and collected. In addition the policies must:

(1) Be consistent with safe and sound credit union practices;

(2) Be appropriate to the size and financial condition of the credit union and the nature and scope of its operations;

(3) Be compatible with the size and expertise of the credit union's lending staff;

(4) Be compliant with all related laws and regulations;

(5) Be reviewed and approved by the credit union's board of directors at least annually;

(6) Establish loan portfolio diversification standards to avoid undue concentrations of risk;

(7) Establish underwriting standards, including loan-to-value limits, that are clear and measurable;

(8) Establish loan administration procedures for monitoring the condition of the loan portfolio, the adequacy of any collateral securing the loans, and the continual existence of insurance protection upon the collateral with loss payable clause to the credit union, and ensuring compliance with applicable lending policies; and

(9) State the lending authority delegated to each loan officer or to the loan committee by the board of directors.

(c) The underwriting standards included in the credit union's loan policies will address, as applicable, specific procedures for determining and documenting:

(1) The capacity of the member to adequately service the debt from the source(s) specified by the member.

(2) The value of the collateral.

(3) The overall creditworthiness of the member.

(4) The level of equity invested in the collateral.

(5) Loan-to-collateral value limits.

(6) Any secondary sources of repayment.

(7) Any additional collateral or credit enhancement (such as guarantees or mortgage insurance).

(8) Maximum loan maturities for each type of lending.

(9) Repayment terms and conditions.

(d) Except when a higher maturity date is provided for elsewhere in this chapter, the maturity of a loan to a member may not exceed 15 years. Open-end credit is not subject to a regulatory maturity limit. Amortization of line of credit balances and the type and amount of security on any line of credit shall be as determined by the contract between the credit union and the member but the amortization scheduling on a line of credit balance shall not exceed 15 years.

(e) The commissioner in the exercise of discretion may grant a waiver in writing of any of the lending requirements described in this chapter. A decision to deny a requested waiver, however, is not appealable.

§91.702. Records for Lending Transactions.

A credit union shall maintain files containing credit and other information adequate to demonstrate evidence of prudent business judgement in exercising the lending powers granted under the Act, these rules, or other applicable law. At a minimum, each credit union shall establish and maintain loan documentation practices that ensure that the credit union can make an informed lending decision and can assess risk on an ongoing basis; and ensure that any claims against a member, guarantor, security holders, and collateral are legally enforceable.

§91.703. Interest.

(a) A credit union's board of directors may delegate all or part of its power to determine the interest rates on all lending transactions. The board may also authorize any refund of interest on loans under the conditions it may prescribe.

(b) A loan may provide for variable interest rates, so long as the factor or index governing the extent of the variation is not under the control of the credit union and can be readily ascertained from sources available to the public or any other index approved in writing by the commissioner which is not available to the public.

§91.704. Real Estate Lending.

(a) A credit union for which real estate lending comprises more than 20% of its total outstanding loans shall monitor conditions in the real estate market in its lending area on at least a quarterly basis to ensure that its real estate lending policies continue to be appropriate for current market conditions.

(b) The credit union shall establish loan administration procedures, including documentation, disbursement, collateral inspection, collection, and loan review for its real estate portfolio that address:

(1) Documentation, including:

(A) Type and frequency of financial statements required, including requirements for verification of information provided by the member; and

(B) Type and frequency of collateral evaluations (appraisals and other estimates of value).

(2) Loan closing and disbursement.

(3) Lien recording.

(4) Payment processing.

(5) Title insurance.

(6) Escrow administration.

(7) Property insurance.

(8) Mortgage insurance.

(9) Loan payoffs.

(10) Collection and foreclosure, including:

(A) Delinquency follow-up procedures;

(B) Foreclosure timing;

(C) Extensions and other forms of forbearance; and

(D) Acceptance of deeds in lieu of foreclosure.

(11) Claims processing (e.g., seeking recovery on a defaulted loan covered by a government guaranty or insurance program).

(12) Servicing and participation agreements.

(c) Loan to Value Limitations

(1) The board of directors shall establish their own internal loan-to-value limits for real estate loans based on type of loan. These internal limits, however, shall not exceed the following regulatory limits:

(A) Raw land–Loan to value limit 60%

(B) Interim Construction–Loan to value limit 80%

(C) Owner-occupied–Loan to value limit 95%

(D) Home equity–Loan to value limit 80%

(E) Other–Loan to value limit 80%

(2) In determining the loan to value limit, a credit union shall include all loans secured by the same property and the recourse obligation of any such loan sold with recourse.

(d) Notwithstanding the general 15-year maturity limit on lending transactions to members, the board of directors shall establish in policy internal maximum maturities for real estate lending transactions. These maturities should not exceed the following regulatory limits:

(1) Improved Residential real estate loans (owner-occupied)–40 years

(2) Improved Residential real estate loans (not to be occupied by owner)–30 years

(3) Interim construction loans–18 months

(4) Manufactured Home (first lien)–20 years

(5) Home equity loans–20 years

(6) Home improvement loans–20 years

(7) All other loans–15 years

(e) Exceptions to subsections (c) and (d) are permitted for the following:

(1) Loans that when reduction in principal or senior liens, or additional contribution of collateral or equity (e.g. improvements to the real property securing the loan), the resulting loan-to-value ratio falls into compliance with regulatory limits.

(2) Loans guaranteed or insured by the U.S. government or its agencies, provided that the amount of the guaranty or insurance is at least equal to the portion of the loan that exceeds the regulatory loan-to-value limit.

(3) Loans backed by the full faith and credit of the state, provided that the amount of the assurance is at least equal to the portion of the loan that exceeds the regulatory loan-to-value limit.

(4) Loans guaranteed or insured by the state, a municipal or local government, or an agency thereof, provided that the amount of loan that exceeds the regulatory loan-to-value limit, and provided that the credit union has determined that the guarantor or insurer has the financial capacity and willingness to perform under the terms of the guaranty or insurance agreement.

(5) Loans that are to be sold promptly after origination, without recourse, to a financially responsible third party.

(6) Loans that are renewed, refinanced, or restructured without the advancement of new funds or an increase in the line of credit (except for reasonable closing costs) where consistent with safe and sound credit union practices and part of a clearly defined and well-documented program to achieve orderly liquidation of the debt, reduce risk of loss, or maximize recovery on the loan.

(f) Exception loans granted in compliance with subsection (e) of this section shall be identified in the credit union's records and reported at least quarterly to the board of directors.

§91.705. Home Improvement Loans.

In addition to the requirements of this chapter, all loans in which the proceeds are used to construct new improvements or renovate existing improvements on a homestead property must also comply with the requirements of Section 50(a)(5), Article XVI, Texas Constitution.

§91.706. Home Equity Loans.

For any loan secured by an encumbrance against the equity in a homestead property, the terms and conditions set forth in this chapter and in Section 50, Article XVI, Texas Constitution will apply. If there is an irreconcilable conflict between a constitutional provision and the provision of this section, the constitutional requirement shall prevail.

§91.707. Reverse Mortgages.

A credit union may offer reverse mortgages to its members under the terms and conditions set forth in Section 50, Article XVI, Texas Constitution and other applicable law. In the event of an irreconcilable conflict between any specific requirement contained in this section and a constitutional provision, the constitutional requirement shall prevail.

§91.708. Real Estate Appraisals.

For real estate loans in which the transaction value exceeds $100,000 or in the case of a member business loan exceeding $50,000, a professional appraisal report by a state certified or licensed appraiser, as required by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, is necessary. Reappraisals may be required by the commissioner on real estate or other property or interests therein securing loans, at the expense of the credit union, when the commissioner has reason to believe the value of the security is overstated for any reason. The appraisal report shall be in writing and conform to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice promulgated by the Appraisal Standards Board of the Appraisal Foundation, 1029 Vermont Avenue, NW, Washington, D.C. 20005. In the case of renewal of a loan where additional funds are advanced by the credit union, a written certification of current value by the original appraiser or an acceptable substitute shall satisfy this section.

§91.709. Member Business Loans.

(a) Definition. A member business loan includes any loan, line of credit, or letter of credit, the proceeds of which will be used for a commercial, corporate, business investment property or venture, or agricultural purpose, except that the following shall not be considered a member business loan for the purposes of this rule:

(1) A loan secured by a lien on a 1 to 4 family dwelling that is the member's primary residence;

(2) A loan fully secured by shares in the credit union making the extension of credit or deposits in other financial institutions;

(3) Loan(s) otherwise meeting the definition of a member business loan made to a member or associated member that, in the aggregate, is less than $50,000; or

(4) A loan where a federal or state agency or one of its political subdivisions fully insures repayment, or fully guarantees repayment, or provides an advance commitment to purchase in full.

(b) A credit union that engages in this type of lending shall adopt specific member business loan policies and review them at least annually. The policies, at a minimum, shall address all of the following areas:

(1) Types of business loans to be made.

(2) The maximum amount of credit union assets, relative to credit union equity, that will be invested in member business loans.

(3) The maximum amount of credit union assets, relative to credit union equity, that will be invested in a given category or type of member business loan.

(4) The maximum amount of credit union assets, relative to credit union equity, that will be loaned to any one member or group of associated members, subject to subsection (c) of this section.

(5) The qualifications and experience requirements for personnel involved in making and servicing business loans.

(6) Analysis of the member's initial and ongoing financial capacity to repay the debt.

(7) Documentation supporting each request for an extension of credit or an increase in an existing loan or line of credit, which shall address all of the following:

(A) A balance sheet;

(B) An income statement;

(C) A cash flow analysis;

(D) Tax returns;

(E) Leveraging; and

(F) Receipt and the periodic updating of financial statements, tax returns, and other documentation.

(8) Collateral requirements which include all of the following:

(A) Loan-to-value (LTV) ratios;

(B) Appraisal, title search, and insurance requirements; and

(C) Steps to be taken to secure various types of collateral.

(9) Identification, by position, of the officials and senior management employees who are prohibited from receiving member business loans.

(c) The aggregate amount of outstanding member business loans to any one member or group of associated members shall not be more than 15% of the credit union's equity (less the Allowance for Loan Losses account) or $75,000.00, whichever is higher. If any portion of a member business loan is secured by shares in the credit union or deposits in another financial institution, or is fully or partially insured or guaranteed by, or subject to an advance commitment to purchase by, any agency of the Federal government or of a state or any of its political subdivisions, such portion shall not be calculated in determining the 15% limit.

(d) For the purposes of this section, "associated member" means any member with a common ownership, investment, or other pecuniary interest in the business or agricultural endeavor for which the business loan is being made.

§91.710. Overdraft Protection.

A credit union which permits withdrawal of funds from an account payable to third parties may offer in connection with such accounts overdraft protection to members in the form, on the terms and in amounts consistent with the credit union's policies. For purposes of financial reporting, funds advanced to or for the benefit of a member in connection with an overdraft condition shall be considered as a loan to the member.

§91.711. Loan Participations.

A credit union may participate in loans jointly with other credit unions, credit union organizations or other financial organizations pursuant to written policies established by the board of directors. Before participating in a loan transaction, each credit union shall perform its own due diligence of the transaction.

§91.712. Plastic Cards.

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

(1) Card Activation–process of sending new plastic cards from the issuer to the legitimate cardholder in an "inactive" mode. Once the legitimate cardholder receives the card, they must call the issuer/processor and go through a member verification process before the card is "activated".

(2) Card Security Code–a set of unique numbers encoded on the magnetic strip of plastic cards, such as Card Verification Value from Visa and Card Validation Code from MasterCard, used to combat counterfeit fraud.

(3) Neural Network–a computer program that monitors usage patterns of an account and typical fraud patterns. The program analyzes activity to determine fraud risk scores to detect potentially fraudulent activity. Strategies are then used to determine actions to mitigate frauds. Human intervention occurs to validate if the activity is actually fraudulent.

(4) Plastic Cards–includes credit cards, such as Visa and MasterCard; debit cards, automated teller machine (ATM) or specific network cards; and predetermined stored value and smart cards with micro-processor chips.

(b) A credit union may issue credit cards in accordance with the credit union's written policies, which shall include at a minimum:

(1) Credit policies to set individual limits for credit card accounts:

(2) A process for reviewing each member's payment and/or credit history periodically for the purpose of determining risk; and

(3) The credit underwriting standards for each type of card program offered.

(c) Program Review

(1) A credit union's board shall review, on semiannual basis, its plastic card program with particular emphasis on:

(A) Losses caused by delinquency, theft, and fraud;

(B) Loss prevention measures and their adequacy; and

(C) The availability and use of appropriate loss prevention measures including card activation, card security codes, neural networks, and other evolving technology.

(2) The review shall be documented in writing, with any changes to the plastic card program being entered into the minutes of the board meeting.

(d) At least annually, the credit union's board shall cause to be performed an assessment of earnings and the capital position to ensure that the credit union can absorb potential related plastic card program losses. This review shall include a cost benefit analysis of supplemental insurance coverage for theft and fraud related losses. Establishment of a segregated contingency reserve may be utilized to further mitigate the credit union's risk exposure for losses resulting from its plastic card program.

§91.713. Indirect Financing of Motor Vehicles or Other Chattels.

(a) Credit unions may implement a program of indirect financing of motor vehicles and other chattels. For the purposes of this chapter, a retail installment contract purchased under this authority may be treated as a loan on the books and records of the credit union and is subject to the same limitations and restrictions imposed upon loan transactions. As with other lending, the credit union is responsible for making the final underwriting. Although the seller may initially determine whether the prospective buyer is a member or eligible for membership in the credit union, responsibility for membership eligibility decisions must be the credit union's first consideration before beginning the contract purchase approval process.

(b) A retail installment contract may provide for a rate or amount of time price differential that does not exceed the rate or amount authorized by Chapter 124 of the Texas Finance Code.

(c) The board of directors shall establish, implement, and maintain prudent and reasonable written policies that specify guidelines and criteria to be used in purchasing contracts consistent with safe and sound credit union practices.

§91.714. Leasing.

(a) Definitions. For the purposes of this section:

(1) The term net lease means a lease under which the credit union will not, directly or indirectly, provide or be obligated to provide for:

(A) the servicing, repair or maintenance of leased property during the lease term;

(B) the purchasing of parts and accessories for the leased property, except that improvements and additions to the leased property may be leased to the lessee upon its request in accordance with the full-payout requirements of subsection (c)(2)(A) of this section;

(C) the loan of replacement or substitute property while the leased property is being serviced;

(D) the purchasing of insurance for the lessee, except where the lessee has failed to discharge a contractual obligation to purchase or maintain insurance; or

(E) the renewal of any license, registration, or filing for the property unless such action by the credit union is necessary to protect its interest as an owner or financier of the property.

(2) The term full-payout lease means a lease transaction in which any unguaranteed portion of the estimated residual value relied on by the credit union to yield the return of its full investment in the lease property, plus the estimated cost of financing the property over the term of the lease, does not exceed 25% of the original cost of the property to the lessor. In general, a lease will qualify as a full payout lease if the scheduled payments provide at least 75% of the principal and interest payments that a lessor would receive if the finance lease were structured as a market-rate loan.

(3) The term realization of investment means that a credit union that enters into a lease financing transaction must reasonably expect to realize the return of its full investment in the leased property, plus the estimated cost of financing the property over the term of the lease from:

(A) Rentals; and

(B) The estimated residual value of the property at the expiration of the term of the lease.

(b) Permissible Activities. Subject to the limitations of this section, a credit union may engage in leasing activities. These activities include becoming the legal or beneficial owner of tangible personal property or real property for the purpose of leasing such property, obtaining an assignment of a lessor's interest in a lease of such property, and incurring obligations incidental to its position as the legal or beneficial owner and lessor of the leased property.

(c) Finance Leasing

(1) A credit union may conduct leasing activities that are functional equivalent of loans made under those leases. Such financing leases are subject to the same restrictions that would be applicable to a loan.

(2) To qualify as the functional equivalent of a loan:

(A) The lease must be a net, full-payout lease representing a non-cancelable obligation of the lessee, notwithstanding the possible early termination of the lease;

(B) The portion of the estimated residual value of the property relied upon by the lessor to satisfy the requirements of a full-payout lease must be reasonable in light of the nature of the leased property and all relevant circumstances so that realization of the lessor's full investment plus the cost of financing the property depends primarily on the creditworthiness of the lessee, and not on the residual market value of the leased property; and

(C) At the termination of the financing lease, either by expiration or default, property acquired must be liquidated or released on a net basis as soon as practicable. Any property held in anticipation of releasing must be reevaluated and recorded at the lower of fair market value or the value carried on the credit union's books.

(d) General Leasing. A credit union may invest in tangible personal property, including vehicles, manufactured homes, equipment, or furniture, for the purpose of leasing that property. In contrast to financing leases, lease investments made under this authority need not be the functional equivalent of loans.

(e) Leasing Salvage Powers. If a credit union believes that there has been an unanticipated change in conditions that threatens its financial position by significantly increasing its exposure to loss, it may:

(1) As the owner and lessor, take reasonable and appropriate action to salvage or protect the value of the property or its interest arising under the lease;

(2) As the assignee of a lessor's interest in a lease, become the owner and lessor of the leased property pursuant to its contractual

right, or take any reasonable and appropriate action to salvage or protect the value of the property or its interest arising under the lease; or

(3) Include any provision in a lease, or make any additional agreements, to protect its financial position or investment in the circumstances set forth in subsections (e)(1) and (e)(2) of this section.

§91.715. Exceptions to the General Lending Policies.

Credit unions may provide for the consideration of loan requests from creditworthy members whose credit needs do not fit within the credit union's general lending policies. A credit union may provide for prudently underwritten exceptions to its lending policies. However, the Board is responsible for establishing standards for the review and approval of exception loans. Each credit union should establish an appropriate internal process for the review and approval of loans that do not conform to its own internal policy standards. The approval of any such loan should be supported by a written justification that clearly sets forth all of the relevant credit factors that support the underwriting decision. The justification and approval documents for such loans should be maintained as a part of the permanent loan file. Each credit union should monitor compliance with its lending policies and individually report exception loans of a significant size to its board of directors.

§91.716. Prohibited Fees.

A credit union shall not make any loan or extend any credit if, either directly or indirectly, any commission, fee, or other compensation from any person or entity other than the credit union is to be received by the credit union's directors, committee members, senior management employees, loan officers, or any immediate family members of such individuals, in connection with underwriting, insuring, servicing, or collecting the loan or extension of credit.

§91.717. More Stringent Restrictions.

The Commissioner may impose more stringent restrictions on a credit union's loans if the Commissioner determines that such restrictions are necessary to protect the safety and soundness of the credit union.

§91.718. Charging Off or Setting Up Reserves.

(a) The commissioner, after a determination of value, may order that assets in the aggregate, to the extent that such assets have depreciated in value, or to the extent the value of such assets, including loans, are overstated in value for any reason, be charged off, or that a special reserve or reserves equal to such depreciation or overstated value be established.

(b) A credit union's financial statements shall provide for full and fair disclosure of all assets, liabilities, and members' equity, including such valuation allowance accounts as may be necessary to present fairly the financial position; and all income and expenses necessary to present fairly the results of operations for the period concerned.

(c) As a minimum, adjustments to the valuation allowance for loan losses shall be made prior to the distribution or posting of any dividends to the accounts of members so that the valuation allowance established fairly presents the value of loans and probable losses for all categories.

§91.719. Loans to Officials and Employees.

(a) The rates, terms, conditions, and availability of any loan or other extension of credit made to, or endorsed or guaranteed by, a director, employee, member of the credit committee or an immediate family member of any such individual shall not be more favorable than the rates, terms, conditions, and availability of comparable loans or credit to other credit union members.

(b) Before making a loan, extending credit, or becoming contractually liable to make a loan or extend credit to a director, employee, member of the credit committee, or an immediate family member of such individual, the board of directors must approve the transaction if the loan or the extension of credit or aggregate of outstanding loans and extensions of credit to any one person, the person's business interests, and the members of the person's immediate family is greater than 15% of the credit union's net capital. A loan fully secured by shares in the credit union or deposits in other financial institutions shall not be subject to, or included in the aggregate amounts included in this section.

(c) For purposed of this section, the term immediate family member includes spouse or other family member living in the same household.

(d) The aggregate of all outstanding loans or extensions of credit made to, or endorsed or guaranteed by all directors, credit committee members, senior executive staff, and immediate family members of all such individuals shall not exceed 20% of the credit union's total assets. The requirements described in this subsection shall apply unless waived in writing by the commissioner for good cause shown.

(e) At least semiannually, the president shall make a report to the board of directors on the outstanding indebtedness of all directors, credit committee members, senior executive staff, and immediate family members of such individuals. The report required by this section shall include the following information:

(1) The amount of each indebtedness; and

(2) A description of the terms and conditions (including the interest rate, the original amount and date, maturity date, payment terms, security, if any, and any other unusual term or condition) of each extension of credit.

(f) At the discretion of the Board, the reporting requirement of subsection (e) of this section may be waived if the aggregate of outstanding loans and extensions of credit to any one person, the person's business interests, and the members of the person's immediate family is less than $25,000. Each report must ordinarily be retained at the credit union for a period of three years and shall not be filed with the Department unless specifically requested.

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 January 22, 1999.

TRD-9900465
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: March 7, 1999
For further information, please call: (512) 837–9236

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Subchapter H. Investments

7 TAC §91.801

The Texas Credit Union Commission proposes amendments to §91.801 concerning investment in a credit union service organization (CUSO). The amendments are being proposed for the purposes of clarifying existing requirements and adding new requirements to address potential safety and soundness con-

cerns. One amendment to Subsection (a) confirms the requirement under Subsection (c)(2) that a CUSO must be a separate legal entity from the credit union and that the CUSO must be adequately capitalized to reduce loss risk exposure to the investing credit union(s). The second amendment to Subsection (a) simplifies the notification requirement. An amendment to Subsection (c) adds a registered limited liability partnership to the forms of organization of a CUSO that a credit union may invest in and loan money to. Another amendment requires a credit union that is considering investment in a CUSO to obtain a legal determination that the CUSO's organizational structure will limit the credit union's potential loss exposure. The Commission is also proposing to add two new subsections to the rule. The first prohibits senior credit union staff from receiving directly or indirectly any salary, commission, investment income or other income from a CUSO affiliated with the credit union due to potential conflict of interest. The second new subsection authorizes the Commissioner to charge a CUSO a supplemental examination fee should it be necessary for Credit Union Department examiners to inspect the CUSO's books and records.

Lynette Pool-Harris, Deputy Commissioner, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Pool-Harris has also determined that for each year of the first five years the proposed amended rule is in effect, the public benefit anticipated will be greater protection of state chartered credit unions from business and other risks associated with an investment in a CUSO. There will be no effect on small businesses as a result of adopting the amendments, nor will there be an impact on local government. There may be some economic cost borne by entities that will be required to comply with the amended rule because of the requirement to obtain a legal opinion regarding the risk posed by a CUSO's organizational structure, but the potential cost is not considered significant.

Written comments on the proposed rule amendments must be submitted within 30 days after its publication in the *Texas Register* to Lynette Pool-Harris, Deputy Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas, 78752-1699.

The amendments are proposed under the provisions of Texas Finance Code, Section 124.351(a), which allows the Credit Union Commission to adopt rules pertaining to authorized investments; and under the Texas Finance Code, Section 15.402, which authorizes the commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code.

The specific sections affected by the proposed rule amendments are Texas Finance Code, Sections 124.351 and 124.352 pertaining to permitted investments.

§91.801. Investments in CUSOs.

(a) A credit union by itself, or with other parties, may organize, invest in or make loans to a CUSO which shall be adequately capitalized and which shall be structured and operated as an entity separate and distinct from the credit union. A credit union shall provide written notice to the commissioner [~~only after giving~~] at least 15 days prior [~~advance written notice to the commissioner of its intention to make~~] to making such investment or loans. The credit union shall provide any additional information reasonably requested by the commissioner.

(b) An investment in any one CUSO shall not exceed the lesser of 5.0% of the credit union's total assets or the total amount of its reserves and undivided earnings. Loans to any one CUSO shall not exceed the aggregate limit for loans to one member specified by the Texas Finance Code §124.003 [~~Act §7.02~~] or a rule adopted under that section. The total aggregate amount of all investments in all CUSOs by any one credit union shall not exceed 10% of the total assets of the credit union, unless the credit union receives the prior written approval of the commissioner.

(c) No credit union may invest in or make loans to a CUSO:

(1) (No change.)

(2) unless the organization is structured as a corporation, limited liability company, registered limited liability partnership, or limited partnership and the credit union has obtained a written legal opinion that the CUSO is established in a manner that will limit the credit union's potential exposure to not more than the loss of funds invested in or loaned to such CUSO;

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

(d) (No change.)

(e) Senior management staff of a credit union may receive salary, commission, investment income, or other income or compensation from any CUSO affiliated with their credit union provided the individual provides fair and full disclosure initially and annually thereafter to the boards of participating credit unions.

(f) If a CUSO is requested by the commissioner to make its books and records available for inspection and examination, the CUSO shall pay a supplemental examination fee as prescribed in §97.113 of this title (relating to operating fees). The commissioner may waive the supplemental examination fee or reduce the fee as he deems appropriate.

(g) [~~(e)~~] The requirements of this section apply only to investments or loans made after the effective date 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 January 22, 1999.

TRD-9900468
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: March 7, 1999
For further information, please call: (512) 837–9236

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Subchapter M. Electronic Operations

7 TAC §91.4001, §91.4002

The Texas Credit Union Commission proposes new Subchapter M, Sections §91.4001 and §91.4002 concerning electronic operations by or involving a credit union.

Under the proposed new sections, a credit union may engage in prudent innovation through the use of emerging technology. The proposal permits credit unions to use, or to participate with others to use, electronic means or facilities to perform any function or provide any product or service as part of an authorized activity. The new sections also require a credit

union to notify the Department 30 days before it establishes a transactional web site. Credit unions that present supervisory or compliance concerns may be subject to additional procedural requirements.

Lynette Pool-Harris, Deputy Commissioner, has determined that for the first five-year period the new rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Pool-Harris has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be to provide credit unions with a greater ability to serve as financial intermediaries and to permit credit unions to utilize fully their capacities and by-products generated in providing financial services to its members. There will be no effect on small businesses as a result of adopting these sections. There is no anticipated economic cost to entities that will be required to comply with these new sections, nor will there be an impact on local employment.

Written comments on the proposed rules must be submitted within 30 days after its publication in the *Texas Register* to Lynette Pool-Harris, Deputy Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas, 78752-1699.

The new sections are proposed under the provisions of Texas Finance Code, Section 15.402, which authorizes the commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code.

The specific section affected by the proposed rules is Texas Finance Code, Section 123.001 regarding general powers.

§91.4001. Authority to Conduct Electronic Operations.

(a) A credit union may use, or participate with others to use, electronic means or facilities to perform any function or provide any product or service as part of an authorized activity. Electronic means or facilities include, but are not limited to, automated teller machines, automated loan machines, personal computers, the Internet, the World Wide Web, telephones, and other similar electronic devices.

(b) To optimize the use of its resources, a credit union may market and sell, or participate with others to market and sell, electronic capacities and by-products to others, provided the credit union acquired or developed these capacities and by-products in good faith as part of providing financial services to its members.

(c) If a credit union uses electronic means and facilities authorized by this rule, the credit union's board of directors must require staff to:

(1) Identify, assess, and mitigate potential risks and establish prudent internal controls; and

(2) Implement security measures designed to ensure secure operations. Such measures must be adequate to:

(A) Prevent unauthorized access to credit union records and credit union members' records;

(B) Prevent financial fraud through the use of electronic means or facilities; and

(C) Comply with applicable security device requirements of §91.401(b) pertaining to user safety at unmanned teller machines.

(d) All credit unions engaging in such electronic activities must comply with all applicable requirements, including addressing safety and soundness concerns and ensuring compliance with applicable state and federal laws and regulations.

§91.4002. Notice Requirement.

(a) A credit union must file a written notice with the commissioner at least 30 days before it establishes a transactional web site. The notice must:

(1) Include an address for and a description of the transactional features of the web site;

(2) Indicate the date the transactional web site will become operational; and

(3) List a contact person familiar with the deployment, operation, and security of the transactional web site.

(b) For the purposes of this chapter a transactional web site is an Internet site that enables users to conduct financial transactions such as accessing an account, obtaining an account balance, transferring funds, processing bill payments, opening an account, applying for or obtaining a loan, or purchasing other authorized products or services.

(c) If a credit union has established a transactional web site before the effective date of this rule, it must file a notice describing its activity by June 1, 1999.

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

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Harold E. Feeney
Commissioner
Credit Union Department
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Chapter 97. Commissions Policies and Administrative Rules

Subchapter B. Fees

7 TAC §97.113

The Texas Credit Union Commission proposes to amend existing rule §97.113 concerning operating fees. As a self-funding agency by legislative mandate, the Credit Union Department must collect annual operating fees from state-chartered credit unions to cover its appropriations and any indirect costs associated with operating the agency. The imposition of operating fees should relate to the cost of supervising and regulating credit unions and should not create an undue financial burden to those institutions. This amendment would authorize the Commissioner to reduce or increase the operating fees schedule, the basis for calculating the amount of operating fees paid by credit unions each year, without prior Commission approval, provided good cause exists and the increases do not exceed 5% of the annual operating fees. An example of good cause includes the situation when the existing operating fee schedule would produce revenues significantly more or less than the amount the Department is authorized to spend. The amendment does not authorize any increase or decrease that would result in pro-

jected revenues that do not substantially match revenue with appropriations.

This amendment would also authorize the Commissioner to waive operating fees for individual credit unions on a case-by-case basis, provided good cause exists. An example of good cause includes the situation when its payment of the operating fees would render a credit union financially insolvent.

Lynette Pool-Harris, Deputy Commissioner, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Lynette Pool-Harris has determined that for each year of the first five years the rule is in effect, the public benefit anticipated will be that the Department will be sufficiently funded to cover expenses incurred in regulating and supervising state chartered credit unions. There will be no effect on small businesses as a result of amending this section. There is no anticipated economic cost to entities which are currently required to comply with these sections as result of the proposed amendment's adoption.

Written comments on the proposed amendment must be submitted within 30 days after its publication in the *Texas Register* to Lynette Pool-Harris, Deputy Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas, 78752-1699.

The amendment is proposed under the provisions of Section 15.402 of the Texas Finance Code, which authorizes the commission to set, by rule, reasonable supervision fees, charges, and revenues required to be paid by credit unions authorized to do business under the Texas Credit Union Act.

The specific section affected by the proposed amendment is Section 15.402 of the Texas Finance Code.

§97.113. Operating Fees.

(a) (No change.)

(b) Calculation of operating fees. The schedule provided in this section shall serve as the basis for calculating operating fees. The base date shall be June 30 of the year in which operating fees are calculated. The asset base may be reduced by the amount of reverse-repurchase balances extant on the June 30 base date. The commissioner is authorized to increase or decrease the fee schedule once each year [~~annually by amounts not to exceed 10% per year with prior approval of the commission,~~] as needed to match revenue with appropriations. An increase greater than 5% shall require prior approval of the commission. The commissioner shall notify the commission of any such adjustment at the first meeting of the commission following the determination of the fee schedule.
Figure: 7 TAC §97.113(b)

(c) Waiver of operating fees. The commissioner is authorized to waive the operating fee for an individual credit union when good cause exists. The commissioner shall document the reason(s) for each waiver of operating fees and report such waiver to the commission at its next meeting.

(d) [~~(c)~~] Supplemental examinations. If the commissioner or deputy commissioner schedules a special examination in addition to the regular examination, the credit union shall pay a supplemental fee of $36 for each hour of time expended on the examination. The commissioner may waive the supplemental fee or reduce the fee as he deems appropriate. Such waiver or reduction shall be in writing and signed by the commissioner. The examiner in charge shall fully explain the time and charges for each special examination to the president or designated official in charge of operations of a credit union.

(e) [~~(d)~~] Liquidations. Credit unions in liquidation shall pay an annual operating fee of $100.

(f) [~~(e)~~] Out of state branches. Credit unions operating branch offices in Texas as authorized by §91.211 of this title (Relating to Application for a Certificate of Authority To Do Business in the State of Texas) shall pay an annual operating fee of $200 per branch office.

(g) [~~(f)~~] Credit union conversion fee. A credit union organized under the laws of the United States or of another State that converts to a credit union organized under the laws of this State shall remit to the Credit Union Department an annual operating fee within 30 days after the issuance of a charter by the commissioner. The schedule provided in subsection (b) of this section shall serve as the basis for calculating the operating fee. All provisions set forth in subsection (b) of this section shall apply to converting credit unions with the following exceptions:

(1) Should the effective date of the conversion fall on or after October 31, the base date shall be the calendar quarter end immediately preceding the issuance date of a charter by the commissioner.

(2) The amount of the operating fee calculated under this section will be prorated based upon the number of full months remaining until September 1. For example, should the effective date of the conversion be January 31, the converting credit union will remit seven-twelfths of the amount of the operating fee calculated using December 31 base date.

(3) Any fee received more than 30 days after the issuance of a charter will be subject to a monthly 10% late fee unless waived by the commissioner for good cause.

(h) [~~(g)~~] In the event a credit union in existence as of June 30 merges or consolidates with another credit union and the merger/consolidation is completed on or before September 1, the surviving credit union shall remit to the department the amount that the merging/consolidating credit union would have paid if it had still been in existence on September 1.

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

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Harold E. Feeney
Commissioner
Credit Union Department
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TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission

Chapter 23. Substantive Rules

Subchapter H. Telephone

16 TAC §23.91

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

The Public Utility Commission of Texas (commission) proposes the repeal of §23.91, relating to Long Run Incremental Cost Methodology for Dominant Certificated Telecommunications Utility (DCTU) Services. Project Number 20102 has been assigned to this proceeding. The Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. As a result of this reorganization, §23.91 will be duplicative of proposed new §26.215 of this title (relating to Long Run Incremental Cost Methodology for Dominant Certificated Telecommunications Utility (DCTU) Services) in Chapter 26, Substantive Rules Applicable to Telecommunications Service Providers.

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

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

Mr. Wilson has determined that the proposed new section should not affect the local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the proposed repeal (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. All comments should refer to Project Number 20102, repeal of §23.91.

This repeal is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

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

§23.91. Long Run Incremental Cost Methodology for Dominant Certificated Telecommunications Utility (DCTU) Services.

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

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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936–7308

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16 TAC §23.104

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

The Public Utility Commission of Texas (commission) proposes the repeal of §23.104, relating to Telecommunications Pricing. Project Number 18846 has been assigned to this proceeding. The Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1)satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. As a result of this reorganization, §23.104 will be duplicative of proposed new §26.213 of this title (relating to Telecommunications Pricing) in Chapter 26, Substantive Rules Applicable to Telecommunications Service Providers.

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

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

Mr. Wilson has determined that the proposed new section should not affect the local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the proposed repeal (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. All comments should refer to Project Number 18846, repeal of §23.104.

This repeal is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

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

§23.104. Telecommunications Pricing.

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

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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936–7308

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Chapter 26. Substantive Rules Applicable to Telecommunications Service Providers

Subchapter J. Costs, Rates and Tariffs

16 TAC §26.213

The Public Utility Commission of Texas (commission) proposes new §26.213, relating to Telecommunications Pricing, as well as the repeal of §23.104. Project Number 18846 has been assigned to this proceeding. The new section will replace §23.104 of this title (relating to Telecommunications Pricing) and implements Public Utility Regulatory Act (PURA) §60.101, which requires the commission to adopt a pricing rule to ensure that each price for a monopoly service remains affordable; that each price for a competitive service is not unreasonably preferential, prejudicial, or discriminatory, directly or indirectly subsidized by a noncompetitive service, or predatory or anticompetitive; and requires that each service recover the appropriate costs, including joint and common costs, of each facility and function used to provide the service.

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

General changes to rule language:

All but one of the definitions in this section have been deleted because they have been moved to proposed §26.5 of this title (relating to definitions). The definition for "service" as defined in §26.213(b) is specific to this section.

Other changes specific to each section:

Subsection (f)(3), which addresses price ceilings applicable to a DCTU electing into PURA Chapter 58 incentive regulation, is revised. The commission proposes to use the initial rate approved by the commission as the price ceiling for a service initially offered after September 1, 1995, in place of the current requirement of stand-alone cost as the price ceiling for discretionary services. This proposal would establish a reasonable price ceiling for discretionary services consistent with the requirement in PURA §58.102, and would expedite the review process for applications by a DCTU to provide discretionary telecommunication services.

Bih-Jau Sheu, senior economist, Office of Regulatory Affairs, and Mr. Martin Wilson, assistant general counsel, have determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Sheu and Mr. Wilson have also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing this section will be (1) to establish principles for the pricing of telecommunications services that foster economic efficiency and the public welfare, and (2) to expedite the review process for applications by DCTU for provision of discretionary telecommunication services. There will be no effect on small businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

Ms. Sheu and Mr. Wilson have determined that the proposed new section should not affect the local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

The *Texas Register* will publish §26.213 as all new text. Interested persons may obtain a redline comparing proposed §26.213 to existing §23.104 at the Public Utility Commission of Texas, Central Records Division, under Project Number 18846.

Comments on the proposed section (16 copies) may be submitted to Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, P.O. Box 13326, Austin, Texas, 78701-3326, within 30 days after publication.

The commission invites specific comments regarding whether this proposed amendment provides the intended pricing flexibility for the electing DCTU. The commission also solicits comments on the following two questions:

1. For existing discretionary service offered after September 1, 1995, should the price ceiling be the rate in effect as of the effective date of the rule in the event that initial price is different from current price?

2. For discretionary service initially offered after the effective date of this rule, should the price ceiling be established at a level that is 10% higher than the initial rate proposed?

If the staff, after reviewing the comments, deems a public hearing to be appropriate, or if requested by a commenter, a public hearing will be held and parties who have filed comments will be notified.

The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. The commission also invites specific comments regarding the Section 167 requirement as to whether the reason for adopting §23.104 continues to exist in adopting the new section. All comments should refer to Project Number 18846, §26.213 relating to Telecommunications Pricing.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission of Texas with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically §52.001(b), which provides the Public Utility Commission of Texas with the authority to formulate and apply rules to protect the public interest and provide equal opportunity to each telecommunications utility in a competitive marketplace; and §60.101 which requires the commission to adopt a rule on telecommunications pricing.

Cross Index to Statutes: Public Utility Commission of Texas §§14.002, 52.001(b), 58.102 and 60.101.

§26.213. Telecommunications Pricing.

(a) Purpose. The purpose of this section is to establish principles to foster economic efficiency and the public welfare in the pricing of telecommunications services.

(b) Application. Except as otherwise provided herein, the provisions of this section shall apply to dominant certificated telecommunications utilities (DCTUs). Unless the DCTU has elected to be regulated under the terms of the Public Utility Regulatory Act (PURA) Chapter 58, the provisions of this section may be applied to a DCTU serving 31,000 or more but fewer than one million access lines only on a bona fide request by a holder of a certificate of operating authority or service provider certificate of operating authority.

(c) Definition. As used in this section, a "service" is a tariffed or contract offering which a customer may purchase to the exclusion of other offerings. For example: the various mileage bands for standard toll services are rate elements, not services; individual optional calling plans that can be purchased individually and which are offered as alternatives to each other are services, not rate elements.

(d) General principles.

(1) Subsidy-free pricing.

(A) Telecommunications prices should be subsidy-free. Subsidy-free prices prevent one service or group of services from subsidizing or being subsidized by another. This language is not meant to preclude the use of explicit universal service support mechanisms to maintain affordable rates.

(B) Pricing all services produced by a DCTU above long run incremental cost (LRIC) will ensure subsidy-free pricing.

(C) In a subsidy-free pricing environment, support for universal basic telecommunications service must come from an explicit subsidy, such as a Universal Service Fund.

(D) The transition to subsidy-free pricing should be undertaken in stages, in coordination with implementation of state and federal universal service support mechanisms and initiatives to reform pricing of access services.

(2) Customer-specific pricing. When set above incremental cost and not used in an anticompetitive manner, customer-specific pricing can benefit the general body of ratepayers and foster economic efficiency by encouraging utilization of under- utilized facilities.

(3) Inefficient or uneconomic costs. The commission has no obligation to ensure that a DCTU recovers inefficient or uneconomic costs.

(e) Basic network services. Except as provided by paragraph (2) of this subsection, a DCTU may not exercise pricing flexibility for a basic network service.

(1) The following services are initially classified as basic network services:

(A) flat-rate residential and business local exchange telephone service, including primary directory listings and the receipt of a directory and any applicable mileage or zone charges;

(B) tone dialing service;

(C) lifeline and tel-assistance services;

(D) service connection for basic services;

(E) direct inward dialing service for basic services;

(F) private pay telephone access service;

(G) call trap and trace service;

(H) access to 911 service, where provided by a local authority, and access to dual party relay service;

(I) switched access service;

(J) interconnection to competitive providers;

(K) mandatory extended area service arrangements;

(L) mandatory extended metropolitan service or other mandatory toll-free calling arrangements;

(M) interconnection for commercial mobile service providers;

(N) directory assistance; and

(O) 1+ intraLATA message toll service.

(2) An electing local exchange company (LEC) may lower the rate for a basic network service to the service's price floor. For an electing LEC that is required by the commission to perform long run incremental cost studies or elects to perform those studies, the price floor for switched access service or for any basic local telecommunications service shall be LRIC. For any other electing LEC, the price floor for basic local telecommunications service shall be the appropriate cost of the service. Packaging basic network services with discretionary or competitive services is not permitted.

(3) In setting the price of a basic network service, the commission shall pursue the goal of maintaining basic services at affordable rates for customers.

(f) Discretionary services. Except as provided by paragraph (5) of this subsection, a DCTU may not exercise pricing flexibility for a discretionary service.

(1) The following services shall initially be classified as discretionary services.

(A) 1+ intraLATA message toll services, where intraLATA equal access is available;

(B) 0+, 0- operator services;

(C) call waiting, call forwarding, and custom calling features not classified as competitive services;

(D) call return, caller ID, and call control options not classified as competitive services;

(E) central office-based PBX-type services;

(F) billing and collection services;

(G) integrated services digital network (ISDN) services; and

(H) new services.

(2) The price for a discretionary service shall not be set below LRIC or the price floor prescribed by §23.102 of this title (relating to Imputation), whichever is higher. An electing LEC may request the establishment of a price floor for a discretionary service that is above LRIC.

(3) For services initially offered after September 1, 1995, the price ceiling shall be the initial rate approved by the commission.

(4) The price ceiling for a discretionary service provided by an electing LEC may not be set below or above the rate in effect on September 1, 1995, without regard to proceedings pending under PURA §§12.004, 15.001, 15.002, 53.151 and 53.152 or under Government Code, Chapter 2001, Subchapter G. The ceiling may be raised only after the proceedings required under PURA, Chapter 60. Thereafter, on application by the DCTU or on the commission's own motion, the commission may change the price ceiling but may not increase the ceiling more than 10% annually.

(5) Within the range of the floor and the ceiling established pursuant to this subsection, an electing LEC may change the price of a discretionary service but shall notify the commission of each change. Such price changes may include volume and term discounts, zone density pricing, packaging of services, customer specific pricing, and other promotional pricing flexibility. Packaging of services may include packaging of an installation service or charge with provision of the corresponding service. An electing LEC lowering the price of any component of a package of services, including an installation charge, shall demonstrate that the package of services affected by the price change recovers its LRIC within one year of the price change.

(6) Discounts and other forms of pricing flexibility for discretionary services may not be preferential, prejudicial, or discriminatory.

(g) Competitive services. Except as provided by paragraphs (2) and (4) of this subsection, a DCTU may not exercise pricing flexibility for a competitive service.

(1) The following services shall initially be classified as competitive services:

(A) services described in the WATS tariff as of January 1, 1995;

(B) 800 and foreign exchange services;

(C) private line service;

(D) special access service;

(E) services from public pay telephones;

(F) paging services and mobile services (IMTS);

(G) 911 premises equipment;

(H) speed dialing; and

(I) three-way calling.

(2) The price for a competitive service shall not be set below LRIC or the price floor prescribed by §23.102 of this title, whichever is higher. An electing LEC may request the establishment of a price floor for a competitive service that is above the floor prescribed by this paragraph.

(3) An electing LEC may set the price for a competitive service at any level above the floor prescribed in this subsection. Permissible pricing flexibility includes volume and term discounts, zone density pricing, packaging of services, customer specific contracts, and other promotional pricing flexibility, subject to the requirements of PURA §60.001 and §60.002. However, an electing LEC may not increase the price of a service in a geographic area in which that service or a functionally equivalent service is not readily available from another provider. The pricing flexibility allowed by this subsection permits the packaging of a competitive service with one or more discretionary services only if the DCTU demonstrates that the rate for the package of services is greater than the sum of the LRIC of the competitive service and the tariffed rates of the discretionary services included in the package.

(4) Prices for competitive services may not be unreasonably preferential, prejudicial, or discriminatory.

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

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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936–7308

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16 TAC §26.215

The Public Utility Commission of Texas (commission) proposes new §26.215, relating to Long Run Incremental Cost Methodology for Dominant Certificated Telecommunications Utility (DCTU) Services. The proposed section will replace §23.91 of this title (relating to Long Run Incremental Cost Methodology for Dominant Certificated Telecommunications Utility (DCTU) Services). The proposed section requires DCTUs to determine and provide to the commission the long run incremental costs (LRIC) incurred in the provision of telecommu-

nications services. Project Number 20102 has been assigned to this proceeding.

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

General changes to rule language:

The proposed new section reflects different section, subsection, and paragraph designations due to the reorganization of the rules. Citations to the Public Utility Regulatory Act have been updated to conform to the Texas Utilities Code throughout the sections and citations to other sections of the commission's rules have been updated to reflect the new section designations. Some text has been proposed for deletion as unnecessary in the new section because the dates and requirements in the text no longer apply due to the passage of time and/or fulfillment of the requirements. The *Texas Register* will publish this section as all new text. Persons who desire a copy of the proposed new section as it reflects changes to the existing section in Chapter 23 may obtain a redlined version from the commission's Central Records under Project Number 20102.

Other changes specific to each section:

The following terms from §23.91(c) of this title have not been included in proposed §26.215, as they were moved to §26.5 of this title (relating to Definitions): "depreciation expenses"; "expenses"; "least cost technology"; "long run"; "long run incremental cost (LRIC)"; "unit cost"; "volume insensitive costs"; and "volume sensitive costs". In reviewing §23.91(c)(10) it was found that subparagraph (B) was inadvertently left out of the copy of the rule distributed by the commission's print shop. This subparagraph has been added back in, but does not constitute a change in the rule. Subparagraph (B) was included in the rule as adopted and published in the *Texas Register* (18 TexReg 5723).

Subsections (j), (k), (m) and (p) of §23.91 have not been included in proposed §26.215, as the requirements of these sections have already been fulfilled.

Subsections (f)(5), (g)(8), (h)(7), (i)(5) relating to cost of money are revised to set a forward looking cost of capital for the companies. The revisions state that when the company uses the most recent commission-approved rate of return for the company, determined either in a rate proceedings as described in §23.21(d) of this title (relating to Cost of Service) or a commission arbitration proceeding defined under §251 of the federal Telecommunication Act of 1996, there will be a rebuttable presumption of reasonableness. The company shall justify the use of any other forward-looking-looking rate. Nothing in this revision shall, by itself, cause an updated cost study to be performed. The introduction of the reasonableness of the rate of return (or equivalently, cost of capital) determined in the above mentioned commission arbitration proceeding is to avoid the use of embedded cost data, and therefore to be consistent with subsection (d)(3) of this section.

Subsection (l)(1) is also changed. Instead of requiring the DCTUs to update its cost studies every six months, a DCTU may be required to update the filings only for those studies where significant changes have occurred.

Bih-Jau Sheu, senior economist, Office of Regulatory Affairs, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Sheu has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be: (1) the ability of the commission to prevent cross-subsidization and to eliminate predatory pricing behaviors; and (2) the ability of the commission to adopt the most recent commission approved rate of return for the companies, whether it is determined in a rate proceeding or in an arbitration proceeding. There will be no effect on small businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Ms. Sheu has determined that the proposed new section should not affect the local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the proposed new section (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. The commission also invites specific comments regarding the Section 167 requirement as to whether the reason for adopting or readopting the rule continues to exist. All comments should refer to Project Number 20102.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §52.059 which grants the commission authority to adopt standards necessary to ensure that a rate established under this subchapter covers appropriate costs as determined by the commission. PURA §52.053 requires the commission to ensure that a rate established under this subchapter may not be (1) unreasonably preferential, prejudicial, or discriminatory; (2) subsidized either directly or indirectly by a regulated monopoly service; or (3) predatory of anticompetitive. PURA §52.053

hence calls forth the commission to review and approve LRIC cost studies.

Cross Index to Statutes: Public Utility Regulatory Act §§14.002, 52.053, 52.059.

§26.215. Long Run Incremental Cost Methodology for Dominant Certificated Telecommunications Utility (DCTU) Services.

(a) Application. This section shall apply to DCTUs with annual revenues from regulated telecommunications operations in Texas of $100 million or more for five consecutive years. An incumbent local exchange carrier that is not a Tier 1 local exchange company as of September 1, 1995, at that company's option, may adopt the cost studies approved by the commission for a Tier 1 local exchange company.

(b) Purpose. This section shall be used to determine the long run incremental costs incurred by DCTUs in the provision of telecommunications services. The costs determined in this section shall not be used to determine a company's revenue requirement during a proceeding pursuant the Public Utility Regulatory Act, Chapter 53, Subchapters C and D or E.

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

(1) Ancillary services - The category of basic network functions (BNFs) (as defined in paragraph (2) of this subsection) that provide for certain activities that either support or otherwise are adjuncts to other BNFs or finished services. This category of BNFs consists of three subcategories of BNFs: Billing and Collection; Measurement; and Operator Services.

(A) Billing and collection - The subcategory of BNFs that provide for the function of compiling the information needed for customer billing, preparing the customer bill statement, disbursing the bill and collecting the customer payments.

(B) Measurement - The subcategory of BNFs that provide the functions of assembling, collating and transmitting end office switch recorded call data (occurrence and duration).

(C) Operator services - The subcategory of BNFs that provide for the provision of a number of live or mechanized assistance functions to aid customers in the following ways: obtaining customer telephone number, street address and ZIP code information (directory assistance); providing new telephone numbers or explanatory information to callers who dial numbers which have been changed or disconnected (intercepts); providing assistance to customers in completing operator handled toll or local calls (collect, credit card, third party, station-to-station or person-to- person); checking busy lines to make sure the line is not out of service (busy line verification); and interrupting busy lines (busy line interruption). These operator services are provided to end user customers as well as local exchange and interexchange carriers.

(2) Basic network function (BNF) - A discrete network function, which is useful either as a stand-alone function or in combination with other functions, for which costs can be identified.

(3) Capital costs - The recurring costs that result from expenditures for plant facilities that are capitalized. The annual capital costs consist of depreciation, cost of money, and income taxes.

(4) Categories of BNFs - All BNFs shall fall into one of four categories of BNFs. The categories are: network access (as defined in paragraph (13) of this subsection); switching and switch functions (as defined in paragraph (16) of this subsection); dedicated and switched transport (as defined in paragraph (10) of this subsection); and ancillary services (as defined in paragraph (1) of this subsection).

(5) Common costs - Costs that are not directly attributable to individual cost objects. For the purposes of this section there are three types of common costs: general overhead costs; costs common to BNFs; and costs common to services.

(A) General overhead costs - Costs incurred in operating and managing the company that are not directly attributable to BNFs or services.

(B) Costs common to BNFs - Costs incurred in the provision of BNFs that can not be directly attributed to any one BNF individually but only to a category or subcategory of BNFs collectively.

(C) Costs common to services - Costs incurred in the provision of two or more services that do not vary with changes in the relative proportions of the outputs of those services. Common costs are not directly attributable to any one service individually but only to a group of services collectively. In the event a BNF is used in the provision of two or more services then the volume insensitive cost of the BNF is a cost common to the services that use the BNF. However, if the technological requirements for the provision of one service alter the least cost technology choice for common BNFs or common facilities, then the increase in costs caused by the requirements for more advanced technologies is not a common cost but a cost directly attributable to the service that alters the least cost technology choice.

(6) Cost causation principle - The principle that only those costs that are caused by an activity (such as a network function, service, or group of services) in the long run are directly attributable to that activity. Costs are caused by an activity, in the long run, if the costs are brought into existence as a direct result of the activity.

(7) Cost driver - A specific condition, under which a BNF is provided, whose change causes significant and systematic changes in the cost of providing a BNF. For example, if the cost of providing a network access channel varies with the density and size of a wire center, then density and size are cost drivers for that BNF.

(8) Cost of debt - The rate of interest paid on borrowed money.

(9) Cost of money - The weighted annual cost to the DCTU of the debt and equity capital invested in the company.

(10) Dedicated and switched transport - The category of BNFs that provide for dedicated or shared transmission transport between two or more DCTU switching offices or wire centers. This BNF category consists of two subcategories of BNFs: Dedicated Transport and Switched Transport.

(A) Dedicated transport - The subcategory of BNFs that provide for full period, bandwidth specific (e.g., DS-0, DS-1, DS-3) interoffice transmission paths between the originating and terminating points of channel connection.

(B) Switched transport - The subcategory of BNFs that provide for shared interoffice transmission paths between originating and terminating points of switching.

(11) Group of services - A number of separately tariffed services that share significant common costs (as defined in paragraph (5) of this subsection) that are necessary and unique to the provision of those services and are not directly attributable to any one service individually. This term also refers to a situation in which two or more groups of services are part of a larger group of services

because of significant common costs that are necessary and unique to the provision of all the services in the group but are not directly attributable to any one group or service individually.

(12) Measure of unit cost - The measure of usage used to calculate unit cost for a particular BNF (for example, a minute of use of a switching function, or a quarter mile of a DS-1 network access channel). The measure of unit costs may be multidimensional; for example, it may have both time and distance components. The measure of unit cost chosen for a BNF shall correspond to the basis upon which the costs of that BNF are incurred.

(13) Network access - The category of BNFs that accommodate access to other network functions provided by DCTUs. Access is accomplished by transmission paths between customers and DCTU wire centers. This category consists of three subcategories of BNFs: network access channel; network access channel connection; and channel performance and other features and functions.

(A) Network access (NA) channel - The subcategory of BNFs that provide the transmission path between the point of interface at the customer location and the main distribution frame, or equivalent (e.g., DSX-1, DSX-3), of a DCTU wire center.

(B) Network access (NA) channel connection - The subcategory of BNFs that provide the interface between the network access channel and the DCTU wire center switching equipment, subsequent dedicated transport equipment (dedicated interoffice circuits), or subsequent channel equipment (dedicated intraoffice circuits).

(C) Channel performance and other features and functions - The subcategory of BNFs that provide the channel functions associated with transmission or service type (e.g., analog, digital, coin, ISDN), bandwidth conversion, signaling, multiplexing, amplification, and channel performance.

(14) Significant - For the purposes of this section, the qualifying term significant is used to refer to instances in which costs or changes affect total study results by at least five percent. This general guideline for when costs or changes are significant may be relaxed by considering the cumulative effect of either including or excluding costs or changes from a study.

(15) Subcategories of BNFs - Groupings of closely related BNFs in a category of BNFs.

(16) Switching and switch functions - The category of BNFs that provide for switched access between two or more network access channels or between network access channels and other BNFs, such as interoffice transport. This function is accomplished through the establishment of a temporary transmission path between network access channels in the same switching office; between a network access channel and the interoffice facilities that interconnect switching offices; or between a network access channel and other BNFs. This BNF category shall cover the first point of switching for a customer. This BNF category consists of three subcategories of BNFs: interoffice switching; intraoffice switching; and switching features.

(A) Interoffice switching - The subcategory of BNFs that provide for: switching between network access channels and switched transport facilities which are connected to different wire centers; and switching between network access channels and switched transport facilities when a tandem switch is used as the first point of interface to the DCTU switched network (e.g., connection of facilities from an interexchange carrier's point of network interface).

(B) Intraoffice switching - The subcategory of BNFs that provide for switching between two or more network access channels within the same wire center.

(d) General principles.

(1) Underlying the construction and application of this section is the recognition that the DCTU network consists of a finite number of BNFs that, when bundled in various combinations, can be used to deliver and market a vast variety of telecommunications services. Therefore, the determination of the cost of a service and the costs of a group of services under this section shall involve the identification and costing of BNFs.

(2) The LRIC studies that the DCTU is required to file under this section shall assume that the company is operating in the long run and employs least cost technologies, as those terms are defined in subsection (c) of this section.

(3) In order to obtain accurate LRIC study results, the DCTU shall avoid the use of embedded cost data; expense items and capital costs shall reflect long run incremental costs and the DCTU shall justify any instance in which embedded cost data are used. Further, the fact that the costs determined under this section may differ from the company's embedded costs as determined during proceedings under the Public Utility Regulatory Act, Chapter 53, Subchapters C and D or E, should in no way cause the company to attribute any of this cost discrepancy to LRIC studies for BNFs, services, or groups of services.

(4) When a BNF is used in the provision of two or more services then the volume insensitive cost of the BNF is a cost common to the services (as defined in subsection (c)(5)(C) of this section) that use the BNF.

(5) When services share significant common costs (as defined in subsection (c)(5)(C) of this section), none of the common costs shall be included in the LRIC studies for the services individually; instead, the company shall identify which services share the common costs and attribute the cost recovery responsibility of these costs to the group of services collectively. Specifically, the individual LRIC studies for residential and business basic local exchange service, as these services are tariffed on the effective date of this section, shall exclude any volume insensitive costs associated with the use of the network access channel basic level (as defined in subsection (e)(1)(A) of this section) and network access channel connection basic level (as defined in subsection (e)(2)(A) of this section).

(6) When two or more groups of services share common costs, none of the common costs shall be included in the LRIC studies for groups individually; instead, the company shall identify which groups share the common costs and assign the common cost recovery responsibility of these costs to these groups collectively.

(7) Nothing in this section is intended to either endorse or reject the DCTU's current rate and tariff structures.

(e) Identification of basic network functions. The DCTU shall identify for each subcategory of BNFs the relevant and separately identifiable BNFs. The determination of the appropriate degree of aggregation of network components, functions, or activities into separately identifiable BNFs shall be consistent with the principles described in subsection (d) of this section. Furthermore, in choosing BNFs, the DCTU shall seek to minimize the number of network components, functions, or activities that are not included in BNFs. In addition to BNFs the company identifies under this subsection, the company shall identify for each subcategory of BNFs the following prescribed BNFs:

(1) Required BNFs for subcategory network access (NA) channel:

(A) NA channel basic level: A transmission path which provides less than 1.544 Mbps digital capability. This includes 300 to 3,000 Hz analog voice service.

(B) NA channel DS-1 level: A transmission path which has 1.544 MBPS digital capability.

(C) NA channel DS-3 level: A transmission path which has 45 MBPS digital capability.

(2) Required BNFs for subcategory NA Channel Connection:

(A) NA channel connection basic level: An interface for channels which provide less then 1.544 Mbps digital capability. This includes the interface for 300 - 3,000 Hz analog voice service which is the basic interface for most voice grade services such as: basic local residential and local business service, PBX trunks, centrex-type access lines and voice grade dedicated transport service. In addition, this category includes the interface for four frequency bandwidths provided for audio channels such as: 200 to 3,500 Hz, 100 to 5,000 Hz, 50 to 8,000 Hz and 50 to 15,000 Hz. Also included in this BNF are the interfaces for low speed data transmission at speeds of 2.4, 4.8, 9.6, 56 Kbps and all other speeds below the T-1 rate of 1.544 Mbps. This interface is for narrowband service.

(B) NA channel connection DS-1 level: An interface for 1.544 MBPS digital transmission channels. This interface connects high capacity wideband transmission channels which operate in a full duplex, time division (digital) multiplexing mode.

(C) NA channel connection DS-3 level: An interface for 45 MBPS digital transmission channels. This interface connects broadband transmission channels which operate in full duplex, time division (digital) multiplexing mode.

(3) Required BNFs for subcategory Channel Performance and Other Features and Functions:

(A) Standard signaling and transmission level capabilities. Signaling and transmission level capabilities suitable for a wide variety of network services and applications associated with the BNF NA channel basic level, as defined in paragraph (1)(A) of this subsection.

(B) Nonstandard signaling and transmission level capabilities and other features. Signaling and transmission level capabilities and other features and functions, other than those defined in subparagraph (A) of this paragraph, such as high voltage protection, multiplexing, and bridging. The company is encouraged to disaggregate this BNF into smaller BNFs that capture the variety of features and functions available to customers.

(4) Required BNFs for subcategory interoffice switching: interoffice switching. The type of switching that provides for: switching between network access channels and switched transport facilities which are connected to different wire centers; and switching between network access channels and switched transport facilities when a tandem switch is used as the first point of interface to the switched network (e.g., connection of facilities from an interexchange carrier's point of network interface).

(5) Required BNFs for subcategory intraoffice switching: intraoffice switching. Switching between two or more network access channels served from the same wire center.

(6) Required BNFs for subcategory switching features:

(A) Hunting arrangements. An optional function available to customers with multiple local exchange access lines in service.

(B) Custom calling features. Various optional features which provide added calling convenience.

(C) Central office automatic call distribution. The provision of call distribution as an integrated function of certain electronic central offices equipped to provide this capability. This function permits an equal distribution of a large volume of incoming calls to predesignated groups of answering positions, referred to as agent positions.

(D) Central office based PBX-type functions. A business communications system furnished from stored program control central offices that provides the equivalent of customer premises PBX services through the use of central office hardware and software as well as through network access facilities from the central office to the customer premises. Included in this BNF shall be only hardware specific to this type of service, processor or memory usage involved in special features for this type of service, and any software or software right to use fees associated with this type of service. This BNF should exclude any network functions that are already identified as other BNFs.

(7) Required BNFs for subcategory dedicated transport:

(A) Dedicated transport termination. An interface which provides for the transmission conversions (e.g., multiplexing) required between channel connection and dedicated transport facilities.

(B) Dedicated transport facility. The full period, bandwidth specific (e.g., DS-0, DS-1, and DS-3), interoffice transmission paths established between two points of dedicated transport termination.

(8) Required BNFs for subcategory switched transport:

(A) Switched transport termination. An interface which provides for the transmission conversion (e.g., multiplexing) required between the switching function and switched transport facilities.

(B) Switched transport facility. The temporary interoffice transmission paths established between two points of switched transport termination.

(C) Switched transport tandem switching. The intermediate points of switching used as an economic surrogate to direct routing of interoffice facilities in the provision of switched transport.

(9) Required BNFs for subcategory billing and collection: billing and collection. The function of compiling the information needed for customer billing, preparing the customer bill statement, disbursing the bill and collecting the customer payments (this includes any collection activities required for late payment or non-payment of billing amount due).

(10) Required BNFs for subcategory measurement: measurement. The function of assembling, collating and transmitting end office switch recorded call data (occurrence and duration).

(11) Required BNFs for subcategory operator services: operator services. The role of providing a number of live or mechanized assistance functions to aid customers in the following ways: obtaining customer telephone number, street address and ZIP code information (directory assistance); providing new telephone numbers or explanatory information to callers who dial numbers

which have been changed or disconnected (intercepts); providing assistance to customers in completing operator handled toll or local calls (collect, credit card, third party, station-to-station or person-to- person); checking busy lines to make sure the line is not out of service (busy line verification); and interrupting busy lines (busy line interruption). These operator services are provided to end user customers as well as local exchange and interexchange carriers.

(f) LRIC studies for individual BNFs. The DCTU shall perform a LRIC study for each of the BNFs identified under subsection (e) of this section. The company shall perform the LRIC studies consistent with the principles described in subsection (d) of this section. Additionally, the company shall use the following instructions in determining the LRIC for individual BNFs.

(1) Relevant increment of output. For the purposes of this subsection, the relevant increment of output, as that term is used in the definition of LRIC in §26.5 of this title (relating to Definitions), shall be the level of output necessary to satisfy total current demand levels for all services using the BNF in question. Adjustments to total service output may be made to reflect the presence of new services for which demand levels can demonstrably be anticipated to increase significantly over the course of six months.

(2) Relating expenses to BNFs. The company shall avoid the use of embedded cost data and shall determine expenses consistent with the principles of long run incremental costing.

(A) Common expenses. Common expenses that are not directly attributable, using the cost causation principle, to the BNF shall be excluded.

(B) Nonrecurring expenses. The expenses of nonrecurring activities shall be separately identified.

(C) Taxes. Any tax expenses not directly attributable, using the cost causation principle, shall be excluded from the LRIC study for individual BNFs. Specifically, taxes associated with the provision of services that use more than one BNF shall not be included in the BNF LRICs.

(3) Least cost technology. LRIC studies shall assume the use of least cost technology. The choice of least cost technologies, however, shall:

(A) be restricted to technologies that are currently available on the market and for which vendor prices can be obtained;

(B) be consistent with the level of output necessary to satisfy current demand levels for all services using the BNF in question; and

(C) be consistent with overall network design and topology requirements.

(4) Network topology. LRIC studies shall use the existing or planned network topology.

(5) Cost of money. When the company uses the most recent commission approved rate of return for the company, determined either in a rate proceeding as described in §23.21(d)(1) of this title (relating to Cost of Service) or a commission arbitration proceeding, there will be a rebuttable presumption of its reasonableness. The company may use any other forward-looking rate, but shall justify its use. The DCTU is not required to update its filing only to reflect the most recently approved cost of money.

(6) Rate of depreciation. When the company uses the most recent commission approved rate of depreciation for the company there will be a presumption of reasonableness. The company shall justify the use of any other rate.

(7) Measure of unit cost. LRIC studies shall identify the appropriate measure of unit cost for a BNF (e.g., minutes of use, access line). The measure of unit cost chosen for a BNF shall correspond to the basis upon which the costs of the BNF are incurred. The measure of unit cost may be multidimensional; for example, it may have both time and distance components. In identifying the appropriate measure of unit cost, the company shall ignore the current rate structure for tariffed services using the BNF.

(8) Determination of unit cost. Using the measure of unit cost identified under paragraph (7) of this subsection, the company shall calculate unit cost for the BNF based on the assumption of full capacity utilization of the BNF, which should allow for any spare capacity due to lumpy investments or technical requirements, such as spare capacity needed for testing. The unit cost shall be calculated based on the volume sensitive costs of the BNF and exclude all costs that are volume insensitive (as those terms are defined in §26.5 of this title).

(9) Determination of volume insensitive costs. The company shall calculate the volume insensitive costs (as defined in §26.5 of this title) for the BNF.

(10) Cost drivers. LRIC studies shall identify and account for all relevant cost drivers. LRIC studies for certain BNFs shall at a minimum account for the cost drivers specified below.

(A) Cost drivers for NA channel basic level, NA channel DS-1 level, and NA channel DS-3 level. The LRICs for these BNFs shall systematically account for variations in costs caused by variations in:

(i) the density of a wire center;

(ii) the size of a wire center; and

(iii) the distance.

(B) Cost drivers for NA connection basic level, NA connection DS-1 level, and NA connection DS-3 level. The LRICs for these BNFs shall systematically account for variations in costs caused by variations in:

(i) the density of a wire center; and

(ii) the size of a wire center.

(C) Cost drivers for intraoffice switching and interoffice switching. The LRICs for these BNFs shall systematically account for variations in costs caused by variations in:

(i) the density of a wire center;

(ii) the size of a wire center; and

(iii) the time of day.

(D) Cost drivers for dedicated transport facilities and termination. The LRICs for these BNFs shall systematically account for variations in costs caused by variations in:

(i) the size of a wire center; and

(ii) the distance.

(E) Cost drivers for switched transport facilities, termination and tandem switching. The LRICs for these BNFs shall systematically account for variations in costs caused by variations in:

(i) the size of a wire center;

(ii) the distance; and

(iii) time of day.

(F) Cost drivers for measurement. The LRIC for this BNF shall systematically account for variations in costs caused by variations in:

(i) the density of a wire center;

(ii) the size of a wire center;

(iii) the time of day; and

(iv) the duration of a call.

(G) Cost drivers for operator services. The LRIC for this BNF shall systematically account for variations in costs caused by variations in the type of operator services calls.

(g) LRIC studies for tariffed services. The DCTU shall perform a LRIC study for each tariffed service, except those services for which a waiver has been granted under the workplan approved by the commission. Each LRIC study for a tariffed service shall be calculated as the sum of the costs caused by that a service's use of BNFs and any other service specific costs associated with functions not identified as separate BNFs, such as expenses of billing, service specific advertising and marketing, and service specific taxes. Each LRIC study for a tariffed service shall be consistent with the principles described in subsection (d) of this section. Additionally, the company shall use the following instructions in determining the LRIC for individual tariffed services:

(1) Mapping of BNFs and costs to tariffed services. The LRIC study shall identify the BNFs that are used in the provision of the tariffed service; the long run incremental costs for the tariffed service shall include the costs associated with this usage. The costs associated with the service's use of a BNF shall be calculated as the product of the unit cost for the BNF (as determined under subsection (f)(8) of this section) and the demand of the service for that BNF.

(2) Identification of other costs. The LRIC study for an individual tariffed service shall include all service specific costs (e.g., expenses of billing, marketing, customer service or service specific taxes) related to the provision of the service that are not included in the costs for the BNFs.

(3) Exclusion of common costs. The LRIC study for an individual tariffed service shall exclude any costs that are common costs (as defined in subsection (c)(5) of this section). Specifically, the individual LRIC studies for residential and business basic local exchange service, as these services are tariffed on the effective date of this section, shall exclude any volume insensitive costs associated with the use of the network access channel basic level (as defined in subsection (e)(1)(A) of this section) and network access channel connection basic level (as defined in subsection (e)(2)(A) of this section).

(4) Relevant increment of output. For the purposes of this subsection, the relevant increment of output, as that term is used in the definition of LRIC in §26.5 of this title (relating to Definitions), shall be the level of output necessary to satisfy current demand levels for the service. Adjustments to total service output may be made to reflect the presence of new services for which demand levels can demonstrably be anticipated to increase significantly over the course of six months.

(5) Relating expenses to services. The company shall avoid the use of embedded cost data and shall determine expenses consistent with the principles of long run incremental costing.

(A) Common expenses. Common expenses that are not directly attributable, using the cost causation principle, to the service shall be excluded.

(B) Nonrecurring expenses. The expenses of nonrecurring activities shall be separately identified.

(C) Taxes. Any tax expenses not directly attributable, using the cost causation principle, shall be excluded from the LRIC study for individual services.

(6) Least cost technology. LRIC studies shall assume the use of least cost technology. The choice of least cost technologies, however, shall:

(A) be restricted to technologies that are currently available on the market and for which vendor prices can be obtained;

(B) be consistent with the level of output necessary to satisfy current demand levels for all services using the BNF in question; and

(C) be consistent with overall network design and topology requirements.

(7) Network topology. LRIC studies shall use the existing or planned network topology.

(8) Cost of money. When the company uses the most recent commission approved rate of return for the company, determined either in a rate proceeding as described in §23.21(d)(1) of this title (relating to Cost of Service) or a commission arbitration proceeding, there will be a rebuttable presumption of its reasonableness. The company may use any other forward-looking rate, but shall justify its use. The DCTU is not required to update its filing only to reflect the most recently approved cost of money.

(9) Rate of depreciation. When the company uses the most recent commission approved rate of depreciation for the company there will be a presumption of reasonableness. The company shall justify the use of any other rate.

(h) Identification of BNFs and groups of services that share significant common costs and calculation of such common costs. The company shall identify all instances in which BNFs and groups of services share significant common costs and calculate such common costs.

(1) Costs common to BNFs. The company shall identify and calculate for each subcategory of BNFs and category of BNFs significant costs that are common to BNFs (as defined in subsection (c)(5)(B) of this section). Costs common to BNFs shall only be identified and calculated at the level of subcategories of BNFs and/or categories of BNFs.

(2) Costs common to groups of services. The company shall identify and calculate all significant common costs and the groups of services that share those common costs (as defined in subsection (c)(5)(C) of this section). The calculation of common costs required under paragraphs (1)- (2) of this subsection shall be consistent with the principles described in subsection (d) of this section and the instructions listed below.

(3) Relevant increment of output. When common costs are computed for BNFs or services, the relevant increment of output, as that term is used in the definition of LRIC in §26.5 of this title (relating to Definitions), shall be the level of output necessary to satisfy current demand levels for the BNFs or the services. Adjustments to total service output may be made to reflect the

presence of new services for which demand levels can demonstrably be anticipated to increase significantly over the course of six months.

(4) Expenses. The company shall avoid the use of embedded cost data and shall determine expenses consistent with the principles of long run incremental costing.

(A) Nonrecurring expenses. The expenses of nonrecurring activities shall be separately identified.

(B) Taxes. Any tax expenses not directly attributable, using the cost causation principle, shall be excluded from the cost studies for common costs.

(5) Least cost technology. The studies shall assume the use of least cost technology. The choice of least cost technologies, however, shall:

(A) be restricted to technologies that are currently available on the market and for which vendor prices can be obtained;

(B) be consistent with the level of output necessary to satisfy current demand levels for the BNFs or services in question; and

(C) be consistent with overall network design and topology requirements.

(6) Network topology. Cost studies shall use the existing or planned network topology.

(7) Cost of money. When the company uses the most recent commission approved rate of return for the company, determined either in a rate proceeding as described in §23.21(d)(1) of this title (relating to Cost of Service) or a commission arbitration proceeding, there will be a rebuttable presumption of its reasonableness. The company may use any other forward-looking rate, but shall justify its use. The DCTU is not required to update its filing only to reflect the most recently approved cost of money.

(8) Rate of depreciation. When the company uses the most recent commission approved rate of depreciation for the company there will be a presumption of reasonableness. The company shall justify the use of any other rate.

(i) LRIC studies for groups of tariffed services that share significant common costs. The DCTU shall perform a LRIC study for each group of services identified under subsection (h)(2) of this section. Each group LRIC shall be calculated as the sum of the LRICs (as determined under subsection (g) of this section) for the services in the group and the common costs for those services (as identified under subsection (h)(2) of this section). Each LRIC study shall be consistent with the principles described in subsection (d) of this section. Additionally, the company shall use the following instructions in determining the LRIC for groups of services.

(1) Relevant increment of output. When the LRIC is computed for a group of services, the relevant increment of output, as that term is used in the definition of LRIC in §26.5 of this title (relating to Definitions), shall be the level of output necessary to satisfy current demand levels for the services in the group. Adjustments to total service output may be made to reflect the presence of new services for which demand levels can demonstrably be anticipated to increase significantly over the course of six months.

(2) Relating expenses to groups of services. The company shall avoid the use of embedded cost data and shall determine expenses consistent with the principles of long run incremental costing.

(A) Common expenses. Common expenses that are not directly attributable, using the cost causation principle, to the group of services shall be excluded.

(B) Nonrecurring expenses. The expenses of nonrecurring activities shall be separately identified.

(C) Taxes. Any tax expenses not directly attributable, using the cost causation principle, shall be excluded from the LRIC study for the group of services.

(3) Least cost technology. LRIC studies shall assume the use of least cost technology. The choice of least cost technologies, however, shall:

(A) be restricted to technologies that are currently available on the market and for which vendor prices can be obtained;

(B) be consistent with the level of output necessary to satisfy current demand levels for all services using the BNF in question; and

(C) be consistent with overall network design and topology requirements.

(4) Network topology. LRIC studies shall use the existing or planned network topology.

(5) Cost of money. When the company uses the most recent commission approved rate of return for the company, determined either in a rate proceeding as described in §23.21(d)(1) of this title (relating to Cost of Service) or a commission arbitration proceeding, there will be a rebuttable presumption of its reasonableness. The company may use any other forward-looking rate, but shall justify its use. The DCTU is not required to update its filing only to reflect the most recently approved cost of money.

(6) Rate of depreciation. When the company uses the most recent commission approved rate of depreciation for the company there will be a presumption of reasonableness. The company shall justify the use of any other rate.

(j) Requirements for subsequent filings of LRIC studies. The LRIC studies required by this subsection shall be consistent with the principles, instructions and requirements set forth in this section and the workplan approved by the commission and shall be reviewed in accordance with the procedures established in subsection (k) of this section.

(1) Updated studies. A DCTU may be required to update the filings required by this section, other than the workplan, for those studies where no significant changes have occurred.

(2) Provisions for new BNFs. When significant technological or other changes occur that necessitate a change in the definition of current BNFs or the identification of new BNFs, the DCTU shall file with the commission and the Office of Public Utility Counsel (OPUC) updated versions for all affected LRIC studies or new studies as appropriate.

(3) Provisions for new services. For each application for a service filed pursuant to this title, the DCTU shall file with the commission and OPUC a LRIC study for the service consistent with the principles described in subsection (d) of this section and the specific requirements set forth in subsection (g) of this section.

(4) Unbundling of existing tariffed services. When an application filed pursuant to this title proposes a service that previously had been bundled with other BNFs into a tariffed service, the DCTU shall carefully reexamine the identification of groups of services that share significant common costs (as required under subsection (h) of

this section). If the new service significantly changes the identification of groups of services and the identification of common costs, the DCTU should update all studies required under this section that are affected by these changes.

(k) Review process for LRIC studies. A LRIC study considered under this section shall be reviewed administratively to determine whether the DCTU's LRIC study is consistent with the principles, instructions and requirements set forth in this section.

(1) Sufficiency. The LRIC study shall be examined for sufficiency. To be sufficient, the LRIC study shall conform to the prototype studies developed under the workplan approved by the commission. If the presiding officer or the commission staff concludes that material deficiencies exist in the LRIC study, the DCTU shall be notified within 15 days of the filing date of the specific deficiency in its LRIC study. The DCTU shall have 15 days from the date it is notified of the deficiency to file a corrected LRIC study.

(2) Time schedule.

(A) No later than 45 days after the filing date of the sufficient LRIC study, any party that demonstrates a justiciable interest may file with the presiding officer written comments or recommendations concerning the LRIC study.

(B) No later than 55 days after the filing date of the sufficient LRIC study, OPUC may file with the presiding officer written comments or recommendations concerning the LRIC study.

(C) No later than 65 days after the filing date of the sufficient LRIC study, the commission staff shall file with the presiding officer written comments or recommendations concerning the LRIC study.

(D) No later than 75 days after the filing date of the sufficient LRIC study, any party that demonstrates a justiciable interest, OPUC, or the DCTU may file with the presiding officer a written response to the commission staff's recommendation.

(E) No later than 85 days after the filing date of the sufficient LRIC study, the presiding officer shall complete an administrative review to determine whether the DCTU's LRIC study is consistent with the principles, instructions and requirements set forth in this section. The presiding officer shall approve the LRIC study or order the DCTU to refile the LRIC study incorporating all modifications recommended by the presiding officer.

(F) Any party may appeal to the commission an administrative determination by a presiding officer within five days after the date of notification of the determination. The commission shall rule on the appeal within 30 days after the date it receives the appeal. If the commission or a presiding officer orders a cost study to be changed, the dominant certificated telecommunications utility shall be ordered to make those changes within a period that is commensurate with the complexity of the LRIC study.

(3) Requests for information. While the LRIC study is being administratively reviewed, the commission staff, OPUC, and any party that demonstrates a justiciable interest may submit requests for information to the DCTU. Three copies of all answers to such requests for information shall be provided within ten days after receipt of the request by the DCTU to the commission staff, OPUC and any party that demonstrates a justiciable interest.

(4) Suspension. At any point within the first 45 days of the review process, the presiding officer, the commission staff, OPUC, the DCTU, or any party that demonstrates a justiciable interest may request that the review process be suspended for 30 days. The presiding officer may grant a request for suspension only if he or she has determined that the party has demonstrated that good cause exists for such suspension.

(5) Effective date of the LRIC study. The effective date of the LRIC study shall be the date it is approved by the presiding officer.

(l) Notice requirements. At least ten days before a DCTU files any workplan or LRIC study pursuant to this section, the DCTU shall file with the commission and OPUC a notice of its intent to file such workplan or LRIC study and the expected filing date. The DCTU's notice shall indicate that the filing is being made pursuant to this section. The commission shall then publish notice of the DCTU's intent to file the workplan or LRIC study in the *Texas Register.*

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 January 25, 1999.

TRD-9900518
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: March 7, 1999
For further information, please call: (512) 936–7308

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Part VI. Texas Motor Vehicle Board

Chapter 103. General Rules

16 TAC §103.3

The Motor Vehicle Board of the Texas Department of Transportation proposes amendments to §103.3, General Rules, concerning Amended License. The Board previously proposed amendments to §103.3 which change the reference from Motor Vehicle Commission to Motor Vehicle Board and which would more clearly reflect the licensing process for dealers that sell and/or assign an interest in franchises or franchised entities and allow written notice to the Board of certain changes, instead of requiring an application for amended license. The Board considered comments on the proposal at its January 14, 1999 meeting and determined that proposed additional changes are so significant that the rule should be withdrawn and republished. In addition to the changes previously proposed, this republication includes a provision that a dealership may be operated by a manufacturer, distributor or representative only on a temporary basis and defines "temporary" as one year or less.

Brett Bray, Director, Motor Vehicle Division, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections. There will be no significant impact on local economies or overall employment as a result of enforcing or administering the sections.

Mr. Bray also has determined that for each of the first five years the amendments are in effect the public benefit anticipated as a result of the amended rules will be to provide licensing guidelines that are more clear and understandable to the regulated entities. There will be no effect on small businesses.

The anticipated additional cost to persons required to comply with these sections as proposed is not determinable.

Comments on the proposed rules may be submitted to Brett Bray, Director, Motor Vehicle Division, P.O. Box 2293, Austin, Texas 78768. Please submit 15 copies. The Texas Motor Vehicle Board will consider the final adoption of the proposed rules at its meeting on April 22, 1999. The deadline for proposed amendments is 5:00 p.m., March 5, 1999.

The amendments are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules necessary and convenient to effectuate the provisions of this act.

Texas Motor Vehicle Commission Code §§ 1.03, 4.01(a), 4.02, 4.03, 5.02(b) and 5.04(a) are affected by the proposed amendments.

§103.3. Amended License.

(a) To effectuate the Texas Motor Vehicle Commission Code, §4.02(d), every licensed dealer who proposes to conduct business under a franchise which is additional to or which differs from the franchise or franchises on which the license is then based shall file an application to amend the license on the form prescribed by the Board [~~commission~~], attaching a copy of the franchise agreement. The amended application will be considered as if it were an original application to operate under the additional franchise as to all matters except those reflected by the license as issued.

(b) Every licensed dealer who proposes to sell and/or assign to another an interest in one or more franchises for which the license is issued, or an interest in the franchised entity, whether a corporation or otherwise, so long as the physical location of the franchise remains the same, shall notify the Board and the franchisor of the identity and ownership interest of the purchaser/assignee in writing. If the sale or assignment of the business results in the franchise(s) being held by an entity different from the existing licensee, then the purchasing/assignee entity must apply for and obtain a new license. If the purchaser/assignee is a manufacturer, distributor, or representative, then the dealership may only be operated and licensed on a temporary basis. "Temporary" means for one year or less. [~~equivalent to 10% or more in one or more franchises on which the license is then based or an equivalent interest in the business of the dealership, whether the same is a corporation, partnership, sole proprietorship, or otherwise, shall file an application to amend the license providing the requested information as to the proposed assignee. If the interest involved exceeds 50%, the amended license may be issued in the name of such assignee.~~]

(c) In the event of a change in management reflected by a change of the general manager or other person who is in charge of a licensee's business activities, whether a managing partner, officer, or director of a corporation, or otherwise, the licensee shall notify the Board and the franchisor in writing with 10 days of the change. [~~commission shall be advised by means of an application for an amended license.~~]

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

Filed with the Office of the Secretary of State, on January 25, 1999.

TRD-9900507
Brett Bray
Division Director
Texas Motor Vehicle Board
Proposed date of adoption: April 22, 1999
For further information, please call: (512) 416–4899

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Part VIII. Texas Racing Commission

Chapter 309. Operation of Racetracks

Subchapter C. Greyhound Racetracks

Division 2. Operations

16 TAC §309.353

The Texas Racing Commission proposes an amendment to §309.353, concerning the dismissal of kennels. The amendment is the result of discussions between agency staff and representatives of the greyhound racetracks and the Texas Greyhound Association. The amendment clarifies the reasons for which a kennel contract may be dismissed from a greyhound racetrack. In order for new kennels to be given a chance at Texas greyhound racetracks, the amendment provides that for five years after a kennel is dismissed, the association cannot book another kennel that is owned substantially by the dismissed kennel's owners.

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

Ms. Marcus has also determined that for each of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the proposal will be the assurance that pari-mutuel greyhound racing will be conducted with utmost integrity and with fairness to all licensees. There will be no fiscal implications for small businesses as a result of enforcing this section. There is no anticipated economic cost to an individual required to comply with the amendment as proposed. The proposal has no effect on the state's agricultural, horse breeding, or horse training industries. The proposal may have a positive effect on the state's greyhound breeding and greyhound training industries.

Comments on the proposal may be submitted on or before March 15, 1999, to Roselyn Marcus, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080.

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

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

§309.353. Dismissal of Kennel.

(a) (No change.)

(b) A contract between an association and a kennel owner must provide a uniform dismissal clause. The clause must state the following [~~that~~]:

(1) if a kennel has been continuously booked at the association for more than two year, the association shall dismiss a kennel if the kennel's win record is [~~that finishes~~] in the bottom four positions at the end of a race meeting for two of the past three years and the associaton may not rebook the kennel for a period of five years;

(2) the association may place a kennel on probation by written notice if the kennel's win record is in the lowest three positions during each of the three preceding months; [~~and~~]

(3) an association may place a kennel on probation by written notice if the kennel is in breach of the kennel contract in a manner that materially affects the rights or privileges of the association; and

(4) [~~(3)~~] an association may dismiss a kennel on probation if during the three-month period following the beginning of probation, the kennel fails to cure the breach or fails to place [~~has not placed~~] higher than at least three other kennels [~~during the 90 day period following the beginning of the probation~~].

(c) (No change.)

(d) For a five-year period after a kennel is dismissed pursuant to this section, an association may not book another kennel that is owned substantially by the same owners as the dismissed kennel. For purposes of this subsection, "substantially" means more than a 50% ownership interest in the kennel.

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 January 25, 1999.

TRD-9900486
Paula C. Flowerday
Executive Secretary
Texas Racing Commission
Proposed date of adoption: March 26, 1999
For further information, please call: (512) 833–6699

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Chapter 321. Pari-mutuel Wagering

Subchapter A. Regulation and Totalisator Operations

Division 2. Mutuel Tickets

16 TAC §321.38

The Texas Racing Commission proposes an amendment to §321.38, concerning the cancellation of mutuel tickets. This proposal changes the focus of the section from regulating the cancellation of mutuel tickets to the cancellation of win wagers on mutuel tickets. The amendment provides a win wager over $500 may not be cancelled. The amendment also adds clarity and additional circumstances under which a win wager may be cancelled. Lastly, it provides for the association to post notice of these standards.

Roselyn Marcus, General Counsel for the Texas Racing Commission, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the proposal. Ms. Marcus has also determined that for each of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the proposal will be that pari-mutel wagering will be fair to the patrons, while maintaining its high integrity. There will be no fiscal implications for small businesses as a result of enforcing this proposal. There is no anticipated economic cost to an individual required to comply with the proposal. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Comments on the proposal may be submitted on or before March 15, 1999, to Roselyn Marcus, General Counsel, for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080.

The amendment is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §11.01, which authorizes the commission to adopt rules to regulate pari-mutuel wagering; and §11.011, which authorizes the commission to adopt rules to regulate pari-mutuel wagering on simulcast races.

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

§321.38. Cancellation of Win Wagers [~~Tickets~~].

(a) An association may not cancel a win wager for more than $500 on any live or simulcast race offered for wagering by the association, unless: [~~ticket except as authorized by this section.~~]

(1) the patron requests to cancel the wager before the patron leaves the teller's window and before the ticket-issuing machines are locked; or

(2) the stewards or racing judges order the wager to be canceled because of a scratch in the race.

(b) If a patron desires to cancel a wager that is on the same mutuel ticket as a win wager that may not be canceled under this section, the association may cancel the ticket but must immediately replace the win wager that was on the ticket. [~~An association may cancel a mutuel ticket for $250 or less on request by the holder of the ticket before the ticket-issuing machines are locked. An association may cancel a ticket for any amount if the holder of the ticket requests that the ticket be canceled before the patron leaves the teller's window and before the ticket-issuing machines are locked.~~]

(c) An association shall post a notice by each automatic ticket-issuing machine on association grounds that at a minimum states that a win wager for more than $500 may not be canceled except if the stewards or racing judges order the wager to be canceled because of a scratch in the race. [~~An association may cancel a mutuel ticket if the stewards or racing judges order tickets to be cancel because of a scratch in a race.~~]

(d) An association may adopt a house policy regarding the cancellation of win wagers [~~mutuel tickets~~] that is more restrictive than this section, subject to the approval of the executive secretary.

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 January 25, 1999.

TRD-9900487
Paula C. Flowerday

Executive Secretary
Texas Racing Commission
Proposed date of adoption: March 26, 1999
For further information, please call: (512) 833–6699

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TITLE 19. EDUCATION

Part II. Texas Education Agency

Chapter 150. Commissioner's Rules Concerning Educator Appraisal

Subchapter AA. Teacher Appraisal

19 TAC §150.1003

The Texas Education Agency (TEA) proposes an amendment to §150.1003, concerning educator appraisal. The section establishes requirements and procedures related to appraisal of teachers. Legislation enacted in 1995 required the commissioner of education to adopt a recommended appraisal process and criteria on which to appraise the performance of teachers.

The proposed amendment adds language to 19 TAC §150.1003(b) and (d) to clarify timelines related to the completion of the teacher self-report form and the teacher appraisal calendar. The need for these clarifications is based on feedback from principals' and teachers' evaluation of the initial year of implementation of the Professional Development and Appraisal System (PDAS). Feedback indicated that schedules for the completion of the PDAS orientation for teachers and the completion of the teacher self-report by teachers were unclear.

Felipe Alanis, deputy commissioner for programs and instruction, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Alanis and Criss Cloudt, associate commissioner for policy planning and research, have determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be enhancement of the professional practice of teachers, providing students with increased levels of teaching performance and resulting in increased levels of student achievement. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

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

The amendment is proposed under the Texas Education Code, §§21.351-21.356, which authorizes the commissioner of education to adopt a recommended appraisal process and criteria on which to appraise the performance of teachers.

The proposed amendment implements the Texas Education Code, §§21.351-21.356.

§150.1003. Appraisals, Data Sources, and Conferences.

(a) (No change.)

(b) The annual teacher appraisal shall include:

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

(3) completion of Section I of the Teacher Self-Report Form that shall be presented to the principal:

(A) within the first three weeks from the day of completion of [~~after~~] the Professional Development and Appraisal System (PDAS) orientation as described in §150.1007 of this title (relating to Teacher Orientation);

(B) within the first three weeks from the day of completion of the PDAS orientation as described in §150.1007 of this title for teachers new to the PDAS; or

(C) within the first three weeks of instruction in the school years when the PDAS orientation is not required pursuant to §150.1007 of this title.

(4) - (7) (No change.)

(c) (No change.)

(d) Each school district shall establish a calendar for the appraisal of teachers. The appraisal period for each teacher must include all of the days of a teacher's contract. Observations during the appraisal period must be conducted during the required days of instruction for students during one school year. The appraisal calendar shall [~~period~~]:

(1) exclude observations in the three weeks following the day of completion of the PDAS orientation in the school years when an orientation is required as described in §150.1007 of this title;

[~~(1) shall exclude the first two weeks of instruction;~~]

(2) exclude observations in the three weeks following the day of completion of the PDAS orientation for teachers new to the PDAS as described in §150.1007 of this title;

(3) exclude observations in the first three weeks of instruction in the school years when the PDAS orientation is not required pursuant to §150.1007 of this title;

(4) [~~(2)~~] [~~shall~~] prohibit observations on the last day of instruction before any official school holiday or on any other day deemed inappropriate by the school district board of trustees; and

(5) [~~(3)~~] [~~shall~~] indicate a period for summative annual conferences that ends no later than 15 working days before the last day of instruction for students.

(e)-(k) (No change.)

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

Filed with the Office of the Secretary of State, on January 25, 1999.

TRD-9900504
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Earliest possible date of adoption: March 7, 1999
For further information, please call: (512) 463–9701

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 305. Consolidated Permits

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §305.50 and the repeal of §305.146, concerning Consolidated Permits.

EXPLANATION OF PROPOSED RULES

This rulemaking eliminates hazardous waste storage, processing, and disposal applicant requirements that are more stringent than state statute or unnecessary and eliminates a redundant reporting requirement.

Section 305.50(2), concerning Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit, is proposed to be amended to delete the requirement that an industrial solid waste permit applicant must submit listings of evidence of non-compliance concerning solid waste management in the application and to delete the requirement than an applicant must submit information on debts owed to the state. Texas Health and Safety Code §361.084, concerning Compliance Summaries, provides that evidence of noncompliance may be offered and admitted into evidence for consideration by the commission in determining whether to issue a permit; however, it does not require this information to be submitted by the applicant as part of a permit application. Additionally, commission staff can easily obtain information on an applicant's debts owed to the state, for example, by accessing the agency's database on fee status. Therefore, the commission proposes to eliminate the requirement that the applicant submit such information. The commission staff wants to retain the requirement for listings of sites owned, operated, or controlled by the applicant to aid in the preparation of internal compliance summaries.

Section 305.146, concerning Reporting, is proposed to be repealed because its reporting requirements are redundant to reporting requirements in Chapter 335, Subchapter A, concerning Industrial Solid Waste and Municipal Hazardous Waste in General.

SMALL BUSINESS ANALYSIS The commission has reviewed the adopted rulemaking in light of Texas Government Code §2006.002 requirements and has determined that there is no adverse economic effect on small businesses because the rulemaking reduces regulatory requirements.

FISCAL NOTE Mr. Jeffrey Horvath, Strategic Planning and Appropriations, has determined that for the first five-year period the rules, as proposed, are in effect, there will be no significant fiscal implications for state or local government.

PUBLIC BENEFIT Mr. Horvath has also determined that for the first five years the rules as proposed are in effect the public benefit anticipated, as a result of the administration of these sections, will be reduction of certain permit application requirements for hazardous waste storage, processing, and disposal facilities. The proposed rules will result in no increase in costs to the affected parties because the certain permit application requirements have been reduced. Anticipated cost savings to persons, and businesses, large and small, applying for hazardous waste storage, processing, and disposal facilities permits are not quantifiable at this time and are not expected to be significant.

DRAFT REGULATORY IMPACT ANALYSIS The rule proposal would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the rule eliminates certain permit application requirements relating to evidence of noncompliance and debts owed to the state, and eliminates a redundant reporting requirement, which in turn provides benefits to the affected economy, sectors of the economy, productivity, competition, jobs, the environment, and the public health and safety of the state and affected sectors of the state, as explained below. The elimination of these requirements would provide a benefit to the economy, sectors of the economy, productivity, competition, and jobs by lessening regulatory requirements, thus costing certain companies less. The rule would not have an adverse effect in a material way, to the environment and the public health and safety of the state and affected sectors of the state, because the information which is currently being collected through the proposed-to-be-eliminated requirements is already available in other ways or databases at the agency. For example, the agency, separately from the permit application process, generates the information concerning evidence of noncompliance that is proposed to be deleted as a permit application requirement, so there is no loss of information by the elimination of this application requirement. In addition, this proposed rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency.

TAKINGS IMPACT ASSESSMENT The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to delete the mandatory requirement that an industrial solid waste permit applicant submit listings of evidence of non-compliance concerning solid waste management in the application, to delete the requirement than an applicant must submit information on debts owed to the state, and to repeal a redundant reporting requirement. The rules will substantially advance this specific purpose by amending 30 TAC §305.50(2), concerning Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit, and by repealing 30 TAC §305.146, concerning Reporting. Promulgation and enforcement of these rules will not burden private real property because they reduce hazardous waste storage, processing and disposal facility permit application requirements and repeal a redundant reporting requirement. Real property is not the subject of these rules, and therefore, the rule changes do not affect real property.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW The commission has reviewed this rulemaking and found that the proposal is a rulemaking subject to the Coastal Management Program (CMP) and must be consistent with all applicable goals and policies of the CMP. The commission has prepared a consistency determination for this proposed rule pursuant to 31 TAC §505.22 and has found that the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goals applicable to the rulemaking are the goals to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treat-

ment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code Annotated, §§6901 et seq. Promulgation and enforcement of this proposed rule would be consistent with the applicable CMP goals and policies because the rule amendments would streamline certain state permit application requirements which are unnecessary and/or redundant, thereby providing for a more efficient permitting system, thus serving to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs, and also thereby serving to ensure that new solid waste facilities and areal expansions of existing solid waste facilities are sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code Annotated, §§6901 et seq. In addition, the proposed rule does not violate any applicable provisions of the CMP's stated goals and policies. The commission invites public comment on the consistency of the proposed rule.

SUBMITTAL OF COMMENTS Written comments may be submitted by mail to Bettie Bell, Office of Policy and Regulatory Development, MC-205, P.O. Box 13087, Austin, Texas 78711-3087; or by fax at (512) 239-4808. All comments must be received by March 8, 1999, and should reference Rule Log No. 98024-305-WS. Comments received by 5:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. For further information, please contact Wayne Harry at (512) 239-6619.

Subchapter C. Application for Permit

30 TAC §305.50

STATUTORY AUTHORITY This rule amendment is proposed under the Texas Water Code §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §26.011, which requires the commission to control the quality of water by rule. This rule amendment is also proposed under Texas Health and Safety Code, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous municipal waste, to adopt rules consistent with Chapter 361, and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency.

The proposed amendment implements Texas Health and Safety Code Chapter 361.

§305.50. Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit.

Unless otherwise stated, an application for a permit to store, process, or dispose of solid waste shall meet the following requirements.

(1) (No change.)

(2) Plans and specifications for the construction and operation of the facility and the staffing pattern for the facility shall be submitted, including the qualifications of all key operating personnel. Also to be submitted is the closing plan for the solid waste storage, processing or disposal facility. The information provided shall be sufficiently detailed and complete to allow the executive director to ascertain whether the facility will be constructed and operated in compliance with all pertinent state and local air, water, public health and solid waste statutes. Also to be submitted are listings of [~~evidence of noncompliances concerning solid waste management by the permit holder in the preceding five years at the permitted site, listings of evidence of noncompliances concerning solid waste management in the preceding five years at any~~] sites [~~site~~] owned, operated, or controlled by the applicant in the state of Texas[~~, a summary of the attempts of the permit holder to correct the environmental violations, and an indication of whether the permit holder or applicant is indebted to the state for fees, payment of penalties, or taxes imposed by the Texas Solid Waste Disposal Act or by any rule of the commission~~]. For purposes of this subsection, the terms "permit holder" and "applicant" include each member of a partnership or association and, with respect to a corporation, each officer and the owner or owners of a majority of the corporate stock, provided such partner or owner controls at least 20% of the permit holder or applicant and at least 20% of another business which operates a solid waste management facility.

(3)-(14) (No change.)

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

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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: March 7, 1999
For further information, please call: (512) 239-6087

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Subchapter G. Additional Conditions for Hazardous and Industrial Solid Waste Storage, Processing, or Disposal Permits

30 TAC §305.146

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

STATUTORY AUTHORITY This rule repeal is proposed under the Texas Water Code §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §26.011, which requires the commission to control the quality of water by rule. This rule repeal is also proposed under Texas Health and Safety Code, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous municipal waste, to adopt rules consistent with Chapter 361, and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency.

The proposed repeal implements Texas Health and Safety Code Chapter 361.

§305.146. Reporting.

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

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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-6087

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Chapter 335. Industrial Solid Waste and Municipal Hazardous Waste

Texas Natural Resource Conservation Commission (commission) proposes amendments to §§335.9, 335.10, 335.15, 335.112, 335.115, 335.117, 335.152, 335.155, 335.159 and repeal of §§335.114 and 335.154, concerning Industrial Solid Waste and Municipal Hazardous Waste.

EXPLANATION OF PROPOSED RULES The general purpose of this rulemaking is to make state rules no more stringent than federal rules in accordance with commission policy.

The proposed reporting amendments are part of an ongoing regulatory reform effort to reduce unnecessary reporting requirements for hazardous waste management facilities. The proposed rule amendments will reduce the reporting frequency for interim status and permitted RCRA hazardous waste storage, processing, and disposal facilities from state required annual reporting to federally required biennial reporting. The commission has determined that this information is not necessary on an annual basis and that the federal biennial reporting frequency is satisfactory for state information requirements.

Environmental Protection Agency (EPA) has also promulgated in 62 FedReg 6622-6657, February 12, 1997, an exemption from manifesting for transport of hazardous waste over right-of-ways on contiguous properties (properties touching along a boundary) in Title 40 Code of Federal Regulations (CFR) §262.20(f). Under 40 CFR §271.21(e), states, such as the State of Texas, having final Resource Conservation and Recovery Act (RCRA) authorization must modify their program to reflect federal program changes and submit the modifications to the EPA for approval. Establishing equivalency with federal regulations will enable the commission to retain authorization to operate aspects of the hazardous waste program. Incorporating the federal manifesting exemption into state rules will also make state rules no more stringent than the federal rules in accordance with commission policy. In addition, removing barriers to consolidation of waste in one central area should reduce the possibility that the public and the environment could come into contact with hazardous waste because one area is easier to control and can be better located than numerous smaller areas.

A typographical error is also corrected.

Section 335.9 is proposed to be amended by deleting the cross references to §§335.114 and 335.154, relating to annual reporting requirements for interim status and permitted hazardous waste management facilities that are proposed for repeal.

Section 335.10 is proposed to be amended by adding a new subsection (h). This new subsection will exempt hazardous waste shipments from manifesting if they are transported along a public right-of- way joining contiguous land controlled by the same person, as in federal rule 40 CFR §262.20(f).

Section 335.15 is proposed to be amended by adding a new subsection (7). This new subsection will clarify that information submitted as part of the monthly waste receipt summary reports need not be resubmitted as part of the required biennial reports for interim status and permitted hazardous waste storage, processing, and disposal facilities. This will eliminate the need to submit the same information to the commission twice.

Section 335.112 is proposed to be amended to delete the part of subsection (a)(4) which expressly excludes 40 CFR 265.75, the federal biennial reporting requirement. Deletion of this exemption will result in incorporation of the federally required biennial reporting requirement (which is included in Subchapter E, already adopted in §335.112(a)(4)) by reference to replace the state annual reporting requirements proposed for repeal.

Section 335.114 is proposed to be repealed. This will eliminate the annual reporting requirement for interim status facilities. This information will then be reported biennially per 40 CFR §265.75, which would now be incorporated by reference, due to the deletion of the exemption of 40 CFR §265.75 in §335.112(a)(4).

Section 335.152 is proposed to be amended to delete the part of subsection (a)(4) which expressly excludes 40 CFR 264.75, the federal biennial reporting requirement. Deletion of this exemption will result in incorporation of the federally required biennial reporting requirement (which is included in Subchapter E, already adopted in §335.152(a)(4)) by reference to replace the annual reporting requirement proposed for repeal.

Section 335.154 is proposed to be repealed. This will eliminate the annual reporting requirement for permitted facilities. This information will then be reported biennially per 40 CFR §264.75, which would now be incorporated by reference, due to the deletion of the exemption of 40 CFR §264.75 in §335.152(a)(4).

A revision to 335.159 is included to correct a typographical error. In the first sentence, the word "or" is corrected to "of." This simple correction does not revise the intent of the requirement.

Sections 335.115, 335.117, and 335.155 are proposed to be amended to delete cross references to repealed sections.

SMALL BUSINESS ANALYSIS The commission has reviewed the adopted rulemaking in light of Texas Government Code, §2006.002, requirements and has determined that there is no adverse economic effect on small businesses because the rulemaking reduces certain reporting and manifesting requirements for businesses, large and small.

FISCAL NOTE Mr. Jeffrey Horvath, Strategic Planning and Appropriations, has determined that for the first five-year period the rules, as proposed, are in effect, there will be no significant fiscal implications for state or local government.

PUBLIC BENEFIT Mr. Horvath has also determined that for the first five years the rules as proposed are in effect the

public benefit anticipated will be less reporting requirements for hazardous waste storage, processing, and disposal facilities; less manifesting requirements for hazardous waste generators, transporters, and storage, processing, and disposal facilities; greater rule clarity; and improved consistency with federal rules on reporting and manifesting requirements. The proposed rules will result in no increase in costs to the affected parties because certain rule manifesting and reporting requirements have been reduced. Anticipated cost savings to persons, and businesses, large and small, are not quantifiable at this time.

DRAFT REGULATORY IMPACT ANALYSIS The rule proposal would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the rule conforms certain state rules to match the federal hazardous waste regulations, which in turn provides benefits to the affected economy, sectors of the economy, productivity, competition, jobs, the environment, and the public health and safety of the state and affected sectors of the state, as explained below. The benefit from conforming certain state rules to match the federal hazardous waste regulations is derived from proposing to provide for (1) an exemption from manifesting requirements for transport of hazardous waste over rights-of-way on contiguous properties, and (2) a reduction in certain reporting requirements for hazardous waste storage, processing, and disposal facilities. The incorporation of the manifesting exemption and the reduction in reporting requirements would provide a benefit to the economy, sectors of the economy, productivity, competition, and jobs by lessening regulatory requirements, thus costing certain companies less. The rule also would provide a benefit, as opposed to an adverse effect in a material way, to the environment and the public health and safety of the state and affected sectors of the state, by providing for enhanced consistency between federal and state waste regulatory requirements, which leads to improvements in the management of hazardous waste and hazardous waste facilities. Another way of explaining this benefit is that the federal regulations to which the state rules are being conformed are protective of the environment and public health and safety. In the case of the manifesting exemption, for example, the environment and public health and safety would be benefitted because there would be a reduced possibility that the environment or public would come into contact with hazardous waste, since, by removing barriers to consolidation of wastes in one central area, the waste would not be as "spread out" over numerous smaller areas. Thus, the waste could more readily be consolidated in one central area that is easier to control and can be more suitably located than numerous smaller areas. In addition, this proposed rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency.

TAKINGS IMPACT ASSESSMENT The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to reduce state hazardous waste reporting requirements that are more stringent than federal rules, to incorporate a federal manifesting exemption into the state rules, and to correct a wording error. The rules will substantially advance this specific purpose by amendments to 30 TAC Chapter 335, §§335.9, 335.10, 335.15, 335.112, 335.115, 335.117, 335.152, 335.155, 335.159 and repeal of §§335.114 and 335.154, concerning Industrial Solid Waste and Municipal Hazardous Waste. Promulgation and enforcement of these rules will not burden private real property because they reduce state regulatory requirements. Real property is not the subject of these rules, and therefore, the rule changes do not affect real property.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW The commission has reviewed this rulemaking and found that the proposal is a rulemaking subject to the Coastal Management Program (CMP) and must be consistent with all applicable goals and policies of the CMP. The commission has prepared a consistency determination for this proposed rule pursuant to 31 TAC §505.22 and has found that the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goals applicable to the rulemaking are the goals to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code Annotated, §§6901 et seq. Promulgation and enforcement of this proposed rule would be consistent with the applicable CMP goals and policies because the rule amendments would conform certain of the commission's rules to the federal hazardous waste regulations, thereby serving to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs, and also thereby serving to ensure that new solid waste facilities and areal expansions of existing solid waste facilities are sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code Annotated, §§6901 et seq. In addition, the proposed rule does not violate any applicable provisions of the CMP's stated goals and policies. The commission invites public comment on the consistency of the proposed rule.

SUBMITTAL OF COMMENTS Written comments may be submitted by mail to Bettie Bell, Office of Policy and Regulatory Development, MC-205, P.O. Box 13087, Austin, Texas 78711-3087; or by fax at (512) 239-4808. All comments must be received by March 8, 1999, and should reference Rule Log No. 98024-335-WS. Comments received by 5:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. For further information, please contact Wayne Harry at (512) 239-6619.

Subchapter A. Industrial Solid Waste and Municipal Hazardous Waste in General

30 TAC §§335.9, 335.10, 335.15

STATUTORY AUTHORITY This rule amendment is proposed under the Texas Water Code §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §26.011, which requires the commission to control the quality of water by rule. This rule amendment is also proposed under Texas Health and Safety Code, Solid Waste Disposal Act, §361.017

and §361.024, which authorize the commission to regulate industrial solid waste and hazardous municipal waste, to adopt rules consistent with Chapter 361, and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency.

The proposed amendment implements Texas Health and Safety Code Chapter 361.

§335.9. Recordkeeping and Annual Reporting Procedures Applicable to Generators.

(a) (No change.)

(b) A generator who ships his hazardous waste off-site must also report the information specified in §335.71 of this title (relating to Biennial Reporting). [~~Any generator who stores, processes, or disposes of hazardous waste on-site shall also submit an annual report in accordance with the requirements of §335.114 of this title (relating to Reporting Requirements), or as provided in §335.154 of this title (relating to Reporting Requirements for Owners and Operators).~~]

§335.10. Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste.

(a) Except as provided in subsection (g) and (h) of this section, no generator of hazardous or Class 1 waste consigned to an off-site solid waste process, storage, or disposal facility within the United States or primary exporters of hazardous waste consigned to a foreign country shall cause, suffer, allow, or permit the shipment of hazardous waste or Class 1 waste unless:

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

(b)-(g) (No change.)

(h) No manifest and no marking in accordance with §335.67(b) of this title (related to Marking) is required for hazardous waste transported on a public or private right-of-way within or along the border of contiguous property under the control of the same person, even if such contiguous property is divided by a public right-of-way. However, in the event of a hazardous waste discharge on a public or private right-of-way, the generator or transporter must comply with the requirements of §335.93 of this title (relating to Hazardous Waste Discharges).

§335.15. Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities.

This section applies to owners and operators who receive hazardous or Class 1 waste from off- site sources or who have notified that they intend to receive hazardous or Class 1 waste from off-site sources.

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

(7) Information which has already been submitted by permitted or interim status facilities pursuant to the requirements of this subsection need not be included in the reports required by 40 CFR §264.75(d) and (e) or §265.75(d) and (e) (relating to Biennial Reports).

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 January 25, 1999.

TRD-9900527

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

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For further information, please call: (512) 239-6087

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Subchapter E. Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities

30 TAC §§335.112, 335.115, 335.117

STATUTORY AUTHORITY This rule amendment is proposed under the Texas Water Code §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §26.011, which requires the commission to control the quality of water by rule. This rule is also proposed under Texas Health and Safety Code, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous municipal waste, to adopt rules consistent with Chapter 361, and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency.

The proposed amendment implements Texas Health and Safety Code Chapter 361.

§335.112. Standards.

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 265 (including all appendices to Part 265) (except as otherwise specified herein) are adopted by reference as amended and adopted in the CFR through June 1, 1990, at 55 FedReg 22685 and as further amended as indicated in each paragraph of this section:

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

(4) Subpart E – Manifest System, Recordkeeping and Reporting (as amended through January 29, 1992, at 57 FedReg 3492), except 40 CFR §§265.71, 265.72, [~~265.75,~~] 265.76, and 265.77;

(5)-(22) (No change.)

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

§335.115. Additional Reports.

In addition to submitting the [~~annual report and~~] waste reports described in §335.15 of this title (relating to Recordkeeping and Reporting Requirements Applicable to Owners and Operators of Storage, Processing, or Disposal Facilities) [~~and §335.114 of this title (relating to Reporting Requirements)~~], the owner or operator must also report to the executive director:

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

§335.117. Recordkeeping and Reporting.

(a) Unless the groundwater is monitored to satisfy the requirements of 40 Code of Federal Regulations §265.93(d)(4), the owner or operator must:

(1) (No change.)

(2) report the following groundwater monitoring information to the executive director:

(A) (No change.)

(B) quarterly, during the initial year of groundwater monitoring, concentrations or values of the parameters listed in 40 Code of Federal Regulations §265.92(b)(2) and (3) for each groundwater monitoring well. Annually thereafter, concentrations or values of the parameters listed in 40 Code of Federal Regulations §265.92(b)(3) for each groundwater monitoring well, along with the required evaluations for these parameters under 40 Code of Federal Regulations §265.93(b). The owner or operator must separately identify any significant differences from initial background found in the upgradient wells, in accordance with 40 Code of Federal Regulations §265.93(c)(1). [~~During the active life of the facility, this information must be submitted as part of the annual report required under §335.114 of this title (relating to Reporting Requirements).~~] In addition, concentration of the groundwater quality parameters listed in 40 Code of Federal Regulations §265.92(b)(2) shall be reported annually.

(C) as a part of the annual report [~~required under §335.114 of this title (relating to Reporting Requirements)~~], results of the evaluation of groundwater surface elevations under 40 Code of Federal Regulations §265.93(f), and a description of the response to that evaluation where applicable.

(b) If the groundwater is monitored to satisfy the requirements of 40 Code of Federal Regulations §265.93(d)(4), the owner or operator must:

(1) (No change.)

(2) annually, until final closure of the facility, submit to the executive director a report containing the results of his groundwater quality assessment program which includes, but is not limited to, the calculated (or measured) rate of migration of hazardous waste or hazardous waste constituents in the groundwater during the reporting period. [~~This report must be submitted as part of the annual report required under §335.114 of this title (relating to Reporting Requirements).~~]

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

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

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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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30 TAC §335.114

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

STATUTORY AUTHORITY This rule repeal is proposed under the Texas Water Code §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §26.011, which requires the commission to control the quality of water by rule. This rule repeal is also proposed under Texas Health and Safety Code, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous municipal waste, to adopt rules consistent with Chapter 361, and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency.

The proposed repeal implements Texas Health and Safety Code Chapter 361.

§335.114. Reporting Requirements.

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

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Subchapter F. Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities

30 TAC §§335.152, 335.155, 335.159

STATUTORY AUTHORITY This rule amendment is proposed under the Texas Water Code §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §26.011, which requires the commission to control the quality of water by rule. This rule amendment is also proposed under Texas Health and Safety Code, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous municipal waste, to adopt rules consistent with Chapter 361, and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency.

The proposed amendment implements Texas Health and Safety Code Chapter 361.

§335.152. Standards.

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 264 (including all appendices to Part 264) are adopted by reference as amended and adopted in the Code of Federal Regulations through June 1, 1990, at 55 FedReg 22685 and as further amended and adopted as indicated in each paragraph of this section:

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

(4) Subpart E–Manifest System, Recordkeeping, and Reporting (as amended through January 29, 1992, at 57 FedReg 3462),

except 40 CFR §§264.71, 264.72, [~~264.75,~~] 264.76 and 264.77; facilities which are subject to 40 CFR Part 264, Subpart X, are subject to 40 CFR §264.73(b)(6);

(5)-(20) (No change.)

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

§335.155. Additional Reports.

In addition to submitting the [~~annual report and~~] waste reports described in §335.15 of this title (relating to Recordkeeping and Reporting Requirements Applicable to Owners and Operators of Storage, Processing, or Disposal Facilities) [~~and §335.154 of this title (relating to Reporting Requirements for Owners and Operators)~~], the owner or operator must also report to the executive director:

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

§335.159. Hazardous Constituents.

(a) The commission will specify in the compliance plan the hazardous constituents to which the groundwater protection standard of [~~or~~] §335.158 of this title (relating to Groundwater Protection Standard) applies. Hazardous constituents are constituents identified in Appendix VIII of 40 Code of Federal Regulations Part 261 that have been detected in groundwater in the uppermost aquifer underlying a regulated unit and that are reasonably expected to be in or derived from waste contained in a regulated unit, unless the commission has excluded them under subsection (b) of this section.

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

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

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Margaret Hoffman
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30 TAC §335.154

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

STATUTORY AUTHORITY This rule repeal is proposed under the Texas Water Code §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §26.011, which requires the commission to control the quality of water by rule. This rule repeal is also proposed under Texas Health and Safety Code, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous municipal waste, to adopt rules consistent with Chapter 361, and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency.

The proposed repeal implements Texas Health and Safety Code Chapter 361.

§335.154. Reporting Requirements for Owners and Operators.

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 January 25, 1999.

TRD-9900531
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: March 7, 1999
For further information, please call: (512) 239-6087

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part V. Texas Board of Pardons and Paroles

Chapter 145. Parole

Subchapter B. Terms and Conditions of Parole

37 TAC §145.27

The Policy Board of the Texas Board of Pardons and Paroles proposes new 37 TAC §145.27, concerning condition requiring certain releasees to participate in the Texas Department of Public Safety Personal Identification Program. The new rule is proposed for the purpose of adopting into rule Policy Board Order 98-10.01 adopted and made effective on October 7, 1998. This rule will require all parole certificates of all persons released on parole or mandatory supervision to participate in the Texas Department of Public Safety Driver's License Program or Personal Identification Program as a term and condition of parole or mandatory supervision.

Victor Rodriguez, Chair of the Policy Board, has determined that for the first five-year period the proposed new rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering this section.

Chairman Rodriguez also has determined that for each year of the first five years the new rule as proposed is in effect, the public benefit anticipated as a result of enforcing the section will be to establish at least one generally accessible data base that may contain information about persons on release to parole or mandatory supervision.

There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the new rule as proposed.

Comments should be directed to Laura McElroy, General Counsel, Texas Board of Pardons and Paroles, P.O. Box 13401, Austin, Texas 78711. Written comments from the general public should be received within 30 days of the publication of the new section.

The new section is proposed under the Code of Criminal Procedure, Article 42.18, §8(g), and Government Code,

§508.044(d)(3), which provide the Policy Board with the authority to adopt impose conditions on a person released to parole or mandatory supervision; and Government Code, §508.045, which provides parole panels with the authority to act in matters of release to parole or mandatory supervision.

There is no cross-reference to the proposed new rule.

§145.27. Condition Requiring Certain Releasees to Participate in the Texas Department of Public Safety Personal Identification Program.

(a) The purpose of this rule is to adopt into rule the Policy Board Order 98-10.01 adopted and made effective on October 7, 1998.

(b) Any person released to parole or mandatory supervision who does not hold a Texas driver's license shall participate in the Texas Department of Public Safety Personal Identification Card Program under Chapter 521 of the Texas Transportation Code.

(c) The parole certificates of all persons released to parole or mandatory supervision shall be modified to include a standard condition that requires that all releasees shall participate in the Texas Department of Public Safety Driver's License Program or Personal Identification Program as a term and condition of parole or mandatory supervision.

(d) Participation shall be deemed satisfactory if the releasee has in possession at all times a valid Texas driver's license or personal identification card duly issued by the Texas Department of Public Safety.

(e) All persons on release to parole or mandatory supervision shall comply with all applicable laws, rules and regulations in connection with the Texas Department of Public Safety Driver's License Program or the Personal Identification Card Program.

(f) This condition shall be strictly enforced and shall remain in effect and govern all persons released to parole or mandatory supervision for the duration of the supervision period.

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 January 19, 1999.

TRD-9900339
Laura McElroy
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: March 7, 1999
For further information, please call: (512) 463–1883

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Part VI. Texas Department of Criminal Justice

Chapter 155. Reports and Information Gathering

Subchapter B. Site Selection and Facility Names

37 TAC §155.23

The Texas Department of Criminal Justice proposes new §155.23, concerning site selection process for the location of additional facilities. The new rule defines Agency policy for determining the location of new TDCJ facilities in a manner that is fair and open, and that results in facilities sites that are cost-effective for construction and operations, and sensitive to the ultimate mission of the facilities sited.

David P. McNutt Director of Financial Services for the Texas Department of Criminal Justice has determined that there will be no fiscal implications for state or local government as a result of enforcing or administering the new section as proposed.

Mr. McNutt also has determined that the public benefit anticipated as a result of enforcing the section as proposed will be the ability to construct additional facilities designed to house and support offenders, as needed, considering all logistical support requirements, operational concerns, and legal mandates, on State-owned property or on land acquired at no cost to the State. There will be no effect on small businesses. There is no anticipated economic cost to individuals required to comply with the section as proposed.

Comments should be directed to Carl Reynolds, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711. Written comments from the general public should be received within 30 days of the publication of this proposal.

The new section is proposed under Government Code, §492.013, which grants general rulemaking authority; and Texas Government Code, §496.007.

Cross-reference to statute: Texas Government Code, §496.007.

§155.23. Site Selection Process for the Location of Additional Facilities.

(a) Purpose. This rule establishes Agency policy for determining the location of new TDCJ facilities in a manner that is fair and open, and that results in facilities sites that are cost-effective for construction and operations, and sensitive to the ultimate mission of the facilities sited. Determining the location of a new facility (stand-alone facility or expansion of an existing facility) designed to house and support offenders is a process requiring the review and analysis of a number of factors, including cost-effectiveness, logistical support requirements, operational concerns, and legal mandates. Generally, funding priorities will dictate that such facilities be located on State-owned property, or on land acquired at no cost to the State.

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

(1) Agency - The Texas Department of Criminal Justice.

(2) Board - The Texas Board of Criminal Justice.

(3) Facility - A substantially self-contained, permanently constructed correctional facility for housing offenders. This includes prison units, State jails, Substance Abuse Felony Punishment (SAFP) facilities, and transfer facilities, but does not include intermediate sanction facilities, community corrections facilities, as defined in §509.001, or facilities defined in §§508.118, 508.119, or 508.320, of the Texas Government Code. This also includes additions to existing facilities that add housing capacity or other capacity (such as program capacity) that will increase the payroll of the facility by more than five percent.

(4) Prison unit - Includes a private prison under Texas Government Code, Chapter 495, Subchapter A, a psychiatric unit, or a facility the capacity of which will be determined under, and regulated by Texas Government Code, Chapter 499, Subchapters E (Unit and System Capacity), and B (Population Management).

(5) SAFP facility - A substance abuse felony punishment facility authorized by Texas Government Code, §493.009.

(6) State jail - A State jail felony facility authorized by Texas Government Code, Chapter 507.

(7) TDCJ - The Texas Department of Criminal Justice.

(8) Transfer facility - A facility authorized by Texas Government Code, Chapter 499, Subchapter G.

(c) Procedures. It is the policy of the Board that the location of any additional facility operated by the TDCJ be carefully considered in accordance with this policy.

(1) The Texas Criminal Justice Policy Council is the State agency responsible for projecting the demand for prison, State jail, SAFP and transfer facility beds. Based on these projections, a plan shall be developed by staff and adopted by the Board that details how any additional bed needs will be met. This plan will be presented to the legislature with a request for appropriations. With respect to facilities requiring siting, the plan adopted by the Board will include:

(A) recommendations for specific types of facilities needed by the TDCJ, the approximate size of each facility, and regional distribution by facility type that is needed;

(B) a description of the mission of the recommended facilities;

(C) a description of the type of offenders to be housed in each facility and the programming requirements for that population; and

(D) any recommendations for redesignation and renovation of existing facilities.

(2) Site selections will be made in accordance with and through a Request for Proposals (RFP) process, published in the Texas Register. The RFP shall be formulated and issued under the direction of the Board beginning immediately after the legislature has completed the appropriations bill. The RFP will be based on the array of facilities authorized and appropriated for by the legislature. For each round of site selections, an RFP will be developed that specifies:

(A) types of facilities needed;

(B) minimum acreage and site characteristics requirements for each facility type;

(C) requirements for geotechnical information based on drilling matrix and site preparation requirements;

(D) requirements for verified documentation of the absence of any environmental problems and historical preservation conditions;

(E) requirements for supporting information such as easement, utility and topographical maps;

(F) requirements for description of land values, transferability of mineral rights, surface leases, easements, title report, warranty deed, aerial photographs and other issues affecting the timely transferability of a site;

(G) transportation and utility requirements; and

(H) the requirements for solicited citizen input and State and local elected official input regarding a specific site.

(3) Staff review will be conducted under the direction of the TDCJ Executive Director. Planning and Programming within the Facilities Division will have the responsibility to coordinate the site selection process for the Executive Director. In accordance with the Board approved criteria and process, staff will be responsible for the development of the RFP, devising and completing scoring instruments and cost analysis for Board review and action. Information presented to the Board shall:

(A) be structured in a uniform format as illustrated in the Facilities Division policies and procedures;

(B) include data from a weighted scoring evaluation system that was developed before any review, and based on the Facilities Division policies and procedures as well as on the requirements as outlined in an RFP, that objectively assesses each site based on the proposal, site visit and support information;

(C) include life-cycle cost calculations for a specific time period for each responsive proposal; and

(D) identify and explain any deviations from the approved process.

(4) Any selection process shall take into consideration the intent of the legislature to locate each facility:

(A) in close proximity to a county with 100,000 or more inhabitants to provide services and other resources provided in such a county;

(B) cost-effectively with respect to its proximity to other facilities in TDCJ;

(C) in close proximity to an area that would facilitate release of offenders or persons to their area of residence;

(D) in close proximity to an area that provides adequate educational opportunities and medical care;

(E) in close proximity to an area that would be capable of providing hospital and specialty clinic medical services, as well as a sufficient pool of medical personnel from which to recruit and contract; and

(F) on State-owned or donated land.

(5) The Board is responsible for site selection, but may request that the staff provide a short list of recommended sites or a preference ranking of sites with an explanation for the recommendation or ranking. Staff recommendations shall be based on scoring of the information contained in each submitted proposal based on RFP requirements, actual site assessment, and information obtained from external and internal sources for each site.

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 January 25, 1999.

TRD-9900510
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Proposed date of adoption: March 7, 1999
For further information, please call: (512) 463–9693

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Chapter 159. Special Programs

37 TAC §159.13

The Texas Department of Criminal Justice (Department) proposes new §159.13, concerning a memorandum of understanding between the Department and the Texas Education Agency to provide educational services to released offenders. The memorandum of understanding is designed to offer releasees choices and opportunities, within the realm of educational services, to remain outside prison and to integrate smoothly and successfully into the community. The new section adopts by reference 19 TAC §89.1311 effective October 1, 1998, (23 TexReg 9341).

Pursuant to the Texas Government Code, §508.318, the Texas Education Agency and the Department shall set forth the respective responsibilities of the board and the agency in implementing a continuing education program to increase the literacy of releasees.

David P. McNutt, Director of Financial Services for the Texas Department of Criminal Justice has determined that for the first five year period the section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the new section as proposed.

Mr. McNutt also has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the section will be services that offer releasees choices and opportunities, within the realm of educational services, to remain outside prison and to integrate smoothly and successfully into the community. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the section as proposed.

Comments should be directed to Carl Reynolds, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711. Written comments from the general public should be received within 30 days of the publication of this proposal.

The new section is proposed under Government Code, §492.013, which grants general rulemaking authority and the Texas Government Code, §508.318, as added by the 75th Texas Legislature, 1997, Chapter 165, §12.01, which authorizes the Department and the Texas Education Agency to adopt a memorandum of understanding that establishes the respective responsibilities of the board and the agency in implementing a continuing education program to increase the literacy of releasees.

Cross Reference to Statute: Texas Government Code, §508.318, as added by the 75th Texas Legislature, 1997, Chapter 165, §12.01.

§159.13. Educational Services to Released Offenders / Memorandum of Understanding.

(a) The Texas Department of Criminal Justice adopts by reference a memorandum of understanding with the Texas Education Agency, 19 TAC §89.1311 (relating to Memorandum of Understanding to Provide Educational Services to Released Offenders), establishes the respective responsibilities of the board and the agency in implementing a continuing education program to increase the literacy of releasees.

(b) The memorandum of understanding is required by the Texas Government Code, §508.318, as added by the 75th Texas Legislature, 1997, Chapter 165, §12.01.

(c) Copies of the memorandum of understanding are filed in the Office of the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

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 January 25, 1999.

TRD-9900511
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Proposed date of adoption: March 7, 1999
For further information, please call: (512) 463–9693

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WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission of Texas

Chapter 26. Substantive Rules Applicable to Telecommunications Service Providers

Subchapter B. Customer Service and Protection

16 TAC §26.45

The Public Utility Commission of Texas has withdrawn from consideration for permanent adoption new §26.45, which appeared in the August 28, 1998, issue of the *Texas Register* (23 TexReg 8784).

Filed with the Office of the Secretary of State on January 21, 1999.

TRD-9900384
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: January 21, 1999
For further information, please call: (512) 936–7308

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Part VI. Texas Motor Vehicle Board

Chapter 103. General Rules

16 TAC §103.3

The Texas Motor Vehicle Board has withdrawn from consideration for permanent adoption the proposed amendment §103.3, which appeared in the October 30, 1998, issue of the *Texas Register* (24 TexReg 11034).

Issued in Austin, Texas, on January 25, 1999.

TRD–9900508
Brett Bray
Division Director
Texas Motor Vehicle Board
Effective date: January 25, 1999
For further information, please call: (512) 416–4899

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TITLE 22. EXAMINING BOARDS

Part V. State Board of Dental Examiners

Chapter 109. Conduct

Subchapter L. Anesthesia and Anesthetic Agents

22 TAC §109.171

The State Board of Dental Examiners has withdrawn from consideration for permanent adoption the amendment to §109.171, which appeared in the September 4, 1998, issue of the *Texas Register* (23 TexReg 8971).

Filed with the Office of the Secretary of State on January 22, 1999.

TRD-9900478
Douglas A. Beran, Ph.D.
Executive Director
State Board of Dental Examiners
Effective date: January 22, 1999
For further information, please call: (512) 463–6400

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22 TAC §109.172

The State Board of Dental Examiners has withdrawn from consideration for permanent adoption the amendment to §109.172, which appeared in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10795).

Filed with the Office of the Secretary of State on January 22, 1999.

TRD-9900477
Douglas A. Beran, Ph.D.
Executive Director
State Board of Dental Examiners
Effective date: January 22, 1999
For further information, please call: (512) 463–6400

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22 TAC §109.173

The State Board of Dental Examiners has withdrawn from consideration for permanent adoption the amendment to §109.173, which appeared in the September 4, 1998, issue of the *Texas Register* (23 TexReg 8973).

Filed with the Office of the Secretary of State on January 22, 1999.

TRD-9900476
Douglas A. Beran,Ph.D.

Executive Director
State Board of Dental Examiners
Effective date: January 22, 1999
For further information, please call: (512) 463–6400

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22 TAC §109.174

The State Board of Dental Examiners has withdrawn from consideration for permanent adoption the amendment to §109.174, which appeared in the September 4, 1998, issue of the *Texas Register* (23 TexReg 8973).

Filed with the Office of the Secretary of State on January 22, 1999.

TRD-9900475
Douglas A. Beran,Ph.D.
Executive Director
State Board of Dental Examiners
Effective date: January 22, 1999
For further information, please call: (512) 463–6400

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22 TAC §109.175

The State Board of Dental Examiners has withdrawn from consideration for permanent adoption the amendment to §109.175, which appeared in the September 4, 1998, issue of the *Texas Register* (23 TexReg 8976).

Filed with the Office of the Secretary of State on January 22, 1999.

TRD-9900474
Douglas A. Beran,Ph.D.
Executive Director
State Board of Dental Examiners
Effective date: January 22, 1999
For further information, please call: (512) 463–6400

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ADOPTED RULES

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

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

TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission of Texas

Chapter 22. Practice and Procedure

Subchapter L. Evidence and Exhibits in Contested Cases

16 TAC §22.222, §22.225

The Public Utility Commission of Texas (commission) adopts amendments to §22.222 relating to Official Notice with changes to the proposed text as published in the October 23, 1998 *Texas Register* (23 TexReg 10789); and adopts §22.225 relating to Written Testimony and Accompanying Exhibits with no changes to the proposed text as published in the October 23, 1998 *Texas Register* (23 TexReg 10789). The amendments are necessary to reflect current commission practice, and update citations to the Public Utility Regulatory Act as codified in the Texas Utilities Code. These amendments are adopted under Project Number 17709.

The commission received comments on the proposed amendments from Central Power and Light Company, Southwestern Electric Power Company and West Texas Utilities Company, collectively the Texas Central and South West electric utility operating companies (CSW Companies).

Comments on proposed changes to §22.222(a).

The commission proposed adding the sentence "(t)he specialized skills or knowledge of the commission and its staff may be used in evaluating the evidence" to §22.222(a) to conform the section to Texas Government Code §2001.090. CSW Companies states that it believes the proposed language is inappropriately placed within the "Official Notice" portion of the commission's Procedural Rules, Subchapter L, relating to Evidence and Exhibits in Contested Cases. CSW Companies concluded that Texas Government Code §2001.090 discusses two concepts: (1) official notice in subsections (a)-(c), and (2) state agency utilization of expertise in evaluating evidence in subsection (d). CSW Companies states that the two concepts are not necessarily linked and that the permission to utilize specialized skills or knowledge of the agency applies to all types of evidence (documentary, testimonial and officially noticed) before the agency. CSW Companies believes that the commission has overemphasized the use of specialized skills or knowledge to evaluate evidence in the context of Official Notice and suggest that the sentence be added as a new subsection (f) to §22.221 relating to Rules of Evidence and Contested Cases.

The commission agrees that §2001.090(d), while applying to evidence officially noticed, is not limited to evidence officially noticed and encompasses all types of evidence. However, under *Texas Register* rules, the commission can not move the sentence to §22.221 without proposing a separate amendment. Upon further consideration, the commission has determined that since it has the authority to apply its specialized skills or knowledge under the statute, it is unnecessary to add the sentence to the Procedural Rules and has deleted the sentence from §22.222(a).

The Appropriations Act of 1997, HB 1, Article IX, §167 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission requested specific comments on the §167 requirement as to whether the reason for adopting or readopting these sections continues to exist. The commission received no comments on the §167 requirement. The commission finds that the reason for adopting these sections continues to exist.

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Index to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

§22.222. Official Notice.

(a) Facts noticeable. Official notice may be taken of judicially cognizable facts not subject to reasonable dispute in that they are generally known within the jurisdiction of the commission or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. In addition, official notice may be taken of generally recognized facts within the area of the commission's specialized knowledge.

(b) (No change.)

(c) Notification of materials proposed to be noticed. The presiding officer may take official notice of facts, material, records or documents authorized by APA, §2001.090. The parties shall be notified of the facts, material, records or documents proposed to be

officially noticed and shall be given the opportunity to contest the proposed action.

(d) (No change.)

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

Filed with the Office of the Secretary of State on January 22, 1999.

TRD-9900469
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: February 11, 1999
Proposal publication date: October 23, 1998
For further information, please call: (512) 936–7308

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Chapter 23. Substantive Rules

The Public Utility Commission of Texas (commission) adopts the repeal of §23.17 relating to Administration of IntraLATA Compensation and Interexchange Carrier Access Charge Revenues, and §23.53 relating to Universal Service Fund, with no changes as published in the *Texas Register* on November 20, 1998 (23 TexReg 11757). On December 17, 1997, the commission adopted new §§23.131 (relating to Texas Universal Service Fund (TUSF)), 23.133 (relating to Texas High Cost Universal Service Plan (THCUSP)), 23.134 (relating to Small and Rural Incumbent Local Exchange Carrier (ILEC) Universal Service Plan), 23.136 (relating to Implementation of the Public Utility Regulatory Act §56.025), 23.138 (relating to Additional Financial Assistance), 23.142 (relating to Service and Link Up Service Programs), 23.143 (relating to Tel-Assistance Service), 23.144 (relating to Telecommunications Relay Service), 23.145 (relating to Specialized Equipment Distribution), 23.147 (relating to Designation of Local Exchange Carriers as Eligible Telecommunications Providers to Receive Texas Universal Service Funds), 23.148 (relating to Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds), and 23.150 (relating to Administration of Texas Universal Service Fund). Upon implementation of these new rules, §23.17 and §23.53 became duplicative and no longer necessary. The repeals of §23.17 and §23.53 are adopted under Project Number 20021.

No parties filed comments in response to the proposed repeals.

Subchapter B. Records and Reports

16 TAC §23.17

The repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

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

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

Filed with the Office of the Secretary of State on January 19, 1999.

TRD-9900343
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: February 8, 1999
Proposal publication date: November 20, 1998
For further information, please call: (512) 936–7308

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Subchapter E. Customer Service and Protection

16 TAC §23.53

The repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

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

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

Filed with the Office of the Secretary of State on January 19, 1999.

TRD-9900344
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: February 8, 1999
Proposal publication date: November 20, 1998
For further information, please call: (512) 936–7308

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Part VI. Texas Motor Vehicle Board

Chapter 103. General Rules

16 TAC §§103.1, 103.4, 103.5, 103.6, 103.7, 103.8, 103.12, 103.13

The Motor Vehicle Board of the Texas Department of Transportation adopts amendments to §§103.1, 103.4, 103.5, 103.6, 103.7, 103.8, 103.12, and 103.13, General Rules concerning licensing, without changes to the proposed text as published in the October 30, 1998, issue of the *Texas Register* (23 TexReg 10034). The text will not be republished. Proposed amendments to §103.3, published in the same issue of the *Texas Register*, have been withdrawn and the rule is being republished due to substantive changes.

The Texas Motor Vehicle Commission was renamed the Texas Motor Vehicle Board in 1992. The amendments change all references from "commission" to "Board" in §§103.4, 103.5, 103.6, 103.8 and 103.12. Amendments to §103.1 correct a typographical error and clarify how the Board licenses employees of corporate representative licensees. The amendment to §103.4 clarifies whether a protest is applicable to the purchase or transfer of an existing dealership. The amendment to §103.5 defines the time restrictions on the filing of protests. The amendment to §103.7 clarifies that the rule is applicable to relocations of line-makes as well as to additions of line-makes. The amendments to §§103.8 and 103.12 correct the statutory reference to renum-

bered Texas Motor Vehicle Commission Code §5.02(b)(3)(TEX. REV. CIV. STAT, art. 4413(36)). The amendment to §103.13 requires that more than one line-make must be represented to qualify for approval as a motor home show.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules as necessary and convenient to effectuate the provisions of the Code.

Texas Motor Vehicle Commission Code §§ 1.03(31), 4.01(a), 4.02, 4.03, and 5.04(a) are affected by the proposed amendments.

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

Filed with the Office of the Secretary of State on January 25, 1999.

TRD-9900509
Brett Bray
Division Director
Texas Motor Vehicle Board
Effective date: February 14, 1999
Proposal publication date: October 30, 1998
For further information, please call: (512) 416–4899

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Part VIII. Texas Racing Commission

Chapter 309. Operation of Racetracks

Subchapter B. Horse Racetracks

Division 4. Operations

16 TAC §309.199

The Texas Racing Commission adopts an amendment to §309.199, concerning the purse account. This amendment is adopted without changes to the proposed text published in the December 11, 1998, issue of the *Texas Register* (23 TexReg12600). The amendment was presented to the commission as a rulemaking petition by the Texas Horsemen's Partnership, LLP, the officially recognized horsemen's organization in this state. According to the petition, the amendment relates to and clarifies the distribution of the purse money accrued at horse racetracks which do not conduct live races for an extended period of time.

No comments were received regarding the adoption of the new rule.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.22, which authorizes the Commission to adopt rules relating to the horsemen's account; and §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of racetracks.

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 January 25, 1999.

TRD-9900484
Paula C. Flowerday
Executive Secretary
Texas Racing Commission
Effective date: February 15, 1999
Proposal publication date: December 11, 1998
For further information, please call: (512) 833–6699

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Chapter 319. Veterinary Practices and Drug Testing

Subchapter B. Treatment of Horse

16 TAC §319.111

The Texas Racing Commission adopts an amendment to §319.111, concerning the bleeder and furosemide (Lasix) program. The amendment is adopted without changes to the proposed as text published in the December 11, 1998, issue of the *Texas Register* (23 TexReg 12600). The amendment modifies the time within which a trainer of a horse must request that the horse be admitted to the furosemide (Lasix) program. The amendment allows the stewards the flexibility to authorize a late filing if in the best interest of the patrons and the horse.

No comments were received regarding the adoption of this amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of racetracks; and §14.03, which authorizes the Commission to adopt rules to prohibit the illegal influencing of the outcome of a race.

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 January 25, 1999.

TRD-9900485
Paula C. Flowerday
Executive Secretary
Texas Racing Commission
Effective date: February 15, 1999
Proposal publication date: December 11, 1998
For further information, please call: (512) 833–6699

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TITLE 22. EXAMINING BOARDS

Part V. State Board of Dental Examiners

Chapter 107. Dental Board Procedures

Subchapter B. Procedures for Investigating Complaints

22 TAC §107.101

The State Board of Dental Examiners adopts amendments to §107.101, concerning guidelines for the conduct of investigations without changes to the proposed text as published in the December 11, 1998, issue of the *Texas Register* (23 TexReg 12629) and will not be republished.

The amended §107.101 establishes categories for dental complaints as mandated by the Texas Legislature through the Dental Practice Act.

The current §107.101 established seventeen categories of complaints which included specific violations listed in the Dental Practice Act. The rule as amended, has six categories that are defined in the rule. This new approach will allow a more meaningful assignment to a category. Under the old categories, it was difficult to appropriately assign a category on the basis of a review of the complaint, which often resulted in unintended distortions of categories reported. For example, in excess of forty percent of complaints were placed in the dishonorable conduct group which rendered the use of categories essentially meaningless, since far less than forth percent of complaints, after investigation, include charges of dishonorable conduct. The new categories are broad enough that complaints can be assigned accurately on the basis of review of the complaint. The amended rule will enable the Board to come to a more useful understanding of the nature of all complaints filed. The Board is of the opinion that the new categories more accurately reflect the types of conduct over which the Board has jurisdiction.

No comments were received regarding adoption of the amended rule.

The amended rule is adopted under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, Article 4548h, §(1)(e)(1) which provides that the board shall distinguish categories of complaints, and Article 4551d which provides the State Board of Dental Examiners with the authority to adopt and promulgate rules consistent with the Dental Practice Act.

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

Filed with the Office of the Secretary of State on January 22, 1999.

TRD-9900471

Douglas A. Beran, Ph.D.

Executive Director

State Board of Dental Examiners

Effective date: February 11, 1999

Proposal publication date: December 11, 1998

For further information, please call: (512) 463–6400

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22 TAC §107.102

The State Board of Dental Examiners adopts amendments to §107.102 concerning procedures in the conduct of investigations without changes to the proposed text as published in the December 11, 1998, issue of the *Texas Register* (23 TexReg 12630) and will not be republished.

The amended §107.102 provides for procedures in the conduct of investigations of dental complaints as mandated by the Texas Legislature through the Dental Practice Act.

The amended §107.102 is intended to ensure that the procedures comply with the requirements of Article 4548h, §1 of the Dental Practice Act. This current rule does not accurately reflect the requirements set forth in the Dental Practice Act; the amended rule does. This compliance will result in a clearer understanding by the public of the rights and responsibilities of the parties to a complaint that alleges a violation of the Dental Practice Act and/or the Board rules and regulations.

No comments were received regarding adoption of the amended rule.

The amended rule is adopted under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, Article 4548h, §1 which provides that the board shall adopt rules concerning the processing of complaints and Article 4548h, §2(d) which provides that the board, in certain circumstances, may suspend a license temporarily, and Article 4551d which provides the State Board of Dental Examiners with the authority to adopt and promulgate rules consistent with the Dental Practice Act.

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

Filed with the Office of the Secretary of State on January 22, 1999.

TRD-9900472

Douglas A. Beran, Ph.D.

Executive Director

State Board of Dental Examiners

Effective date: February 11, 1999

Proposal publication date: December 11, 1998

For further information, please call: (512) 463–6400

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Chapter 109. Conduct

Subchapter H. Health and Sanitation

22 TAC §109.132

The State Board of Dental Examiners adopts new §109.132 concerning access to a dental office without changes to the proposed text as published in the December 11, 1998, issue of the *Texas Register* (23TexReg12632) and will not be republished.

The effect of new §109.132 is that dentists who refuse access to their dental premises could face the possibility of temporary license suspension.

The new §109.132 provides that dentists who refuse access to their premises to board investigators who are acting pursuant to a sanitation complaint could have their practices temporarily closed. The board is of the opinion that an unsanitary dental office could pose a serious threat to the health and welfare of the people of Texas. Presently, if a dentist refuses access to an investigator who is acting pursuant to a sanitation complaint, the Board has no effective recourse. In the meantime, the unsanitary condition, if severe enough, poses a threat to the health of patients. By operation of the rule, the board finds, or will find, that refusal by a licensee to allow board investigators

access to investigate a complaint about unsanitary facilities poses such a threat, if it continues unabated. It is anticipated that the mere knowledge that a recalcitrant dentist might face temporary suspension will result in cleaner offices. Article 4548h, §2(d) provides adequate procedural safeguards for the property rights of the practitioner

No comments were received regarding adoption of the new rule.

The new rule is adopted under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, Article 4548h, §2(d) which provides the State Board of Dental Examiners with the authority to suspend temporarily a license if the Board, or an executive committee of the Board, determines that continuation of the practice would constitute a clear, imminent or continuing threat to a person's physical health, and Article 4551d, §(a) which provides the board may adopt rules to control the spread of infection in the practice of dentistry.

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 January 22, 1999.

TRD-9900473
Douglas A. Beran, Ph.D.
Executive Director
State Board of Dental Examiners
Effective date: February 11, 1999
Proposal publication date: December 11, 1998
For further information, please call: (512) 463–6400

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TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 289. Radiation Control

The Texas Department of Health (department) adopts the repeal of existing §289.2 and new §289.301, concerning registration and radiation safety requirements for lasers with changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register* (23 TexReg 9936), as a result of comments received during the 30-day comment period. The repeal of §289.2 is adopted without changes and therefore will not be republished.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 289.2 has been reviewed and the department has determined that reasons for adopting the section continue to exist; however, a new rule was proposed. The department published a Notice of Intention to Review the section as required by Rider 167 in the *Texas Register* (23 TexReg 9079) on September 4, 1998. No comments were received by the department on this section.

The section adopted for repeal adopts by reference the *Texas Regulations for Control of Laser Radiation Hazards*. The new section incorporates language from the *Texas Regulations for Control of Laser Radiation Hazards* that has been rewritten into *Texas Register* format and includes the addition and revision of several subsections of the section. The repeal and new section are part of the renumbering phase in the process of rewriting the department's radiation rules in the *Texas Register* format. The new section reflects the renumbering.

The new section establishes requirements for the registration of persons who possess and use class IIIb and IV lasers in the healing arts, veterinary medicine, industry, academic and research and development institutions, and of persons who provide laser services. The revision includes new definitions that support terminology used in the new section. It also establishes requirements for protection against laser radiation hazards, responsibilities of the registrant and the laser safety officer; laser hazard control methods; training requirements; and notification of injuries. The rule revision updates the current 20-year old requirements by addressing changes in technologies and uses of lasers. Other minor grammatical changes are made to the section for clarification.

The department is making the following changes due to staff comments to clarify the intent and improve the accuracy of the section.

Change: Concerning §289.301(b)(3), the department deleted the words "Code of Federal Regulations" because the term is already spelled out in subsection (b)(2). Change is reflected in §289.301(b)(2).

Change: Concerning §289.301(d)(2), the department changed the words "millirad (mrad)" to "milliradians" because millirad is a unit of absorbed ionizing radiation dose and is not the appropriate term for this definition.

Change: Concerning proposed §289.301(d)(50), the department deleted the definition of "PRF" because it was not necessary and it was not used anywhere else in the rule. The department renumbered subsequent definitions as reflected in §289.301(d)(50)-(62).

Change: Concerning §289.301(f)(1)(C), the department deleted the last sentence because it is redundant. The requirement is stated in subsection (b)(1) of this section.

Change: Concerning §289.301(g)(2)(B), the department changed the wording and added another sentence to specifically state that an application for healing arts shall be signed by a licensed practitioner of the healing arts and an application for veterinary medicine shall be signed by a veterinarian.

Change: Concerning §289.301(j)(3), the department deleted the word "annual" to allow the department to request information when needed.

Change: Concerning §289.301(k)(2), the department deleted subparagraphs (A)-(C) and added the words "terminate use and/or services of laser(s) and request termination as outlined in subsection (l) of this section" to simplify the subsection.

Change: Concerning §289.301(n)(1)-(3), the department deleted paragraphs (1)-(3) and added the sentence, "Modification, suspension, and revocation of certificates of laser registration shall be in accordance with §289.205 of this title" to simplify the subsection and avoid repetition. Change is reflected in §289.301(n).

Change: Concerning §289.301(p)(1), the department changed the word "non-ionizing" to "laser" and added the word "or" after "course;" to clarify that educational courses or experience will suffice as an LSO qualification.

Change: Concerning §289.301(q)(1), the department changed the words "in use with the users duties" to "the individual uses" to clarify the intent of the rule.

Change: Concerning §289.301(r), the department changed the word "requirements" to "controls" to clarify the intent of the rule.

Change: Concerning §289.301(r)(2)(E)(iii)(I), the department deleted the word "both" after "allow," added the word "and" after "all times," and deleted the words "and/or" to clarify the requirements to prevent unauthorized entry into controlled areas.

Change: Concerning §289.301(w)(5), the department added the words "that may be" after the word "surveys" to clarify that such surveys may only be necessary when a laser is modified from the manufacturer's specifications.

Change: Concerning §289.301(z)(1), the department added the words "seek appropriate medical attention for the individual and" after the word "immediately" to clarify the intent of the rule.

Change: Concerning §289.301(dd)(1)-(2), the department changed the words "signs and graphs" to "sign" to clarify the intent of the rule.

Change: Concerning §289.301(dd)(3)-(10), the department changed the words "signs and graphs" to "graph" to clarify the intent of the rule.

The following comments were received concerning the proposed section. Following the comments are the department's responses.

Comment: Concerning the section in general, the commenter noted that holding working group discussions prior to draft and proposed changes should result in a more mature document at the time of the initial comment period, resulting in more efficient use of the department's limited resources. These working groups should include both regulators and industry experts interested.

Response: The department has in the past held stakeholder meetings when significant regulatory changes and rule revisions were being considered. This process was used in the development of this rule. No change was made as a result of the comment.

Comment: Concerning the section in general, the commenter noted that as of now, a laser program is not funded by the legislature. The commenter suspected these regulations are a backdoor justification to acquire funding (and the certain fee increase) by pointing out that the department does not have the ability to enforce such broad regulatory equipments.

The commenter stated there is no hint of the promised move toward adoption of the American National Standards Institute (ANSI) and suspects the statement was something of a bone tossed to the Texas Radiation Advisory Board (TRAB) after it was clear that the ANSI was an acceptable alternative per legal counsel.

The commenter stated the rules continue to suffer from the fact that there is no provision for updates as the science, technology and consensus standards change. More than other rules there is a certain feeling of programmed obsolescence. The static nature of the laser rules over the last 24 years should cause a fundamental rethinking of how we (the state) want to do business.

Response: The department has presented an initiative to the legislature during the last three legislative sessions to increase funding in order to implement a more complete laser regulatory program. The TRAB has supported these initiatives. Because the initiatives have been unsuccessful, the proposed rules are more performance-based rather than prescriptive. This gives the registrant and the laser safety officer more latitude and more responsibility for ensuring laser safety and for updating the laser safety program concurrently with changes in science and technology.

Referencing the ANSI standard is acceptable in rulemaking. However, the legality of referencing is not the only consideration the department must take into account in responsible rulemaking. Referencing a standard is legal and is acceptable if the agency makes the standard or a method for obtaining the standard available to registrants. The department has always made the radiation rules available to registrants at no cost. The department does not believe that making a registrant seek out and pay for a referenced standard encourages compliance. The rules represent a minimum standard for safe use of lasers and the department has incorporated the portions of the ANSI standard believed necessary to achieve that minimum level. While "large" laser registrants (those with multiple lasers) may have and routinely use ANSI standards, the majority of laser registrants are registered for a single laser. The department does not believe it to be cost effective to force those registrants to pay approximately $60 for an ANSI standard when the rule provides an acceptable level of safety. The rule does not prohibit a registrant from incorporating additional ANSI standards nor does it conflict with ANSI standards. No change was made as a result of the comment.

Comment: Concerning the section in general, the commenter noted that it would be much simpler and more justifiable to adopt the current ANSI standards for safe use of lasers. ANSI is almost universally accepted as the standard for safe laser operation. The rules could be kept current by treating ANSI in the same manner as the Department of Transportation regulations are used for regulations involving transport of radioactive material in Texas. ANSI would also provide a much more efficient way to keep the regulations updated as laser science, technology and consensus standards change.

Response: Referencing the ANSI standard is acceptable in rulemaking. However, the legality of referencing is not the only consideration the department must take into account in responsible rulemaking. Referencing a standard is legal and is acceptable if the agency makes the standard or a method for obtaining the standard available to registrants. The department has always made the radiation rules available to registrants at no cost. The department does not believe that making a registrant seek out and pay for a referenced standard encourages compliance. The rules represent a minimum standard for safe use of lasers and the department has incorporated the portions of the ANSI standard believed necessary to achieve that minimum level. While "large" laser registrants (those with multiple lasers) may have and routinely use ANSI standards, the majority of laser registrants are registered for a single laser. The department does not believe it to be cost effective to force those registrants to pay approximately $60 for an ANSI standard when the rule provides an acceptable level of safety. The rule does not prohibit a registrant from incorporating additional ANSI standards nor does it conflict with ANSI standards. No change was made as a result of the comment.

Comment: Concerning §289.301(a)(1), the commenter noted that the stated purpose is to establish requirements for class IIIb and IV lasers. There must also be some statement that these rules apply only to class IIIb and IV lasers. Statements in the body of the draft refer simply to "lasers" or to classes in addition to IIIb and IV, and imply a level of regulation of other classes. The commenter suggested constraining language is necessary to prevent confusion.

Response: Subsection (a)(1) and (2) clearly specify the intentions of the rule to address registration and use requirements for class IIIb and IV lasers. Unless stated otherwise, the word "lasers" refers to those covered by the rule. No change was made as a result of the comment.

Comment: Concerning §289.301(a)(1), the commenter questioned whether there is sufficient evidence to show that class IIIb lasers need to be registered with the state and questioned how many accidents in Texas, the United States, and the world have occurred from using class IIIb lasers.

The commenter noted that subsection (a)(1) seems to cover businesses and institutions, but questioned whether it covers individuals. By this statement, anyone can order and use a laser of any type if it is used at home and if it is not used in the healing arts, veterinary medicine, etc.

Response: The department believes that the potential for increased injury exists because of the increased use of lasers by individuals that are not properly trained or aware of the hazards of improper use of class IIIb and IV lasers. The word "person" is defined in the §289.201 of this title to include any individual. No change was made as a result of the comment.

Comment: Concerning §289.301(a)(1), the commenter noted that the purpose is to establish requirements for "class IIIb and class IV lasers." Other areas in the draft refer to simply "lasers" and to classes other than class IIIb and class IV. If it is intended to exempt class I, II, and IIIa lasers, then this should be unambiguously stated.

Response: Subsection (a)(1) and (2) clearly specify the intentions of the rule to address registration and use requirements for class IIIb and IV lasers. Unless stated otherwise, the word "lasers" refers to those covered by the rule. No change was made as a result of the comment.

Comment: Concerning §289.301(a)(2), the commenter suggested this sentence be re- structured so that it is more clearly understood.

Response: The department changed the one sentence into two sentences for easier readability.

Comment: Concerning §289.301(b)(2), the commenter stated that this sentence seems very vague. Lasers shall meet the requirements of any applicable federal standard. The commenter suggests that those standards or some of them should be listed here to help registrants with compliance.

Response: The department added the specific citation to the federal standard.

Comment: Concerning §289.301(c)(2), the commenter noted that the rule states that "Individuals shall not be intentionally exposed to laser radiation unless such exposure has been authorized by a licensed practitioner of the healing arts." Use of class I, class II, and class IIIa lasers in engineering materials research and manufacturing can involve incidental exposure (as opposed to deliberate exposure) of persons to this radiation that has been determined to be below established hazardous levels. These facilities are sometimes large open buildings without barriers to break up line of sight. The commenter stated that enforcement of this clause would result in a major impact on laboratory operations, and potentially could have a negative impact on safety if visibility in the building is lost to a proliferation of barriers. The commenter suggested that this statement be modified to a term less general than "laser radiation".

Response: The rule does not apply to class I, II, and IIIa lasers. No change was made as a result of the comment.

Comment: Concerning §289.301(c)(2), the commenter questioned whether the training/demonstration often done in medical school is considered to be healing arts.

Response: Such training/demonstration is considered to be healing arts. No change was made as a result of the comment.

Comment: Concerning §289.301(d), the commenter suggested that laser safety officer (LSO) training be defined. Different entities have different applications and specializations for LSO's.

Response: The department declines to add additional requirements for LSO training. Because of the multiple types and uses of lasers, the department does not believe it to be prudent to set specific time requirements for training at this time. When selecting an LSO, the registrant should ensure the individual is adequately trained and capable of handling the responsibilities for the type of lasers used at the registered facility. No change was made as a result of the comment.

Comment: Concerning §289.301(d), the commenter noted that research laser is a term that is used but not defined and suggests the term "research" or "research laser" should be defined.

Response: A research laser is a laser used in research. The word "research" is defined in 25 TAC §289.201. No change was made as a result of the comment.

Comment: Concerning §289.301(d)(7), the commenter suggested adding a comma after "rays."

Response: A comma is not grammatically necessary. No change was made as a result of the comment.

Comment: Concerning §289.301(d)(30), the commenter noted that this is the only place that the words "fail-safe" are mentioned in the text of these proposed regulations and questioned whether it is necessary here, or is it necessary to have it some where else in the text.

Response: The department deleted the definition for "fail-safe interlock" because it is not used anywhere else in the rules. The department renumbered subsequent definitions as reflected in §289.301(d)(30)-(48).

Comment: Concerning proposed §289.301(d)(33), the commenter suggested deleting "nanometer" and using "nm" instead.

Response: The department deleted the word nanometer because the abbreviation "nm" was already spelled out previously in the section. Change is reflected in §289.301(d)(32).

Comment: Concerning proposed §289.301(d)(39) in the first sentence, the commenter suggested adding the words "according to the performance standards set" after the word "product."

Response: The department acknowledges the comment and changed the rule accordingly. Change is reflected in §289.301(d)(38).

Comment: Concerning proposed §289.301(d)(45), the commenter stated that the purpose of the first part of this definition is unclear. The boundary of the nominal hazard zone (NHZ) is the maximum permissible exposure (MPE), therefore the potential for exposing a patient above the MPE outside the NHZ is zero. The commenter stated that the definition for NHZ explains this phenomenon. The exposure of a patient outside the established laser controlled area for surgery suites could be considered a medical event. The commenter believes exposure when unintentional is what was intended, but not what was said.

Response: The department changed the definition of medical event to read "Any adverse patient health effect that is a result of failure or misuse of laser or laser safety equipment" to more clearly state the intent of the rule. Change is reflected in §289.301(d)(44).

Comment: Concerning proposed §289.301(d)(50), the commenter noted that the abbreviation "PRF" could be handled by identifying it in parentheses the first time the term is used.

Response: The department deleted the definition because it is not used anywhere else in the rule. The department renumbered subsequent definitions as reflected in §289.301(d)(50)-(62).

Comment: Concerning proposed §289.301(d)(52), one commenter stated that clarification of definitions for "mobile services," "provider of services," and "healing arts facility" is needed. The department should clarify that lasers in doctors' offices are under the Safe Medical Devices Act (SMDA).

Response: The department changed the definition of provider of services to "provider of lasers" and added subsection (g)(2)(C) to clarify that if a person is furnished a laser by a provider of lasers, that person is responsible for ensuring that a licensed practitioner of the healing arts authorizes intentional exposure of humans to laser radiation. Change is reflected in §289.301(d)(50).

Comment: Concerning proposed §289.301(d)(52), the commenter suggested taking the word "routine" out of the definition. The commenter stated that this may only happen one time.

Response: The department changed the definition of "provider of services" to "provider of lasers" to clarify that a provider of laser(s) is a person who furnishes a laser(s) on a routine basis for a limited time period to a facility(ies) that operates the laser(s) during that limited time period. If a person furnishes a laser to another person only one time, it could be considered a transfer of the laser. Change is reflected in §289.301(d)(50).

Comment: Concerning §289.301(e), the commenter noted that under Texas Regulations for Control of Laser Radiation (TRCLR) 70.4(d), class IIIb hand held pointers were exempt from registration as "mobile lasers." These proposed changes contain no such exemption. These hand held pointers are commonly available, inexpensive, and widely used in classrooms and presentations. In a company with thousands of employees, controlling their use would essentially require banning all such laser pointers from company premises, since it is sometimes difficult to determine the actual class due to deficiencies in the manufacturer's markings, or absence of markings.

Response: The department added paragraph (4) to this subsection to clarify that class IIIb mobile lasers of continuous wave (CW) in the wavelength range of $400 < \lambda \leq 700$ nm and having a peak radiant power of less than or equal to 5×10^{-3} watts are exempted from this section.

Comment: Concerning §289.301(e)(2), the commenter questioned whether or not inoperable lasers are exempted from these regulations.

Response: The department only requires lasers in operation to be registered. No change was made as a result of the comment.

Comment: Concerning §289.301(e)(3), the commenter noted that in the future, there may be changes in the classification scheme from the International Electrotechnical Commission (IEC) that would impact the rule. The commenter recommended the statement read "laser products less than class IIIb are exempt from the requirements of this section."

Response: The department reviews and make changes to the rules when federal rules mandate and will change the classification scheme when changed at the federal level. No change was made as a result of the comment.

Comment: Concerning §289.301(f), the commenter recommended that there should be a section directly indicating what lasers are required to be registered with the state. It should be clearly stated that anyone possessing and using a class IIIb or class IV laser must obtain a certificate of registration and register that laser.

Response: Subsection (a)(1) of this section clearly specifies the classified lasers that are required to be registered with the department. No change was made as a result of the comment.

Comment: Concerning §289.301(g)(1)(B), the commenter questioned whether an LSO can or should be named for multiple sites, whether the LSO needs to reside within Texas, and whether the LSO needs to be present at the site full time, part time, or not at all.

Response: Subsection (q) specifies the duties for the LSO. It is the responsibility of the registrant to determine how the LSO can best fulfill those duties. No change was made as a result of the comment.

Comment: Concerning §289.301(g)(1)(C), the commenter noted that this subparagraph was not in the previous version of regulation and questioned why it was being added now.

Response: This requirement is consistent with other permitting sections of this chapter and is required by state law. No change was made as a result of the comment.

Comment: Concerning §289.301(g)(2)(B), the commenter noted that the department allows the radiation safety officer (RSO) for M.D. Anderson to have signature authority for its broad scope license and multiple use ionizing radiation registration similar to a hospital administrator. A LSO for a multiple use laser registration should have similar signature authority. Requiring signatures from each laser research/physician/veterinarian owner/user gives no real control or safety value, but merely increases the administrative burden of the safety program.

Response: Subsection (g)(2)(B) clearly states that the signature of the administrator, president, or chief executive officer will be accepted in lieu of a licensed practitioner's signature if the facility is a licensed hospital or a medical facility. A signature of

each individual user is not required. No change was made as a result of the comment.

Comment: Concerning §289.301(g)(2)(B), the commenter noted that the wording here is very similar to §289.226(d)(5). The department has agreed that the RSO for this university has the signature authority in a manner similar to a hospital administrator. Given a university system of multiple lasers, internal controls, and assigned permits, the language here should not preclude the LSO from this signature authority. Specifically, a veterinarian professor's signature on the application at Texas A&M contributes no control or safety value and actually increases the administrative burden of the safety program.

Response: Subsection (g)(2)(B) clearly states that the signature of the administrator, president, or chief executive officer will be accepted in lieu of a licensed practitioner's signature if the facility is a licensed hospital or a medical facility. A signature of each individual user is not required. No change was made as a result of the comment.

Comment: Concerning §289.301(g)(2)(B), the commenter stated that there needs to be delineation about healing arts versus veterinary medicine. The commenter noted that there are veterinarians who are purchasing devices then used for human treatment and questioned whether this is allowed.

The commenter also questioned how this clause applies to a rental or mobile surgical company without a single named practitioner/owner/user.

Response: The rules address who uses the lasers and not who purchases the lasers. Subsection (i)(2) specifies that each person registered by the department for laser use in accordance with this section shall confine use and possession of the laser registered to the locations and purposes authorized in the certificate of laser registration. Subsection (g)(5) of this section applies to mobile services. No change was made as a result of the comment.

Comment: Concerning §289.301(g)(4)(A), the commenter noted that many of these medical devices are in the possession of a reseller for less than 30 days and questions whether this will create a preponderance of paperwork. These devices are not of the same risk as an ionizing device. The commenter questioned if they require the same control and scrutiny.

Response: Each individual laser does not require a unique registration. The persons who receive, possess, acquire, transfer, use, or demonstrate lasers for the purpose of sale, class IIIb and IV lasers must be registered. No change was made as a result of the comment.

Comment: Concerning §289.301(g)(5)(B)(ii), the commenter noted that this requirement seems an impossible or endless function for a mobile service. Some mobile sites may be a one-time event. Again, this may create a preponderance of paperwork.

Response: The requirements of this section are for providers of lasers, not for mobile services. No change was made as a result of the comment.

Comment: Concerning §289.301(g)(6), the commenter questioned whether this requirement is an additional registration for the described functions that are required in Part 21 of the Code of Federal Regulations (CFR) as requirements for use. The commenter asked whether this is another layer of registration, or is it meant as a method of registering and controlling aftermarket functions by non-manufacturers.

Response: This subsection clearly specifies that persons providing alignment, calibration, and/or repair of lasers must be registered with the department. The requirement is meant to register persons who are in the business of performing alignment, calibration, and/or repair of lasers. No change was made as a result of the comment.

Comment: Concerning §289.301(g)(8), one commenter suggested that when performing mobile services, the physician who actually performs the procedure with the laser needs to be registered.

Response: Subsection (b)(1) of this section states that lasers shall not be used on humans unless under the supervision of a licensed practitioner of the healing arts. No change was made as a result of the comment.

Comment: Concerning §289.301(g)(8)(C), two commenters suggested that it be made clear that healing arts devices may be signed for only by a healing arts practitioner. There are rumors of healing arts devices being purchased for human application at nonstandard locations through a veterinary signature.

Response: The department changed subsection (g)(8)(C) to specifically state that an application for mobile services for healing arts shall be signed by a licensed practitioner of the healing arts and an application for veterinary medicine shall be signed by a veterinarian.

Comment: Concerning §289.301(g)(8)(D), the commenter questioned how facilities know of this regulation, how and through whom should they verify this information, and will or can a state office promulgate this information.

Response: The department agreed that this paragraph was inappropriate and deleted it. The department added subsection (j)(4) to clarify that the mobile service company providing mobile services shall provide evidence of registration with the agency to each facility receiving the services. The department renumbered the subsequent paragraph as reflected in §289.301(j)(5).

Comment: Concerning §289.301(i)(2), the commenter stated that this will potentially exclude spontaneous use for clinical purposes in locations other than mobile services. For example: UT Southwestern may move a laser to St. Paul of the Dallas Veterans Administration (sister hospitals) for a single procedure. This requirement would preclude any such use and add the burden of additional expense for a non-exceptional procedure. These lasers are not ionizing devices that must be closely monitored to protect the public from invisible and potentially fatal exposure unknowingly.

Response: The department suggests the commenter handle the example situation as a temporary use authorization on the registration or obtain a mobile services authorization. No change was made as a result of the comment.

Comment: Concerning §289.301(i)(2), the commenter asked how this applies to multiple locations that have separate certificates but are under one "person."

Response: The department allows the registrant to register multiple facilities under one certificate of registration or to have a seperate certificate of registration for each facility. No change was made as a result of the comment.

Comment: Concerning §289.301(j)(2), the commenter suggested the department define "make" a laser. Texas A&M as a research institution "makes" lasers as part of the normal business of research and development. Relationships with funding sources or other institutions may involve testing of temporary devices at other locations under research and development conditions. These tests may be made in a variety of conditions. The lasers may be intentionally subjected to destructive forces so that they can be analyzed for cause of the failure. Relief can be provided by a suitably broad definition of research, as noted above. The commenter suggested that the rules should recognize the operating life of a newly made laser may be minutes to weeks and the department should offer appropriate regulatory guidance.

Response: The department defines research and development in §289.201 of this title and the definition incorporates the situation described by the commenter. If a registrant is authorized for research and development, this situation is addressed. No change was made as a result of the comment.

Comment: Concerning §289.301(j)(3), the commenter noted that in the past whenever a laser was taken out of use, they simply sent in a request saying this item had been dropped. The commenter questioned if this is a change in policy.

Response: The registrant is required to submit an inventory of lasers only when requested by the department. When a registration is terminated, the requirements for disposition of lasers in subsection (l) of this section must be met. The word "annual" was deleted for clarification.

Comment: Concerning §289.301(o)(1), the commenter noted that this was not in the previous rule and questioned why it has been included for nonionizing devices. There are already federal rules for use, sale, and transfer of these devices if they are medical.

Response: This requirement is consistent with other permitting sections of this chapter and ensures proper disposition or transfer of lasers. No change was made as a result of the comment.

Comment: Concerning §289.301(p), the commenter stated that this requirement is too broad and that the department needs to be more specific on who qualifies, what kind of training is required, and how many hours of training are required.

Response: The department declined to further define LSO training. Because of the multiple types and uses of lasers, the department does not believe it to be prudent to set specific time requirements for training at this time. When selecting an LSO, the registrant should ensure the individual is adequately trained and capable of handling the responsibilities for the type of lasers used at the registered facility. No change was made as a result of the comment.

Comment: Concerning §289.301(p)(1), the commenter stated that there needs to be delineation of educational courses to define content to match current national guidelines. A course should have been attended no longer than 2 years prior and included at least 4 hours classroom and 4 hours hands-on practical for each wavelength per ANSI Z 136.3.

Response: The department declined to further define LSO training. Because the multipe types and uses of lasers, the department does not believe it to be prudent to set specific time requirements for training at this time. When selecting an LSO, the registrant should ensure the individual is adequately trained and capable of handling the responsibilities for the type of lasers used at the registered facility. No change was made as a result of the comment.

Comment: Concerning §289.301(p)(3), the commenter noted that it is difficult to understand how knowledge of emergency precautions is an adequate substitute for knowledge of laser radiation hazards.

Response: The department changed the word "or" to "and" to clarify that the LSO shall have knowledge of potential laser radiation hazards and laser emergency situations.

Comment: Concerning §289.301(p)(3), the commenter suggested changing "emergency precautions" to "laser emergency situations."

Response: The department changed the words "emergency precautions" to "laser emergency situations."

Comment: Concerning §289.301(p)(3), the commenter suggested changing the clause to read "and," not "or."

Response: The department changed the word "or" to "and" to clarify that the LSO shall have knowledge of potential laser radiation hazards and laser emergency situations.

Comment: Concerning §289.301(p)(3), the commenter suggested that the term "or emergency precautions" should be eliminated or "emergency precautions" should be defined.

Response: The department changed the words "emergency precautions" to "laser emergency situations."

Comment: Concerning §289.301(p)(3), the commenter noted that under LSO qualifications, the LSO requires "knowledge of potential laser radiation hazards "or" emergency precautions." The term "emergency precautions" is not consistent with safety or risk management language and has no clear meaning. The commenter suggested the term needs be defined or eliminated. A definition should include how a knowledge of "emergency precautions" can replace a knowledge of laser hazards.

Response: The department changed the words "emergency precautions" to "laser emergency situations."

Comment: Concerning §289.301(q)(6), the commenter noted that the responsibility for compliance is a registrant obligation and the LSO is the instrument through which compliance is understood, evaluated, and communicated. The LSO will specify engineering or operational controls with these recommendations being supported by the registrant. The LSO is charged by the registrant to assist the operation with understanding the compliance issues and periodically evaluating operational compliance.

Response: The department agrees with the commenter. No change was made as a result of the comment.

Comment: Concerning §289.301(r), the commenter noted that the LSO shall specify alternate requirements that should have at least a base limit of safety or clear definition of equivalence and asked how equivalence is to be determined.

Response: The department allows alternate equivalent engineering controls for protection against laser radiation to obtain laser safety protection. The requirements are performance-based, therefore equivalence to the stated requirements may be achieved through multiple methods. If the performance goal

of the rule is met, the requirements are satisfied. No change was made as a result of the comment.

Comment: Concerning §289.301(r), the commenter stated that engineering controls are generally regarded as the best type of control, but the LSO should be able to make substitution in areas besides medical applications. Research laboratories often have multiple lasers in a single large laser laboratory without the benefit of walled areas and interlocks to prevent operation if someone enters the NHZ. While administrative alternates are available (procedures, training, and signs), it is clear these do not offer "equivalent laser safety protection." The consequence of this rule would result in the possible elimination or curtailment of research or drive up the cost of research where lasers are an integral part.

Response: The department allows that latitude and the section clearly states that alternate equivalent engineering controls to obtain laser safety protection are permitted, including research and development. The term "medical procedures or surgery" is stated as an example. No change was made as a result of the comment.

Comment: Concerning §289.301(r)(1), the commenter suggested that there needs to be reiteration of the medical release for this statement. If the theory is that MPE can exist within the NHZ, then personnel within 3 feet of the active laser appliance will qualify in a surgical application.

Response: The allowance for specifying alternate controls is stated in subsection (r). The statements in subsection (r) apply to paragraphs (1) and (2) of the subsection. No change was made as a result of the comment.

Comment: Concerning §289.301(r)(2), the commenter suggested that a paragraph that overviews the performance standards could suffice for the next several paragraphs. All of the engineering controls other than "controlled area" are specified in the federal performance standards that are required prior to entering commerce. A simple pointer to these requirements should suffice for those persons engaging in the manufacture of lasers or laser products.

The commenter noted that the purpose and scope of this document do not include manufacture of lasers or laser products. Therefore, the requirements of the United States Food and Drug Administration (FDA) for performance standards and labeling are inappropriate in this document. In cases where there are additional requirements specified by Texas, the FDA requirements take precedence and the Texas requirements fall mute. The commenter suggested requiring conformance to the federal requirements and accepting the FDA's rulings on international products.

Response: The proposed rules are not a recapitulation of the FDA requirements, but are items that department inspectors may verify during the course of inspection. No change was made as a result of the comment.

Comment: Concerning §289.301(r)(2)(A), the commenter noted that collateral radiation is defined in (d)(19) as any electromagnetic (EM) radiation. Use of this term in subsections (r)(2)(A) and (w)(5) of this section implies a requirement for measuring EM radiation throughout the spectrum. This would involve an array of specialized equipment and expertise, or use of consultants which would be a significant expenditure of resources. If this is not really intended, the statements or definition should be clarified.

Response: The term "survey" as used in this section is consistent with the definition in §289.201 of this chapter and the rule does not require measurement of beam output or other radiation. No change was made as a result of the comment.

Comment: Concerning §289.301(r)(2)(A)(ii), the commenter suggested that the rule reference 21 CFR 10.40.10(f).

Response: The proposed rules are not a recapitulation of the FDA requirements, but are items that department inspectors may verify during the course of inspection. No change was made as a result of the comment.

Comment: Concerning §289.301(r)(2)(B)(iii) and (iv), the commenter stated that these subsections distinguish between pulsed and continuous wave (CW) lasers with regard to control requirements. This is confusing in that the control measure example given for CW lasers, the use of shutters, is applicable and in current use for many pulsed laser systems. The wording of the regulations seems to prevent the use of shutters for pulsed lasers.

Response: The examples given are not controlling and do not prevent the use of shutters for pulsed lasers. No change was made as a result of the comment.

Comment: Concerning §289.301(r)(2)(B)(iv), the commenter suggested deleting "class IIIb and IV" and adding "continuous wave (CW)" instead.

Response: The department deleted the words "class IIIb and IV" because it was redundant.

Comment: Concerning §289.301(r)(2)(B)(v), the commenter suggested adding between parenthesis another sentence such as "(A manual reset or operator instruction must accomplish the re-establishment of the interlock circuit and restore the function of the laser.)"

Response: As this section is a performance-based rule, the department does not specify how an interlock must prohibit automatic accessibility. No change was made as a result of the comment.

Comment: Concerning §289.301(r)(2)(B)(vi), the commenter questioned what is meant by "failure."

Response: The department replaced the word "such" with "interlock" to clarify that upon interlock failure, either multiple safety interlocks or a means to preclude removal or displacement of the interlocked portion of the protective housing shall be provided.

Comment: Concerning §289.301(r)(2)(B)(vi)(II), the commenter suggested that the rule reference 21 CFR 1040.10(f).

Response: The proposed rules are not a recapitulation of the FDA requirements, but are items that department inspectors may verify during the course of inspection. No change was made as a result of the comment.

Comment: Concerning §289.301(r)(2)(C)(ii), the commenter suggested that the rule reference 21 CFR 1040.10(f).

Response: The proposed rules are not a recapitulation of the FDA requirements, but are items that department inspectors may verify during the course of inspection. No change was made as a result of the comment.

Comment: Concerning §289.301(r)(2)(D), the commenter suggested deleting "except those that allow access only to less than

5 milliwatt (mW) peak visible laser radiation," since it is in the definition of IIIa.

Response: The department believes the wording is necessary because, depending upon the wavelength of the laser, the exception may be applicable. No change was made as a result of the comment.

Comment: Concerning §289.301(r)(2)(E), the commenter stated that in specifying requirements for the laser controlled area, the department should restrict the text to stating the requirements and not extend the text into the methods of compliance. This becomes prescriptive and loses the flexibility the department has achieved in other parts of the document. These recommendations and methods for accomplishing the control of laser hazards may be better served in a regulatory guide. The information is applicable and reasonable, but may limit the ability of an LSO to achieve the objectives of laser safety in an operational environment. The commenter also suggested deleting the words, "except those that allow access only to less than 5 mW visible peak power."

Response: The statements in subsection (r) of this section apply to paragraphs (1) and (2), including paragraph (2)(E). Therefore, the LSO has the latitude to specify alternate controls that achieve equivalent laser radiation safety. The rule is not strictly prescriptive in that it states options for signage and ways to prevent unauthorized entry. The department believes the wording, "except those that allow access only to less than 5 mW visible peak power," is necessary because, depending upon the wavelength, the exception may be applicable to other lasers. No change was made as a result of the comment.

Comment: Concerning §289.301(r)(2)(E)(ii), the commenter questioned through what means shall there be restriction.

Response: As this is a performance-based rule, the department does not specify how to restrict access to controlled areas. If the performance goal of the rule is met, the requirements are satisfied. No change was made as a result of the comment.

Comment: Concerning §289.301(r)(2)(E)(iii)(II)(-b-), the commenter noted that laser radiation is not ionizing radiation and that the current requirements for protection from non- ionizing do not include such a barrier nor are any available by organizations like Rockwell Laser Institute, who have been key to national laser safety regulation for over 20 years.

Response: The department replaced the word "and" with "or" to allow the registrant to choose what is best suitable to attenuate laser radiation at the entryway.

Comment: Concerning §289.301(r)(2)(E)(iii)(II)(-c-), the commenter noted that illuminated or audible signs have not been considered necessary to date. A correctly worded signage is accepted as a national standard in medical arenas.

Response: The rule allows "other appropriate signage." The department changed the word "or" to ", and" for grammatical correctness.

Comment: Concerning §289.301(r)(2)(E)(iii)(II)(-c-), the commenter suggested changing the wording "are some" for "is one" in the second sentence.

Response: The department changed the word "or" to "and" for grammatical correctness.

Comment: Concerning §289.301(r)(2)(E)(v), the commenter noted that controlled air space has a specific definition in the arena of air traffic control. Outdoor laser operations can be performed safely outside of controlled air space with appropriate safe guards. The commenter stated that the rule needs to be reworded to allow ongoing national and international, as well as state, research activities to continue to be performed in Texas. The commenter suggested that the wording "adequate protection to be provided for any visible or class IIIb and class IV laser projecting into navigable air space to assure protection of air traffic," should be considered in place of "controlled air space." This protection shall include consideration of hazards resulting from non-damaging light levels entering the cockpits or aircraft during critical flight operations, such as landing approach and departure.

Response: The department deleted the words "the beam path is limited to controlled air space" and replaced them with the words "air traffic is protected from any laser projecting into navigable air space" to clarify the intentions of the rule.

Comment: Concerning §289.301(s)(1), the commenter noted that this is a point of good information, but it doesn't belong in the regulation. A regulatory guide would be a beneficial use of this and most of the controlled area information.

Response: The department deleted the last sentence.

Comment: Concerning §289.301(t)(1)(C), the commenter noted that the table appears to describe to the user that for a particular laser power that a specific optical density (OD) is required and will provide protection. This logic is not acceptable given the orders of magnitude difference in MPE that is the level to which the OD should be reducing the radiant energy or irradiance. The MPE is the objective and the output power or energy is the information that determines the acceptable OD, not this table. The MPE and thereby, the OD are subject to the laser wavelength and the biological effects that drive the MPE levels.

The commenter suggested deleting the OD table and refer the user to the equation for OD and MPE tables or direct the user to ANSI standard for guidance.

Response: The department believes the first sentence in the subparagraph is sufficient and deleted the last two sentences, including the table.

Comment: Concerning §289.301(t)(1)(E), the commenter asked how the eyewear is to be tested and whether by the user, outside company, or the manufacturer. If there is no commercially or user accessible test, then the user has no alternative but to discard. There is currently no definition for "suspicious condition." The commenter suggested defining the term or removing the last sentence.

Response: The department changed the wording in the last sentence to ensure that unreliable eyewear be discarded.

Comment: Concerning §289.301(v)(3), the commenter noted that the purpose and scope of this document do not address the manufacture of lasers and laser products that are covered by the FDA requirements. It is inappropriate to repeat those requirements in this document. If the information is for the benefit of the user, then the information can be provided in a regulatory guide or just direct the LSO to the FDA regulations (21 CFR 1040.10).

Response: The proposed rules are not a recapitulation of the FDA requirements, but are items that department inspectors may verify during the course of inspection. No change was made as a result of the comment.

Comment: Concerning §289.301(v)(3)(A), the commenter suggested deleting the words "shall have a label...."

Response: The department believes that this wording is needed to clearly specify the intentions of the rule. No change was made as a result of the comment.

Comment: Concerning §289.301(v)(3)(C), the commenter noted that aperture labels are covered by 10 CFR 1040.10(g) and do not need to be restated here. The user should maintain the labeling on the laser, but not determine what labeling is appropriate. That is a manufacturer requirement for meeting the performance standards.

The commenter also noted that if there is an exemption for medical lasers in the state of Texas that relieves the manufacturer from labeling the aperture, then the commenter is unaware of its purpose or benefit.

Response: The proposed rules are not a recapitulation of the FDA requirements, but are items that department inspectors may verify during the course of inspection. In order to maintain appropriate labeling on the laser, the department believes it is prudent for the user to know what the labels must state. The fiber optics of some medical lasers are considered to be the aperture and labeling of such is infeasible. No change was made as a result of the comment.

Comment: Concerning §289.301(v)(3)(C), the commenter suggested deleting the words "..laser or collateral radiation in excess of the limits specified in subsection (cc)(5) and (cc)(8) of this section with the following wording as applicable."

Response: In order to maintain appropriate labeling on the laser, the department believes it is prudent for the user to know what the labels must state. No change was made as a result of the comment.

Comment: Concerning §289.301(v)(3)(C)(ii) and (iii), the commenter suggested deleting this wording.

Response: The proposed rules are not a recapitulation of the FDA requirements, but are items that department inspectors may verify during the course of inspection. No change was made as a result of the comment.

Comment: Concerning §289.301(v)(3)(D), the commenter suggested replacing the word "the" before "output" with "and the" and noted that these are FDA requirements.

Response: The suggested change would not be grammatically correct. No change was made as a result of the comment.

Comment: Concerning §289.301(v)(3)(E), the commenter suggested deleting the words "or collateral radiation" after "human access to laser."

Response: The department believes it is prudent to include collateral radiation for safety purposes. No change was made as a result of the comment.

Comment: Concerning §289.301(v)(3)(E)(ii), the commenter suggested deleting this clause, including the subclauses.

Response: There can be electromagnetic or x-ray radiation associated with laser production, so such labels are necessary for safety awareness. No change was made as a result of the comment.

Comment: Concerning §289.301(v)(3)(F), the commenter suggested deleting the word "labels" and adding "information" instead.

Response: The department replaced the word "labels" with "information" to clarify that the required information includes labels and signs.

Comment: Concerning §289.301(v)(3)(F)(i), the commenter suggested deleting the words "labels and."

Response: In order to maintain appropriate labeling on the laser, the department believes it is prudent for the user to know what the labels must state. No change was made as a result of the comment.

Comment: Concerning §289.301(v)(3)(F)(ii), the commenter suggested deleting the words "labels and."

Response: In order to maintain appropriate labeling on the laser, the department believes it is prudent for the user to know what the labels must state. No change was made as a result of the comment.

Comment: Concerning §289.301(v)(3)(G), the commenter suggested deleting the words "labels placed on lasers or" and the words "and the limits listed in subsection (cc)(8) of this section."

Response: The department deleted subparagraphs (G) and (H) and added new subparagraph (G)to clarify how and where labels and signs shall be attached.

Comment: Concerning §289.301(v)(3)(H), the commenter suggested deleting the words "Labels and," replacing the word "permanently" with "firmly" and deleting the word "or" before facility.

Response: In order to maintain appropriate labeling on the laser, the department believes it is prudent for the user to know what the labels must state. The label should be permanently attached to the laser. Deleting the word "or" does not reflect the intent of the rule. No change was made as a result of the comment. However, subparagraph (H) was deleted and the wording was incorporated in new subparagraph (G) to consolidate requirements for signs and labels.

Comment: Concerning §289.301(w), the commenter suggested adding the word "(Inspections)" after "Surveys". The commenter stated that these issues should be initially dealt with upon installation and reviewed only when changes have been made that would impact the laser control measures.

Response: The word "survey" as used in this section is consistent with the definition in §289.201 of this chapter. Also, the department believes that 12 months is the appropriate interval to conduct surveys. No change was made as a result of the comment.

Comment: Concerning §289.301(w), the commenter stated that this could be all encompassing and practically impossible for registrants to fully address. The commenter suggested that this should be required only if problems are suspected or have occurred in the recent past (at least for academia). In the university environment, a laser will not provide any useful results if it is not operating correctly in terms of output radiation. The commenter stated that making periodic measurements of the beam output will not provide any useful safety information in the academic situation. Measurement of other types of radiation can prove to be very expensive. The definition of "collateral radiation" implies that the registrant must check for all electromagnetic radiations. The commenter noted that it would

be useful to have examples of situations that have actually happened that have lead to accidents because of the lack of such surveys.

Response: The term "survey" as used in this section is consistent with the definition in §289.201 of this title and the rule does not require measurement of beam output or other radiation. The phrase "that may be" was added to subsection (w)(5) of this section for clarification.

Comment: Concerning §289.301(w)(1), the commenter suggested that the wording be changed to read "a review that laser protective devices are correctly labeled and appear to work properly and are properly chosen for lasers in use".

Response: The department believes that the rule wording is appropriate and states the intent of the rule. However, changes were made for grammatical correctness.

Comment: Concerning §289.301(w)(2), the commenter suggested that the wording be changed to read "a review that all warning devices are functioning properly within their design specifications".

Response: The department believes that rule wording is appropriate and states the intent of the rule. No change was made as a result of the comment.

Comment: Concerning §289.301(w)(3), the commenter suggested that the wording be changed to read "a review that the laser hazards are properly controlled and posted with accurate warning signs in accordance with subsection (v) of this section".

Response: The department believes that the rule wording is appropriate and states the intent of the rule. No change was made as a result of the comment.

Comment: Concerning §289.301(w)(4), the commenter suggested adding the words "changes to" after "re-evaluation of."

Response: The department believes that a re-evaluation is necessary whether changes have been made or not. No change was made as a result of the comment.

Comment: Concerning §289.301(w)(5), the commenter suggested deleting this paragraph and noted that lasers are not "surveyed" like x-ray producing machines. The open beam applications are the areas needing the control. Once controls are in place, the hazards are contained until the applications are changed.

Response: The term survey as used in this section is consistent with the definition in §289.201 of this title and the rule does not require measurement of beam output or other radiation. The phrase "that may be" was added to subsection (w)(5) of this section for clarification.

Comment: Concerning §289.301(w)(5), two commenters asked for clarification of this paragraph.

Response: The term survey as used in this section is consistent with the definition in §289.201 of this title and the rule does not require measurement of beam output or other radiation. The phrase "that may be" was added to subsection (w)(5) of this section for clarification.

Comment: Concerning §289.301(w)(5), a commenter stated that collateral radiation is defined in (d)(19) as any EM radiation which, given the vastness the spectrum, must include ionizing, microwave, infrared, ultraviolet, radiowaves and extremely low frequency. Regarding laser radiation, the point of classification by the manufacturer renders unnecessary any regulatory or safety survey of laser output. Measurement of EM radiation is vague and is of dubious value unless some problem is suspected. Equipment and design (§289.301(y)) depends on what part of the EM band you survey. The commenter stated that routine ionizing surveys to demonstrate areas are less than 100 mR/year are not needed. Only high voltage sources even have the capacity to create x-ray fields and historical data do not support the contention that an individual will exceed any limit in 25 TAC §289.202. Compiling annual surveys of the entire EM spectrum will necessarily require the purchase, maintenance and calibration of highly specialized instrumentation and/or use of consultants, all of which require resources which will compete with the safety dollar of any institution.

Response: The term survey as used in this section is consistent with the definition in §289.201 of this title and the rule does not require measurement of beam output or other radiation. The phrase "that may be" was added to subsection (w)(5) of this section for clarification.

Comment: Concerning §289.301(w)(5), a commenter noted that the term "survey" in this section should be carefully defined to avoid confusion as to what is required. Routine surveys should not include beam output measurements or measurements of collateral radiation. Such measurements require expensive devices wavelength specific to the laser output from the specific unit. Accurate measurement of general collateral radiation is very difficult if not impossible in practice. Such measurements usually give negative data which provide a false sense of security for the user. Specific collateral radiation such as ionizing radiation can be more easily measured, but only certain very high voltage sources have the capacity to create x-ray fields and historical data does not show that any individual has received such radiation in excess of any applicable limit when operating such lasers. The commenter noted that operational procedures, built-in interlocks/engineering controls, and labeling are much more important to a good laser safety program.

Response: The term survey as used in this section is consistent with the definition in §289.201 of this title and the rule does not require measurement of beam output or other radiation. The department agrees with the last sentence of the comment. The phrase, "that may be" was added to subsection (w)(5) of this section for clarification.

Comment: Concerning §289.301(z)(1)(B), a commenter suggested adding the word "(bleeding)" after "skin."

Response: Bleeding is not often associated with laser injury. No change was made as a result of the comment.

Comment: Concerning §289.301(bb)(2)(B), a commenter suggested using "attending" or "operating," rather than "referring."

Response: This information is not necessary for the 30-day written report and the department deleted the subparagraph from the paragraph. The department renumbered subsequent subparagraphs as reflected in §289.301(bb)(2)(B)-(E).

Comment: Concerning §289.301(cc), a commenter noted that classification tables for accessible emission limit (AEL) are duplicated from the Center for Devices and Radiological Health (CDRH) and are available through the FDA and on the world-wide web. The commenter suggested keeping MPE tables for laser hazards analyses and OD calculations.

Response: The department is aware of the availability of the AEL tables through the FDA and on the world-wide web, but not every registrant has access to the world-wide web. No change was made as a result of the comment.

Comment: Concerning §289.301(cc)(8), a commenter suggested deleting the last part of the sentence, "as determined from subsection (cc)(1) of this section for the appropriate wavelength(s) and emission duration" and clauses (i) and (ii).

Response: Because the laser classifications are definitions in subsection (d) of this section and the definitions reference subsection (cc)(8), subsection (cc)(8) is needed in the rule. No change was made as a result of the comment.

Comment: Concerning §289.301(cc)(8)(B), the commenter suggested deleting the words "and MPE."

Response: The department deleted the words "and MPE" to clarify the intent of the rule.

Comment: Concerning §289.301(cc)(8)(C), a commenter suggested deleting the subparagraph.

Response: The department deleted the subparagraph because it is not necessary.

Comment: Concerning §289.301(cc)(9)-(11), a commenter suggested deleting paragraphs (9)-(11).

Response: The department believes it is prudent to include these paragraphs for accessibility by all registered laser users. No changes were made as a result of the comment.

Comment: Concerning §289.301(cc)(11)(A), a commenter suggested changing the wording to "The MPE information is excerpted from American National Standard for the Safe Use of Lasers, ANSI Z136.1."

Response: The department does not believe that the additional wording is necessary for the registration and radiation safety requirements for lasers. No change was made as a result of the comment.

Comment: Concerning §289.301(cc)(11)(B), a commenter suggested deleting the subparagraph.

Response: The commenter gives no reason for deletion and the department believes that it is necessary for this wording to be in rule. No change was made as a result of the comment.

Comment: Concerning §289.301(dd), a commenter noted that there should also be an allowance for the use of the IEC 60825 laser symbol. The CDRH has made allowances for this symbol provided the laser classification conforms to the CDRH requirements.

Response: The department will review and make changes to the rule when federal changes mandate. No change was made as a result of the comment.

Comment: Concerning §289.301(dd)(3)-(10), a commenter noted graphical representations of the MPE are nice, but the numerical tables are more accurate and the values can be calculated instead of estimated. The commenter suggested deleting the graphs and pointing the user to the ANSI standard if they want to use the graphs.

Response: The department believes it is prudent to include these paragraphs for accessibility by all registered laser users. No change was made as a result of the comment.

Commenters included representatives from The University of Texas Southwestern Medical Center, Seton Hospital, Texas A & M University, M. D. Anderson Cancer Center, NASA's Goddard Space Flight Center, and Texas Instruments. In addition, numerous individuals commented. The commenters were generally favorable of the rule as proposed; however, the commenters had questions or specific concerns, and offered suggestions for changes to the proposal as discussed in the summary of comments.

Subchapter A. Control of Radiation

25 TAC §289.2

The repeal is adopted under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board the authority to adopt rules for its procedures and the performance of each duty imposed by law on the board, the department, and the commissioner of health. The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature is implemented by the proposal.

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

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Subchapter E. Registration Regulations

25 TAC §289.301

The new section is adopted under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board the authority to adopt rules for its procedures and the performance of each duty imposed by law on the board, the department, and the commissioner of health. The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature is implemented by the proposal.

§289.301. Registration and Radiation Safety Requirements for Lasers.

(a) Purpose.

(1) This section establishes requirements for the registration of persons who receive, possess, acquire, transfer, or use class IIIb and class IV lasers in the healing arts, veterinary medicine, industry, academic, research and development institutions, and of persons who are in the business of providing laser services. No person shall use lasers or perform laser services except as authorized in a certificate of laser registration issued by the agency in accordance with the requirements of this section.

(2) This section also establishes requirements for protection against laser radiation hazards resulting from activities conducted with class IIIb or class IV lasers. This section includes responsibilities of the registrant and the laser safety officer (LSO), laser hazard control methods, training requirements and notification of injuries.

(b) Scope.

(1) Except as otherwise specifically provided, this section applies to all persons who receive, possess, acquire, transfer, or use lasers that emit or may emit laser radiation. Nothing in this section shall be interpreted as limiting the intentional exposure of patients to laser radiation for the purpose of diagnosis, therapy, or treatment by a licensed practitioner of the healing arts. Individuals shall not use lasers on humans for medical or cosmetic purposes unless under the supervision of a licensed practitioner of the healing arts. This chapter does not apply to the manufacture of lasers.

(2) Lasers, including lasers used on humans for research demonstration, shall meet the requirements of any applicable federal standards in 21 Code of Federal Regulations (CFR) 1040. All lasers shall meet the requirements of these and any other applicable state requirements.

(3) If any conflict arises between the requirements of this section and the laser performance standards in 21 CFR 1040, the requirements of the federal standard shall apply.

(4) This section applies to lasers that operate at wavelengths between 180 nanometers (nm) and 1 millimeter (mm).

(5) In addition to the requirements of this section, all registrants are subject to the applicable requirements of §289.112 of this title (relating to Hearing and Enforcement Procedures); §289.201 of this title (relating to General Provisions); §289.203 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections); and §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material(s) Licenses, Emergency Planning and Implementation, and Other Regulatory Services).

(c) Prohibitions.

(1) The agency may prohibit uses of lasers that pose significant threat or endanger public health and safety, in accordance with §289.112 of this title and §289.201 of this title.

(2) Individuals shall not be intentionally exposed to laser radiation unless such exposure has been authorized by a licensed practitioner of the healing arts. This provision specifically prohibits deliberate exposure for the following purposes:

(A) exposure of an individual for training, demonstration, or other non- healing arts purposes;

(B) exposure of an individual for the purpose of healing arts screening, except as specifically authorized by the agency; and

(C) exposure of an individual for the purpose of research. Any research using radiation producing devices on humans must be approved by an institutional review board (IRB) as required by 45 Code of Federal Regulations (CFR) 46 and 21 CFR 56. The IRB must include at least one practitioner of the healing arts to direct use of laser radiation in accordance with subsection (b)(1) of this section.

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

(1) Accessible emission limit (AEL) - The maximum accessible emission level permitted within a particular class.

(2) α_{max} - The angular limit beyond which extended source maximum permissible exposures (MPE) for a given exposure duration are expressed as a constant radiance or integrated radiance. This value is defined as 100 milliradians.

(3) α_{min} - (See definition for limiting angular subtense.)

(4) Aperture - An opening through which radiation can pass.

(5) Apparent visual angle - The angular subtense of the source as calculated from source size and distance from the eye. It is not the beam divergence of the source.

(6) Attenuation - The decrease in the radiant flux of any optical beam as it passes through an absorbing or scattering medium.

(7) Beam - A collection of rays that may be parallel, divergent, or convergent.

(8) C_A - Correction factor that increases the MPE values in the near infrared (IR-A) spectral band (700-1400 nm) based upon reduced absorption properties of melanin pigment granules found in the skin and in the retinal pigment epithelium.

(9) C_B - Correction factor that increases the MPE values in the red end of the visible spectrum (550-700 nm) because of greatly reduced photochemical hazards.

(10) C_C - Correction factor that increases the MPE values for ocular exposure because of pre-retinal absorption of radiant energy in the spectral region between 1150 and 1400 nm.

(11) C_E - Correction factor used for calculating the extended source MPE for the eye from the intrabeam MPE, when the laser source subtends a visual angle exceeding α_{min}.

(12) C_F - Correction factor that reduces the MPE for repetitively pulsed exposure of the eye.

(13) Class I laser - Any laser that does not permit access during the operation to levels of laser radiation in excess of the accessible emission limits contained in subsection (cc)(1) of this section.

(14) Class II laser - Any laser that permits human access during operation to levels of visible laser radiation in excess of the accessible emission limits contained in subsection (cc)(1) of this section, but does not permit human access during operation to levels of laser radiation in excess of the accessible emission limits contained in subsection (cc)(2) of this section.

(15) Class IIIa laser - Any laser that permits human access during operation to levels of visible laser radiation in excess of the accessible emission limits contained in subsection (cc)(2)of this section, but does not permit human access during operation to levels of laser radiation in excess of the accessible emission limits contained in subsection (cc)(3) of this section.

(16) Class IIIb laser - Any laser that permits human access during operation to levels of laser radiation in excess of the accessible emission limits of subsection (cc)(3) of this section, but does not permit human access during operation to levels of laser radiation in excess of the accessible emission limits contained in subsection (cc)(4) of this section.

(17) Class IV laser - Any laser that permits human access during operation to levels of laser radiation in excess of the accessible emission limits contained in subsection (cc)(4) of this section.

(18) Coherent - A light beam is said to be coherent when the electric vector at any point in it is related to that at any other point by a definite, continuous function.

(19) Collateral radiation - Any electromagnetic radiation, except laser radiation, emitted by a laser that is physically necessary for its operation.

(20) Collimated beam - Effectively, a "parallel" beam of light with very low divergence or convergence. (See definition for intrabeam viewing.)

(21) Continuous wave (CW) - The output of a laser that is operated in a continuous rather than a pulsed mode. In this section, a laser operating with a continuous output for a period ≥0.25 seconds is regarded as a CW laser.

(22) Controlled area - An area where the occupancy and activity of those within is subject to control and supervision by the registrant for the purpose of protection from radiation hazards.

(23) Cosmetic - Radiation intended to be applied to the human body or any part of the human body for cleaning, beautifying, promoting attractiveness, or altering the appearance.

(24) Diopter - A measure of the power of a lens, defined as $1/f_0$, where f_0 is the focal length of the lens in meters.

(25) Divergence - For purposes of this section, divergence is taken as the full angle, expressed in radian, of the beam spread measured between those points that include laser energy or irradiance equal to 1/e (where e means base natural logarithm) of the maximum value (the angular extent of a beam that contains all the radius vectors of the polar curve of radiant intensity that have length rated at 36.8% of the maximum). This is also referred to as beam spread.

(26) Electromagnetic radiation - The flow of energy consisting of orthogonally vibrating electric and magnetic fields lying transverse to the direction of propagation. X-ray, ultraviolet, visible, infrared, and radio waves occupy various portions of the electromagnetic spectrum and differ only in frequency, wavelength, or photon energy.

(27) Electronic product - Any product or article defined as follows:

(A) any manufactured or assembled product that, when in operation:

(i) contains or acts as part of an electronic circuit; and

(ii) emits, or in the absence of effective shielding or other controls would emit, electronic product radiation; or

(B) any manufactured or assembled article that is intended for use as a component, part, or accessory of a product described in subparagraph (A) of this paragraph and that when in operation emits, or in the absence of effective shielding or other controls would emit, such radiation.

(28) Energy - The capacity for doing work. Energy content is commonly used to characterize the output from pulsed lasers, and is generally expressed in joules (J).

(29) Entertainment laser - Any laser manufactured, designed, intended, or promoted for purposes of entertainment, advertising display, or artistic composition.

(30) Focal point - The point toward which radiation converges or from which radiation diverges or appears to diverge.

(31) Hertz (Hz) - The unit that expresses the frequency of a periodic oscillation in cycles per second.

(32) Infrared radiation - Electromagnetic radiation with wavelengths that lie within the range 700 nm to 1 mm.

(33) Institutional Review Board (IRB) - Any board, committee, or other group formally designated by an institution to review, approve the initiation of, and conduct periodic review of biomedical research involving human subjects.

(34) Intrabeam viewing - The viewing condition where the source subtends an angle at the eye that is equal to or less than α_{min}, the limiting angular subtense. This category includes most collimated beams and so called point sources.

(35) Irradiance (at a point of a surface) - The quotient of the radiant flux incident on an element of the surface containing the point at which irradiance is measured, by the area of that element. Unit: watt per square centimeter (W/cm^2).

(36) Joule - A unit of energy. One joule is equal to one watt • second.

(37) Laser - A device that produces an intense, coherent, directional beam of light by stimulating electronic or molecular transitions to lower energy levels. "Laser" is an acronym for light amplification by stimulated emission of radiation. The term "laser" also includes the assembly of electrical, mechanical, and optical components associated with the laser.

(38) Laser product - Any manufactured product or assemblage of components that constitutes, incorporates, or is intended to incorporate a laser and is classified as a class I, II, IIIa, IIIb or IV laser product according to the performance standards set by the United States Food and Drug Administration (FDA). A laser that is intended for use as a component of an electronic product shall itself be considered a laser product. A laser product contains an enclosed laser with an assigned class number higher than the inherent capability of the laser in which it is incorporated and where the product's lower classification is appropriate due to the engineering features limiting accessible emission.

(39) Laser safety officer - An individual who has a knowledge of and the authority and responsibility to apply appropriate laser radiation protection rules, standards, and practices, and who must be specifically authorized on a certificate of laser registration.

(40) Limiting angular subtense (α_{min}) - The apparent visual angle that divides intrabeam viewing from extended-source viewing.

(41) Limiting aperture (D_l) - The maximum diameter of a circle over which irradiance and radiant exposure can be averaged.

(42) Limiting exposure duration (T_{max}) - An exposure duration that is specifically limited by the design or intended use(s).

(43) Maximum permissible exposure (MPE) - The level of laser radiation to which a person may be exposed without hazardous effect or adverse biological changes in the eye or skin.

(44) Medical event - Any adverse patient health effect that is a result of failure or misuse of a laser safety equipment.

(45) Nominal hazard zone (NHZ) - The space within which the level of direct, reflected, or scattered radiation during operation exceeds the applicable MPE. Exposure levels beyond the boundary of the NHZ are below the applicable MPE level.

(46) Optical density (D_λ) - The logarithm to the base ten of the reciprocal of the transmittance. $D_\lambda = -\log_{10} \tau_\lambda$, where τ_λ is transmittance.

(47) Point source - A source of radiation whose dimensions are small enough to result in a subtended angle that is less than α_{min}. For the purpose of this section, a point source leads to intrabeam viewing condition.

(48) Practitioner of the healing arts (practitioner) - A person licensed to practice the healing arts by either the Texas State Board of Medical Examiners as a physician; the Texas State Board of Dental Examiners; the Texas Board of Chiropractic Examiners; or the Texas State Board of Podiatry Examiners.

(49) Protective housing - An enclosure surrounding the laser that prevents access to laser radiation above the applicable MPE level. The aperture through which the useful beam is emitted is not part of the protective housing. The protective housing may enclose associated optics and a work station and shall limit access to other associated radiant energy emissions and to electrical hazards associated with components and terminals.

(50) Provider of lasers - A person who furnishes a laser(s) on a routine basis for a limited time period to a facility(ies) that operates the laser(s) during that limited time period.

(51) Pulse duration - The duration of a laser pulse. This is usually measured as the time interval between the half-power points on the leading and trailing edges of the laser pulse.

(52) Pulsed laser - A laser that delivers its energy in the form of a single pulse or a train of pulses. In this section, the duration of a pulse is <0.25 seconds in a pulsed laser.

(53) Reflection - The deviation of radiation following incidence on a surface.

(54) Service - The performance of those procedures or adjustments described in the manufacturer's service instructions that may affect any aspect of the performance of the laser.

(55) Source - A laser or a laser-illuminated reflecting surface.

(56) T_1 - The exposure duration (time) at which MPEs based upon thermal injury are replaced by MPEs based upon photochemical injury to the retina.

(57) T_{max} - (See definition for limiting exposure duration.)

(58) Transmission - Passage of radiation through a medium.

(59) Ultraviolet radiation - Electromagnetic radiation with wavelengths smaller than those of visible radiation; for the purpose of this section 180 to 400 nm.

(60) Visible radiation (light) - Electromagnetic radiation that can be detected by the human eye. This term is commonly used to describe wavelengths that lie in the range of 400 to 700 nm.

(61) Watt - The unit of power or radiant flux. 1 watt equals 1 joule per second.

(62) Wavelength (λ) - The distance between two successive points on a periodic wave that have the same phase.

(e) Exemptions.

(1) Lasers in transit or in storage incident to transit are exempt from the requirements of this section. This exemption does not apply to the providers of lasers.

(2) Inoperable lasers are exempt from the requirements of this section.

(3) Class I, class II, and class IIIa lasers or products are exempt from the requirements of this section.

(4) Class III mobile lasers are exempt from registration only if they are continuous wave (CW) in the wavelength range of $400 < \lambda \leq 700$ nm and have a peak radiant power of less than or equal to 5×10^{-3} watts.

(f) Registration of laser uses and services.

(1) For purposes of this section, laser uses and services shall include, but may not be limited to:

(A) possession and use of lasers in the healing arts, veterinary medicine, industry, academic, and research and development institutions;

(B) demonstration and sales of lasers that require the individual to operate or cause a laser to be operated in order to demonstrate or sell;

(C) provision of lasers on a periodic basis to a facility for limited time periods by a provider of lasers;

(D) alignment, calibration, and/or repair; or

(E) laser light shows.

(2) A person who has made application for registration in accordance with this section and is using a laser prior to receiving a certificate of laser registration is subject to the requirements of this chapter.

(g) Application requirements.

(1) General application requirements.

(A) Application for certificate of laser registration shall be completed on forms prescribed by the agency and shall contain all the information required by the form and accompanying instructions.

(B) A laser safety officer (LSO) shall be designated on each application form. The qualifications of that individual shall be submitted to the agency with the application. The LSO shall meet the applicable requirements of subsection (p) of this section and carry out the responsibilities of subsection (q) of this section.

(C) If the applicant is a corporation under the Texas Business Corporation Act, BRC Form 226-1 shall be submitted with the application to confirm that no tax owed the state under Tax Code, Chapter 171, is delinquent.

(D) Each application for a certificate of laser registration shall be accompanied by the appropriate fee prescribed in §289.204 of this title.

(E) An application for a certificate of laser registration may include a request for a certificate of laser registration authorizing one or more activities.

(F) The agency may, at any time after filing of the original application and before issuance of the certificate of registration, require further statements in order to enable the agency to determine whether the application should be granted or denied.

(G) Applications and documents submitted to the agency may be made available for public inspection except that the agency may withhold any document or part thereof from public inspection in accordance with §289.201(n) of this title.

(2) Application for use of laser on humans or animals.

(A) In addition to the requirements of subsection (g)(1) of this section, each person having a laser for use in the healing arts, or for use on animals shall submit an application to the agency within 30 days following the commencement of operation of that laser.

(B) An application for healing arts shall be signed by a licensed practitioner of the healing arts. An application for veterinary medicine shall be signed by a veterinarian. The signature of the administrator, president, or chief executive officer will be accepted in lieu of a licensed practitioner's signature if the facility is a licensed hospital or a medical facility. A signature by the administrator, president, or chief executive officer does not relieve the practitioner user or veterinarian user from complying with the requirements of this section.

(C) If a person is furnished a laser by a provider of lasers, that person is responsible for ensuring that a licensed practitioner of the healing arts authorizes intentional exposure of laser radiation to humans.

(3) Application for use of lasers in industrial, academic, and research and development institutions. In addition to the requirements of subsection (g)(1) of this section, each applicant having a laser(s) for use in industrial, academic, and research and development institutions shall submit an application to the agency within 30 days following the commencement of operation.

(4) Application for demonstration for the purpose of sales of lasers.

(A) Each applicant shall apply for and receive a certificate of laser registration before the demonstration for purpose of selling laser(s), including demonstration for the selling of surplus lasers.

(B) In addition to the requirements of subsection (g)(1) of this section, the applicant shall submit a statement confirming that no demonstration will be performed on humans unless directed by a licensed practitioner of the healing arts.

(5) Application for providers of lasers.

(A) Each applicant shall apply for and receive a certificate of laser registration before providing lasers.

(B) In addition to the requirements of subsection (g)(1) of this section, the applicant shall submit the following:

(i) the address of the established main location where the laser and records will be maintained for inspection. This shall be a physical street address, not a post office box number; and

(ii) a list of facilities where the laser will be provided.

(6) Application for alignment, calibration, and/or repair. In addition to the requirements of subsection (g)(1) of this section, each applicant shall apply for and receive a certificate of laser radiation for alignment, calibration, and/or repair before providing alignment, calibration, and/or repair of lasers.

(7) Application for laser light show.

(A) Each applicant shall apply for and receive a certificate of laser registration for laser light show before beginning any show.

(B) In accordance with subparagraph (A) of this paragraph and in addition to the requirements of subsection (g)(1) of this section, each applicant shall submit the following:

(i) a valid variance issued from the FDA for the laser intended to be used. The registrant shall comply with the conditions of the FDA variance.

(ii) a written notice of the laser light show to be performed in Texas. The information contained in BRC Form 301-1 shall be provided seven days prior to each show. If, in a specific case the seven working-day period would impose an undue hardship on the applicant, the applicant may, upon written request to the agency, obtain permission to proceed sooner.

(8) Application for mobile services used in the healing arts and veterinary arts.

(A) Each applicant shall apply for and receive a certificate of laser registration for mobile services before beginning to provide mobile services.

(B) In addition to the requirements of subsection (g)(1) of this section, each applicant shall submit the address of the established main location where the laser, records, etc. will be maintained for inspection. This shall be a physical street address, not a post office box number.

(C) An application for mobile services for healing arts shall be signed by a licensed practitioner of the healing arts and an application for mobile services for veterinary medicine shall be signed by a veterinarian.

(h) Issuance of certificate of laser registration.

(1) Upon determination that an application meets the requirements of the Texas Radiation Control Act (Act) and the rules of the agency, the agency may issue a certificate of laser registration authorizing the proposed activity in such form and containing such conditions and limitations as it deems appropriate or necessary.

(2) The agency may incorporate in the certificate of laser registration at the time of issuance, or thereafter by amendment, such additional requirements and conditions with respect to the registrant's receipt, possession, use, and transfer of lasers subject to this section as it deems appropriate or necessary in order to:

(A) minimize danger to public health and safety;

(B) require such reports and the keeping of such records for inspection by the agency; and

(C) prevent loss or theft of lasers subject to this section.

(i) Specific terms and conditions of certificates of laser registration.

(1) Each certificate of laser registration issued in accordance with this section shall be subject to the applicable provisions of the Act, now or hereafter in effect, and to the applicable rules in this chapter and orders issued by the agency.

(2) Each person registered by the agency for laser use in accordance with this section shall confine use and possession of the laser registered to the locations and purposes authorized in the certificate.

(3) No certificate of laser registration issued or granted under this section shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, to any person unless the agency authorizes the transfer in writing.

(j) Responsibilities of registrant.

(1) The registrant shall notify the agency in writing within 30 days of a change in any of the following:

(A) name and mailing address;

(B) laser safety officer (LSO); or

(C) name of facility contracted for "provider of services", if applicable.

(2) No person shall make, sell, lease, transfer, or lend lasers unless such machines and equipment, when properly placed in operation and used, meet the applicable requirements of this section.

(3) When requested by the agency, the registrant shall submit an inventory of lasers possessed and used, including disposition.

(4) The mobile service company providing mobile services shall provide evidence of registration with the agency to each facility receiving the services.

(5) The registrant is responsible for complying with this section and the conditions of the certificate of laser registration.

(k) Expiration of certificates of laser registration.

(1) Except as provided by subsection (m) of this section, each certificate of laser registration that specifies an expiration date expires at the end of the day on that date. Expiration of the certificate of laser registration does not relieve the registrant of the requirements of this chapter.

(2) If a registrant does not submit an application for renewal of the certificate of laser registration under subsection (m) of this section, as applicable, the registrant shall on or before the expiration date specified in the certificate of laser registration terminate use and/or services of laser(s) and request termination as outlined in subsection (l) of this section.

(l) Termination of certificates of laser registration.

(1) Each registrant shall notify the agency immediately, in writing, and request termination of the certificate of laser registration when the registrant decides to terminate all activities involving lasers authorized under the certificate of laser registration.

(2) Concurrent with the notification and request for termination of the certificate of laser registration, the registrant shall do the following:

(A) submit a record of disposal of lasers; and

(B) pay any outstanding fees in accordance with §289.204 of this title.

(m) Renewal of certificate of registration.

(1) Application for renewal of laser registration shall be filed in accordance with subsection (g) of this section.

(2) If a registrant files an application in proper form before the existing certificate of laser registration expires, such existing certificate of laser registration shall not expire until the application status has been determined by the agency.

(n) Modification and revocation of certificates of laser registration. Modification, suspension, and revocation of certificates of laser registration shall be in accordance with §289.205 of this title.

(o) Notifications.

(1) Each registrant shall notify the agency, in writing, immediately following the filing of a voluntary or involuntary petition for bankruptcy by or against:

(A) a registrant;

(B) an entity controlling a registrant or listing the certificate of laser registration of the registrant as property of the estate; or

(C) an affiliate of the registrant.

(2) This notification shall include:

(A) the bankruptcy court in which the petition for bankruptcy was filed;

(B) the name of the entity in bankruptcy; and

(C) the date of the filing of the petition.

(3) A copy of the "petition for bankruptcy" shall be submitted to the agency along with the written notification.

(p) LSO qualifications. LSO qualifications shall be submitted to the agency and shall include the following:

(1) educational courses related to laser radiation safety or a laser safety officer course; or

(2) experience in the use and familiarity of the type of equipment or services registered for; and

(3) knowledge of potential laser radiation hazards and laser emergency situations.

(q) LSO duties. Specific duties of the LSO shall include, but not be limited to the following:

(1) ensuring that users of lasers are trained in laser safety, as applicable for the class and type of lasers the individual uses;

(2) assuming control and having the authority to institute corrective actions including shutdown of operations when necessary in emergency situations or unsafe conditions; and

(3) specifying whether any changes in control measures are required following:

(A) any service and maintenance of lasers that may affect the output power or operating characteristics; or

(B) whenever deliberate modifications are made that could change the laser class and affect the output power or operating characteristics.

(4) ensuring maintenance and other practices required for safe operation of the laser(s) are performed;

(5) ensuring the proper use of protective eyewear and other safety measures; and

(6) ensuring compliance with the requirements in this section and with any engineering or operational controls specified by the registrant.

(r) Requirements for protection against laser radiation. These requirements are for lasers in their intended mode of operation and include special requirements for service, testing, maintenance, and modification. During some laser operations, certain engineering controls may be inappropriate. In situations where an engineering control may be inappropriate, for example, during medical procedures or surgery, the LSO shall specify alternate controls to obtain equivalent laser safety protection.

(1) MPE. Each registrant or user of any laser shall not permit any individual to be exposed to levels of laser or collateral radiation higher than are specified in subsection (cc)(5)-(8) of this section.

(2) Engineering controls.

(A) Protective housing.

(i) Each laser shall have a protective housing that prevents human access during the operation of the laser and collateral radiation that exceeds the limits of class I and subsection (cc)(8)(A) and (B) of this section, wherever and whenever such human access is not necessary in order for the laser to perform its intended function.

(ii) Wherever and whenever human access to laser radiation levels that exceed the limits of class I and subsection (cc)(8)(A) and (B) of this section is necessary, these levels shall not exceed the limits of the lowest laser class necessary to perform the intended function(s).

(B) Safety interlocks.

(i) A safety interlock, that shall ensure that radiation is not accessible above MPE limits, shall be provided for any portion of the protective housing that by design can be removed or displaced without the use of tools during normal operation or maintenance, and thereby allows access to radiation above MPE limits.

(ii) Adjustment during operation, service, testing, or maintenance of a laser containing interlocks shall not cause the interlocks to become inoperative or the radiation to exceed MPE limits outside protective housing except where a laser controlled area as specified in subparagraph (E) of this paragraph is established.

(iii) For pulsed lasers, interlocks shall be designed so as to prevent firing of the laser; for example, by dumping the stored energy into a dummy load.

(iv) For CW lasers, the interlocks shall turn off the power supply or interrupt the beam; for example, by means of shutters.

(v) An interlock shall not allow automatic accessibility of radiation emission above MPE limits when the interlock is closed.

(vi) Either multiple safety interlocks or a means to preclude removal or displacement of the interlocked portion of the protective housing upon interlock failure shall be provided, if failure of a single interlock would allow the following:

(I) human access to levels of laser radiation in excess of the radiant power accessible emission limit of class IIIa laser radiation; or

(II) laser radiation in excess of the accessible emission limits of class II to be emitted directly through the opening created by removal or displacement of that portion of the protective housing.

(C) Viewing optics and windows.

(i) All viewing ports, viewing optics, or display screens included as an integral part of an enclosed laser or laser shall incorporate suitable means to attenuate the laser and collateral radiation transmitted through the port to less than the MPE and the limits listed in subsection (cc)(8) of this section under any conditions of operation of the laser.

(ii) Since optical systems such as lenses, telescopes, and microscopes may increase the hazard to the eye or the skin, the potential hazard and specific administrative procedures and the use of controls such as interlocks or filters shall be determined.

(D) Warning systems. Each class IIIb or IV laser or laser product shall provide visual or audible indication during the emission of accessible laser radiation. In the case of class IIIb lasers, except those that allow access only to less than 5 milliwatt (mW) peak visible laser radiation, and class IV lasers, this indication shall be sufficient prior to emission of such radiation to allow appropriate action to avoid exposure. Any visual indicator shall be clearly visible through protective eyewear designed specifically for the wavelength(s) of the emitted laser radiation. If the laser and laser energy source are housed separately and can be operated at a separation distance of greater than two meters, both laser and laser energy source shall incorporate visual or audible indicators. The visual indicators shall be positioned so that viewing does not require human access to laser radiation in excess of the MPE.

(E) Controlled area. With a class IIIb laser, except those that allow access only to less than 5 mW visible peak power, or class IV laser, a controlled area shall be established when exposure to the laser radiation in excess of the MPE or the limits listed in subsection (cc)(8) of this section is possible. The controlled area shall meet the following requirements, as applicable.

(i) The area shall be posted as required by subsection (v) of this section.

(ii) Access to the controlled area shall be restricted.

(iii) For class IV indoor controlled areas, latches, interlocks, or other appropriate means shall be used to prevent unauthorized entry into controlled areas.

(I) Such measures shall be designed to allow rapid egress by the laser personnel at all times and admittance to the controlled area in an emergency condition. For such emergency conditions, a control-disconnect switch or equivalent device (panic button) shall be available for deactivating the laser.

(II) Where safety latches or interlocks are not feasible or are inappropriate, for example during medical procedures, such as surgery, the following shall apply.

(-a-) All authorized personnel shall be trained in laser safety and appropriate personal protective equipment shall be provided upon entry.

(-b-) A door, blocking barrier, screen, or curtains shall be used to block, screen, or attenuate the laser radiation at the entryway. The level at the exterior of these devices shall not exceed the applicable MPE, nor shall personnel experience any exposure above the MPE immediately upon entry.

(-c-) At the entryway there shall be a visible or audible signal indicating that the laser is energized and operating at class IV levels. A lighted laser warning sign, flashing light (visible through laser protective eyewear), and other appropriate signage are some of the methods to accomplish this requirement. Alternatively, an entryway warning light assembly may be interfaced to the laser in such a manner that one light will indicate when the laser is not operational (high voltage off) and by an additional light when the laser is powered up (high voltage applied, but no laser emission) and by an additional (flashing optional) light that activates when the laser is operating.

(iv) For class IV indoor controlled areas, during tests requiring continuous operation, the individual in charge of the controlled area shall be permitted to momentarily override the safety interlocks to allow access to other authorized personnel if it is clearly evident that there is no optical radiation hazard at the point of entry and if the necessary protective devices are being worn by the entering personnel.

(v) For class IV indoor controlled areas, optical paths (for example, windows) from an indoor facility shall be

controlled in such a manner as to reduce the transmitted values of the laser radiation to levels at or below the appropriate ocular MPE and the limits listed in subsection (cc)(8) of this section. (When the laser beam must exit the indoor controlled area (as in the case of exterior atmospheric beam paths), the operator shall be responsible for ensuring that air traffic is protected from any laser projecting into navigable air space (contact Federal Aviation Administration (FAA) or other appropriate agencies, as necessary) or controlled ground space when the beam irradiance or radiant exposure is above the appropriate MPE and the limits listed in subsection (cc)(8) of this section).

(vi) When the removal of panels or protective covers and/or overriding of interlocks becomes necessary, such as for servicing, testing, or maintenance, and accessible laser radiation exceeds the MPE and the limits listed in subsection (cc)(8) of this section, a temporary controlled area shall be established and posted.

(s) Additional requirements for special lasers and applications.

(1) Infrared laser. The beam from a laser shall be terminated in fire-resistant material where necessary. Inspection intervals of absorbent material and actions to be taken in the event or evidence of degradation shall be specified in the operating and safety procedures.

(2) Laser optical fiber transmission system.

(A) Laser transmission systems that employ optical cables shall be considered enclosed systems with the optical cable forming part of the protective housing.

(B) Disconnection of a connector resulting in access to radiation in excess of the applicable MPE or the limits listed in subsection (cc)(8) of this section shall take place in a controlled area. Except for medical lasers whose manufacture has been approved by the FDA, the use of a tool shall be required for the disconnection of a connector for service and maintenance purposes when the connector is not within a secured enclosure. All connectors shall bear the appropriate label or tag specified in subsection (v)(3) of this section.

(t) Additional requirements for safe operation.

(1) Eye Protection. Protective eyewear shall be worn by all individuals with access to class IIIb and/or class IV levels of laser radiation. Protective eyewear devices shall meet the following requirements:

(A) provide a comfortable and appropriate fit all around the area of the eye;

(B) be in proper condition to ensure the optical filter(s) and holder provide the required optical density or greater at the desired wavelengths, and retain all protective properties during its use;

(C) be suitable for the specific wavelength of the laser and be of optical density adequate for the energy involved;

(D) have the optical density or densities and associated wavelength(s) permanently labeled on the filters or eyewear; and

(E) be examined, at intervals not to exceed 12 months, to ensure the reliability of the protective filters and integrity of the protective filter frames. Unreliable eyewear shall be discarded.

(2) Skin protection. When there is a possibility of exposure to laser radiation that exceeds the MPE limits for skin as specified in subsection (cc)(7) of this section, the registrant shall require the appropriate use of protective gloves, clothing, or shields.

(u) NHZ. Where applicable, in the presence of unenclosed class IIIb and class IV beam paths, an NHZ shall be established. If the beam of an unenclosed class IIIb or class IV laser is contained within a region by adequate control measures to protect personnel from exposure to levels of radiation above the appropriate MPE, that region may be considered to contain the NHZ. The NHZ may be determined by information supplied by the laser manufacturer, by measurement, or by using the appropriate laser range equation or other equivalent assessment.

(v) Caution signs, labels, and posting.

(1) General requirements. Except as otherwise authorized by the agency, signs, symbols, and labels prescribed by this section shall use the design and colors specified in subsection (dd)(1) and (2) of this section.

(2) Posting and instructions.

(A) The laser controlled area shall be conspicuously posted with an appropriate sign or signs as specified in paragraph (3) of this subsection and subsection (dd)(1) and (2) of this section.

(B) Operating personnel of each laser shall be provided with written instructions for safe use, including clear warnings and precautions to avoid possible exposure to laser and collateral radiation in excess of the MPE and the limits listed in subsection (cc)(8) of this section.

(3) Labeling lasers and posting laser facilities.

(A) Class IIIb lasers shall have a label and facilities shall be posted with a sign(s) with the warning specified in subsection (dd)(2) of this section that includes the following wording: "LASER RADIATION - AVOID DIRECT EXPOSURE TO BEAM. CLASS IIIb LASER (OR LASER PRODUCT)."

(B) Class IV lasers and facilities shall have a label affixed and be posted with a sign(s) with the warning specified in subsection (dd)(2) of this section that includes the following wording: "LASER RADIATION - AVOID EYE OR SKIN EXPOSURE TO DIRECT OR SCATTERED RADIATION. CLASS IV LASER (OR LASER PRODUCT)."

(C) Lasers, except lasers used in the practice of medicine, shall have a label(s) in close proximity to each aperture through which is emitted accessible laser or collateral radiation in excess of the limits specified in subsection (cc)(5) and (8) of this section with the following wording as applicable.

(i) "AVOID EXPOSURE - Laser radiation is emitted from this aperture," if the radiation emitted through such aperture is laser radiation.

(ii) "AVOID EXPOSURE - Hazardous electromagnetic radiation is emitted from this aperture," if the radiation emitted through such aperture is collateral radiation.

(iii) "AVOID EXPOSURE - Hazardous x-rays are emitted from this aperture," if the radiation emitted through such aperture is collateral x-ray radiation.

(D) Each laser shall state, on the required warning logotype, the maximum output of laser radiation, the pulse duration when appropriate, and the laser medium or emitted wavelength(s).

(E) Each noninterlocked or defeatably interlocked portion of the protective housing or enclosure that is designed to be displaced or removed during normal operation or servicing, and that would permit human access to laser or collateral radiation, shall have labels as follows.

(i) For laser radiation in excess of the accessible emission limits of class IIIb, the wording: "DANGER - LASER RADIATION WHEN OPEN. AVOID EYE OR SKIN EXPOSURE TO DIRECT OR SCATTERED RADIATION."

(ii) For collateral radiation in excess of the emission limits of subsection (cc)(8) of this section:

(I) if the limits in subsection (cc)(8)(A) of this section are exceeded, the wording: "CAUTION - HAZARDOUS ELECTROMAGNETIC RADIATION WHEN OPEN"; and

(II) if the limits in subsection (cc)(8)(B) of this section are exceeded, the wording: "CAUTION - HAZARDOUS X-RAY RADIATION."

(iii) For protective housing or enclosures that provide a defeatable interlock, the words "and interlock defeated" shall be included in the labels specified in clauses (i) and (ii) of this subparagraph.

(F) Other required information.

(i) The word "invisible" shall immediately precede the word "radiation" on labels and signs required by this subparagraph for wavelengths of laser and collateral radiation that are outside of the range of 400 to 700 nm.

(ii) The words "visible and invisible" shall immediately precede the word "radiation" on labels and signs required by this subparagraph for wavelengths of laser and collateral radiation that are both within and outside the range of 400 to 700 nm.

(G) Labels required by this subparagraph shall be clearly visible, legible, and permanently attached to the laser or facility. Signs required by this subparagraph shall be clearly visible, legible, and securely attached to the facility.

(w) Surveys. Each registrant shall make or cause to be made such surveys as may be necessary to comply with this section. Surveys shall be performed at intervals not to exceed 12 months, to include but not be limited to the following:

(1) a determination that all laser protective devices are labeled correctly, functioning within the design specifications, and properly chosen for lasers in use;

(2) a determination that all warning devices are functioning within their design specifications;

(3) a determination that the laser controlled area is properly controlled and posted with accurate warning signs in accordance with subsection (v) of this section;

(4) a re-evaluation of potential hazards from surfaces that may be associated with laser beam paths; and

(5) additional surveys that may be required to evaluate the laser and collateral radiation hazard incident to the use of lasers.

(x) Records. Each registrant shall maintain current records in accordance with subsection (ee) of this section.

(y) Measurements and instrumentation. Each determination requiring a measurement for compliance with this section shall use instrumentation that is calibrated and designed for use with the laser that is to be tested.

(z) Notification of injury other than a medical event.

(1) Each registrant shall immediately seek appropriate medical attention for the individual and notify the agency by telephone of any injury involving a laser possessed by the registrant, other than intentional exposure of patients for medical purposes, that has or may have caused:

(A) an injury to an individual that involves the partial or total loss of sight in either eye; or

(B) an injury to an individual that involves perforation of the skin or other serious injury exclusive of eye injury.

(2) Each registrant shall, within 24 hours of discovery of an injury, report to the agency each injury involving any laser possessed by the registrant, other than intentional exposure of patients for medical purposes, that may have caused, or threatens to cause, an exposure to an individual with second or third-degree burns to the skin or potential injury and partial loss of sight.

(aa) Reports of injuries.

(1) Each registrant shall make a report in writing, or by electronic transmittal, within 30 days to the agency of any injury required to be reported in accordance with subsection (z) of this section.

(2) Each report shall describe the following:

(A) the extent of injury to individuals to laser radiation;

(B) power output of laser involved;

(C) the cause of the injury; and

(D) corrective steps taken or planned to be taken to prevent a recurrence.

(3) Any report filed with the agency in accordance with this subsection shall include the full name of each individual injured and a description of the injury. The report shall be prepared so that this information is stated in a separate part of the report.

(4) When a registrant is required in accordance with paragraphs (1)-(3) of this subsection to report to the agency any injury of an individual to laser radiation, the registrant shall also notify the individual. Such notice shall be transmitted to the individual at a time not later than the transmittal to the agency.

(bb) Medical event.

(1) The registrant shall notify the agency, by telephone or electronic transmittal, within 24 hours of any injury to or death of a patient. Within 30 days after a 24 hour notification is made, the registrant shall submit a written report to the agency of the event.

(2) The written report shall include the following:

(A) the registrant's name;

(B) a brief description of the event;

(C) the effect on the patient;

(D) the action taken to prevent recurrence; and

(E) whether the registrant informed the patient or the patient's responsible relative or guardian.

(3) When a medical event occurs, the registrant shall promptly investigate its cause, make a record for agency review, and retain the records as stated in subsection (ee) of this section.

(cc) Appendices.

(1) Class I accessible emission limits for laser radiation. The following table contains class I accessible emission limits for laser radiation.

Figure: 25 TAC §289.301(cc)(1)

(2) Class II accessible emission limits for laser radiation. The following table contains class II accessible emission limits that are identical to class I accessible emission limits except:
Figure: 25 TAC §289.301(cc)(2)

(3) Class IIIa accessible emission limits for laser radiation. The following table contains class IIIa accessible emission limits that are identical to class I accessible emission limits except:
Figure: 25 TAC §289.301(cc)(3)

(4) Class IIIb accessible emission limits for laser radiation. The following table contains class IIIb accessible emission limits for laser radiation.
Figure: 25 TAC §289.301(cc)(4)

(5) MPE for direct ocular exposure (intrabeam viewing) to a laser beam. The following table contains the MPEs for direct ocular exposure.
Figure: 25 TAC §289.301(cc)(5)

(6) MPE for viewing a diffuse reflection of a laser beam or an extended-source laser. The following table contains the MPEs for viewing a diffuse reflection of a laser beam or an extended source laser.
Figure: 25 TAC §289.301(cc)(6)

(7) MPE for skin exposure to a laser beam. The following table contains the MPEs for skin exposure to a laser beam.
Figure: 25 TAC §289.301(cc)(7)

(8) Accessible emission limits for collateral radiation from lasers or facilities and MPE. The following table contains accessible emission limits for collateral radiation from lasers or facilities and MPE.

(A) Accessible emission limits for collateral radiation having wavelengths greater than or equal to 180 nm but less than or equal to 1 mm are identical to the accessible emission limits of class I laser radiation as determined from subsection (cc)(1) of this section for the appropriate wavelength(s) and emission duration.

(i) In the wavelength range of ≤ 400 nm, for all emission durations.

(ii) In the wavelength range > 400 nm, for all emission durations less than or equal to 1×10^3 seconds and, when applicable for all emission durations.

(B) Accessible emission limit for collateral radiation within the x-ray range of wavelengths is 0.5 milliroentgen in an hour, averaged over an area of 10 square centimeters with no dimension greater than 5 centimeters.

(9) Values of wavelength dependent correction factors.
Figure: 25 TAC §289.301(cc)(9)

(10) Selected numerical solutions.
Figure: 25 TAC §289.301(cc)(10)

(11) Maximum aperture diameters (limiting aperture) for measurement averaging. The following table contains maximum aperture diameters (limiting aperture) for measurement averaging.
Figure: 25 TAC §289.301(cc)(11)

(A) This material is from American National Standard for the Safe Use of Lasers, ANSI Z136.1.

(B) For the specific case of optical viewing (beam collecting) instruments, the apertures listed for eye MPE and skin MPE apply to the exit beam of such devices.

(dd) Signs and graphs.

(1) Caution sign. The following sign contains an appropriate sign in accordance with subsection (v)(2)(A) of this section.
Figure: 25 TAC §289.301(dd)(1)

(2) Danger sign. The following sign contains an appropriate sign in accordance with subsection (v)(2)(A) of this section.
Figure: 25 TAC §289.301(dd)(2)

(3) Graph A. The following graph contains graphic representation in accordance with subsection (cc)(5) of this section.
Figure: 25 TAC §289.301(dd)(3)

(4) Graph B. The following graph contains graphic representation in accordance with subsection (cc)(5)-(7) of this section.
Figure: 25 TAC §289.301(dd)(4)

(5) Graph C. The following graph contains graphic representation in accordance with subsection (cc)(5)-(7) of this section.
Figure: 25 TAC §289.301(dd)(5)

(6) Graph D. The following graph contains graphic representation in accordance with subsection (cc)(6) of this section.
Figure: 25 TAC §289.301(dd)(6)

(7) Graph E. The following graph contains graphic representation in accordance with subsection (cc)(5)-(7) of this section.
Figure: 25 TAC §289.301(dd)(7)

(8) Graph F. The following graph contains graphic representation in accordance with subsection (cc)(5) and (6).
Figure: 25 TAC §289.301(dd)(8)

(9) Graph G. The following graph contains graphic representation in accordance with subsection (cc)(5) and (6) of this section.
Figure: 25 TAC §289.301(dd)(9)

(10) Graph H. The following graph contains graphic representation in accordance with subsection (cc)(5) and (6) of this section.
Figure: 25 TAC §289.301(dd)(10)

(ee) Record keeping. The following are time requirements for record keeping:
Figure: 25 TAC §289.301(ee)

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 January 25, 1999.

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Texas Department of Health
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For further information, please call: (512) 458–7236

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TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 3. Life, Accident and Health Insurance Annuities

Subchapter HH. Standards for Reasonable Cost Control and Utilization Review for Chemical Dependency Treatment Centers

28 TAC §§3.8001, 3.8002, 3.8004, 3.8005, 3.8007, 3.8019, 3.8022-3.8030

The Commissioner of Insurance adopts amendments and new sections to Chapter 3, Subchapter HH, concerning utilization review for chemical dependency treatment centers, by amending §§3.8001-3.8002, 3.8004-3.8005, 3.8007, 3.8019 and 3.8022, and adding new §§3.8023-3.8030. Sections 3.8001, 3.8005 and 3.8007 are adopted with changes to the proposed text as published in the December 4, 1998 issue of the *Texas Register* (23 TexReg 12172). Sections 3.8002, 3.8004, 3.8019, and 3.8022-3.8030 are adopted without changes and will not be republished. In conjunction with these adopted amendments and new sections, the commissioner has adopted the repeal of existing §3.8006. Notice of the repeal is published elsewhere in this issue of the *Texas Register*.

The amendments and new sections are necessary to make utilization review standards for chemical dependency treatment consistent with broader standards promulgated pursuant to Insurance Code Article 21.58A, relating to health care utilization review agents, which was amended by Acts 1997, 75th Legislature, Chapter 163, §§2, 3, & 4 and Chapter 1025, §§1, 2, 3, 4, 5, 6, 7, 8, 9, & 10. These amendments and new sections are also necessary to update oversight of the utilization review process, expand the pool of professionals capable of making mental health decisions, define emergency procedures in accord with new statutory standards, and update the range of treatment modes by adopting standards for outpatient chemical dependency treatment. These amendments will bring Texas into accord with national standards for clinical and social prevention, intervention and treatment and will promote the delivery of quality health care in a cost-effective manner by requiring utilization review agents to adhere to such standards when conducting reviews. The amendments will further facilitate consistent and appropriate utilization management decisions by insurers and health maintenance organizations (HMOs) regarding the type and duration of individual services, assure that utilization review agents adhere to reasonable standards for conducting utilization reviews, and foster greater coordination and cooperation between health care providers and utilization review agents. Finally, the amendments will improve communications and knowledge of benefits among all parties concerned before expenses are incurred. These new sections will outline the benefit package and utilization review criteria for use by insurance companies, HMOs, and limited service HMOs in Texas. These sections provide comprehensive length-of-stay, placement, and discharge guidelines.

In response to public comment on the proposed amendments, the department deleted language from §3.8007 that prohibited payors from requiring an otherwise qualified individual to have failed an episode of outpatient detoxification therapy as a qualification for admission to inpatient detoxification therapy. The department added language to §3.8005(c) to broaden that prohibition so that payors cannot require an otherwise qualified individual to have failed an episode of any outpatient therapy as a qualification for admission to any inpatient therapy. All other changes are made to correct punctuation, grammatical, or typographical errors.

New definitions for intensive outpatient services and qualified credentialed counselor are added to §3.8001. The adoption also amends the existing definitions of chemical dependency treatment center and partial hospitalization. The amendment to §3.8002 makes a minor revision for clarification. The amendment to §3.8004 enables qualified credentialed counselors to authorize admission to certain treatment regimens. The amendment to §3.8005 substitutes qualified credentialed counselor for physician, incorporates the provisions of 28 TAC Chapter 19, Subchapter R (relating to Utilization Review Agents) into this subchapter, and prohibits payors from requiring an otherwise qualified individual to have failed an episode of outpatient therapy as a qualification for admission to inpatient therapy. The amendment to §3.8007 adds an additional qualifying condition for inpatient detoxification services. The amendment to §3.8019 redefines intensive outpatient rehabilitation/treatment service. The amendment to §3.8022 alters the recommended length of stay for intensive outpatient rehabilitation treatment service. New §§3.8023-3.8030 add provisions outlining admission criteria, continued stay criteria, discharge criteria, and recommended length of stay for outpatient treatment service and outpatient detoxification treatment service.

General. A commenter urged that inpatient residential treatment should remain an option for those who qualify.

Agency Response: The department agrees that inpatient residential treatment is an important chemical dependency treatment option. These amendments do not alter the inpatient residential treatment standards in force; they merely add standards for outpatient residential treatment to complement the therapies currently available.

Comment: A commenter expressed concern about misuse and abuse of the rule's standards, particularly in light of the uncertain future of Independent Review Organizations (IROs). The commenter suggested that the Texas Commission on Alcohol and Drug Abuse, in light of the rule's direction to report such misuse or abuse to that agency, take a more active role in mediating claims of abuse of the clinical criteria concerning medical necessity of treatment.

Agency Response: While there are legal actions pending which make the continued stability of IROs uncertain, the department believes it would be appropriate to defer any suggested changes to the rule pending further judicial or legislative direction.

Comment: A commenter reported that payors are viewing the criteria established by the rules as mere "guidelines" and generating and applying additional, more restrictive criteria in addition to those listed in the rule. The commenter suggested that the department change the rule to prohibit this practice.

Agency Response: The department appreciates the commenter's concern. The commenter is correct that the criteria in this rule are to be enforced as written. Nothing in this rule authorizes a payor or any other entity to impose criteria more restrictive than those set out in this subchapter. The department believes that, rather than adding emphasis to the language of the rule, it is more appropriate and will be more effective to address this problem through additional compliance monitoring and enforcement efforts.

General, §3.8004, §3.8005. A commenter stated that these rules will increase access to needed health services for qualified chemically dependent patients. Another commenter supported

the rule's acknowledgement of detoxification standards and qualified credentialed counselors.

Agency Response: The department appreciates and agrees with these comments. §§3.8007, 3.8011, and 3.8019. Commenters supported the proposed revision of the sections. One commenter suggested that the department add the prohibition on requiring failure of outpatient detoxification for admission to inpatient treatment to §3.8011, relating to admission criteria for inpatient rehabilitation services.

Agency Response: The department agrees and, for consistency and clarity, has adopted this standard for inpatient residential as well as all other levels of inpatient treatment by deleting the following in §3.8007: "An individual who otherwise meets the clinical criteria for inpatient detoxification must not be required to fail outpatient detoxification to qualify for inpatient services" and adding similar language in a new subsection (c) to §3.8005.

3.3015. A commenter reported that many payors are refusing to authorize admission to partial hospitalization therapy unless it is performed in the individual's home community.

Agency Response: The department appreciates the commenter's concern but believes the existing admission criteria for partial hospitalization therapy prohibit payors from imposing a uniform requirement that the individual reside at home during the treatment episode. The department believes it is thus more appropriate to address this problem through enforcement mechanisms rather than a rule change. §§3.8023 and 3.8027. A commenter supported the addition of standards for outpatient treatment services and outpatient detoxification services as needed and beneficial. The commenter recommends the establishment of standards for "non-intensive" inpatient treatment.

Agency Response: The department agrees that the addition of outpatient standards will be beneficial to all concerned. While the department recognizes the need for the type of "non-intensive" inpatient treatment the commenter describes, it does not agree with the suggestion that the department adopt standards for this treatment. This type of treatment is a social model rather than a medical model and medical payors have not traditionally covered it.

For: The Association of Substance Abuse Programs, Office of Public Insurance Counsel.

For with changes: La Hacienda, Drug and Alcohol Abuse Recovery Center, The Freeman Center.

The sections are adopted under Insurance Code Articles 21.58A, 3.51-9, and 1.03A. Insurance Code Article 21.58A, §13 provides that the commissioner of insurance may adopt rules to regulate the conduct and activities of health care utilization review agents. Insurance Code Article 3.51-9, §2A authorizes and requires the Texas Department of Insurance to adopt rules with standards for the reasonable control of costs necessary for treatment of chemical dependency. Insurance Code Article 1.03A provides that the commissioner of insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance as authorized by statute.

§3.8001. Definitions.

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

(1) Abusable glue or aerosol paint–Glue or aerosol paint that is:

(A) packaged in a container holding a pint or less by volume or less than two pounds by weight; and

(B) labeled in accordance with the labeling requirements concerning precautions against inhalation established under the Federal Hazardous Substances Act (15 United States Code §1261, et seq.), and under regulations adopted under that Act.

(2) Adolescent–A person who is 17 years of age or younger.

(3) Advanced clinical practitioner–An individual certified as an advanced clinical practitioner by the Texas Department of Human Services.

(4) Aerosol paint–An aerosol paint product, including a clear or pigmented lacquer or finish.

(5) Certified social worker–An individual who is certified as a certified social worker by the Texas Department of Human Services.

(6) Chemical dependency–The abuse of, or the psychological or physical dependence on, or the addiction to, alcohol or a controlled substance.

(7) Chemical dependency counselor–A person who is licensed by the Texas Commission on Alcohol and Drug Abuse.

(8) Chemical dependency treatment center–A facility which provides a program for the treatment of chemical dependency pursuant to a written treatment plan approved and monitored by a physician or qualified credentialed counselor and which facility also meets one of the qualifications in subparagraphs (A)-(D) of this paragraph:

(A) affiliated with a hospital under a contractual agreement with an established system for patient referral;

(B) accredited as such a facility by the Joint Commission on Accreditation of Hospitals;

(C) licensed as a chemical dependency treatment program by the Texas Commission on Alcohol and Drug Abuse; or

(D) licensed, certified, or approved as a chemical dependency treatment program or center by any other state agency having legal authority to so license, certify, or approve.

(9) Controlled substance–A toxic inhalant, or a substance designated as a controlled substance in the Texas Controlled Substances Act (the Health and Safety Code, §481.002(5)).

(10) Facility–An individual program, entity, organization, or other provider of chemical dependency treatment services.

(11) Glue–An adhesive substance intended to be used to join two surfaces.

(12) Intensive outpatient services–An organized nonresidential service providing structured group and individual therapy, educational services, and life skills training which consists of at least 10 hours per week for four to 12 weeks, but less than 24 hours per day.

(13) Licensed professional counselor–An individual licensed as a professional counselor by the Texas State Board of Examiners of Professional Counselors.

(14) Licensed vocational nurse–A nurse licensed by the Texas State Board of Vocational Nurse Examiners.

(15) Partial hospitalization–The provision of treatment for chemical dependency for persons who require care or support or both in a hospital or chemical dependency treatment center but who do not require 24-hour supervision at least 20 hours per week up to 8 weeks.

(16) Payor–An insurer writing health insurance policies; any preferred provider organization, health maintenance organization, self-insurance plan; or any other person or entity which provides, offers to provide, or administers hospital, outpatient, medical, or other health benefits to persons treated by a health care provider in this state pursuant to any policy, plan or contract.

(17) Physician – A licensed doctor of medicine or a doctor of osteopathy.

(18) Program–A particular type or level of service that is organizationally distinct within a facility.

(19) Psychiatrist–An individual who is licensed in the State of Texas to practice psychiatry, who is eligible for, or has received, board certification, and who has hospital affiliation and experience in appropriate use of psychotropic drugs.

(20) Psychologist–An individual licensed as a psychologist by the Texas State Board of Examiners of Psychologists.

(21) Qualified credentialed counselor–An individual who:

(A) meets the definition established by the Texas Commission on Alcohol and Drug Abuse; or

(B) is employed outside the State of Texas and licensed, certified, or registered in a profession corresponding to those described in the definition of Qualified Credentialed Counselor established by the Texas Commission on Alcohol and Drug Abuse.

(22) Toxic inhalant–A volatile chemical under this section or under the Health and Safety Code, §484.002, or abusable glue or aerosol paint under this section or under the Health and Safety Code, §485.001.

(23) Treatment provider–Any "chemical dependency treatment center" as defined in this section or in the Insurance Code Article 3.51-9, §2A, and also any certified or licensed practitioner or facility licensed to provide treatment for chemical dependency.

(24) Utilization review–A system for prospective or concurrent review of the appropriateness of health care services being provided or proposed to be provided in this state.

(25) Volatile chemical–A chemical or an isomer of a chemical listed in subparagraphs (A)-(X) of this definition, as follows:

(A) acetone;

(B) aliphatic hydrocarbons;

(C) amyl nitrite;

(D) butyl nitrite;

(E) carbon tetrachloride;

(F) chlorinated hydrocarbons;

(G) chlorofluorocarbons;

(H) chloroform;

(I) cyclohexanone;

(J) diethyl ether;

(K) ethyl acetate;

(L) glycol ether inter solvent;

(M) glycol ether solvent;

(N) hexane;

(O) ketone solvent;

(P) methanol;

(Q) methyl cellosolve acetate;

(R) methyl ethyl ketone;

(S) methyl isobutyl ketone;

(T) petroleum distillate;

(U) toluene;

(V) trichloroethane;

(W) trichloroethylene; and

(X) xylol or xylene.

§3.8005. Utilization Review.

(a) Treatment providers and payors shall provide for utilization review in accordance with the provisions of this subchapter and of Chapter 19, Subchapter R of this title (relating to Utilization Review Agents). Both payor and treatment provider shall make available a qualified credentialed counselor to discuss the appropriateness of treatment, including levels of care, should this become necessary.

(b) Since utilization review as proposed in these standards must be accomplished in a timely manner, information provided telephonically must be supported by documentation in the patient record and available on request for review.

(c) A payor shall not require an individual to have failed an episode of outpatient therapy as a qualification for admission to inpatient therapy if the individual otherwise meets the criteria for admission to inpatient therapy.

§3.8007. Admission Criteria for Inpatient (Hospital or 24-hour Residential) Detoxification Services.

An individual is considered eligible for inpatient (hospital or 24-hour residential) admission for detoxification services when the individual either meets the conditions of paragraphs (1) and (2) of this section or fails two previous treatment episodes of outpatient detoxifications.

(1) Diagnosis. The diagnosis must meet the criteria for the definition of chemical dependence, as detailed in either the most current revision of the international classification of diseases, or the most current revision of the diagnostic and statistical manual for professional practitioners.

(2) Other factors for admission to inpatient (hospital or 24-hour residential) treatment for detoxification. Once the diagnostic criteria for chemical dependency have been met, the conditions of at least one subparagraph out of subparagraphs (A)-(C) of this paragraph must also be met. Determination of whether treatment should be provided for an individual patient in a hospital or in an other-treatment-center-based program shall depend on the category or categories of dysfunction explained in subparagraphs (A)-(C) of this paragraph.

(A) Category 1: chemical substance withdrawal. The individual must meet the conditions in one of the clauses (i)-(vi) of this subparagraph, as follows:

(i) impaired neurological functions as evidenced by:

(I) extreme depression (e.g., suicidal); and/or

(II) altered mental state with or without delirium as manifested by:

(-a-) disorientation to self;
(-b-) alcoholic hallucinosis;
(-c-) toxic psychosis;
(-d-) altered level of consciousness, as manifested by clinically significant obtundation, stupor, or coma; and/or

(III) history of recent seizures or past history of seizures on withdrawal; and/or

(IV) presence of any presumed new asymmetric and/or focal findings (i.e., limb weakness, clonus, spasticity, unequal pupils, facial asymmetry, eye ocular movement paresis, papilledema, or localized cerebellar dysfunction, as reflected in asymmetrical limb incoordination);

(ii) unstable vital signs combined with a history of past acute withdrawal syndromes, that are interpreted by a physician to be indication of acute alcohol/drug withdrawal;

(iii) evidence of coexisting serious injury or systemic illness, newly discovered or progressive;

(iv) clinical condition (e.g., agitation, intoxication, or confusion) which prevents satisfactory assessment of items cited in clauses (i)-(iii) of this subparagraph, indicating placement in an inpatient service may be justified;

(v) neuropsychiatric changes of a severity and nature that place the patient at imminent risk of harming self or others (e.g., pathological intoxication or alcohol idiosyncratic intoxication, etc.);

(vi) serious disulfiram-alcohol (Antabuse) reaction with hypothermia, chest pains arrhythmia, or hypotension.

(B) Category 2: medical complications. The individual must present a documented condition or disorder which, in combination with alcohol and/or drug use, presents a physician-determined health risk (e.g., GI bleeding; gastritis; anemia, severe; diabetes mellitus, uncontrolled; hepatitis; malnutrition; cardiac disease, hypertension, etc.).

(C) Category 3: major psychiatric illness. The individual must meet the conditions of at least one clause out of clauses (i)-(v) of this subparagraph, as follows:

(i) a documented DSM III-R AXIS I condition or disorder which, in combination with alcohol and/or drug use, compounds a pre-existing or concurrent emotional or behavioral disorder and presents a major risk to the individual;

(ii) severe neurological and psychological symptoms: (e.g., anguish; mood fluctuations; overreactions to stress, lowered stress tolerance; impaired ability to concentrate; limited attention span; high level of distractibility; extreme negative emotions; extreme anxiety);

(iii) danger to others and/or homicidal;

(iv) uncontrolled behavior endangering self or others, or documented neuropsychiatric changes of a severity and nature that place the individual at imminent risk of harming self or others;

(v) mental confusion and/or fluctuating orientation.

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 January 25, 1999.

TRD-9900532
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: February 14, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 463-6327

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28 TAC §3.8006

The Commissioner of Insurance adopts the repeal of §3.8006, concerning utilization review disputes. The repeal is adopted without changes to the proposal as published in the December 4, 1998 issue of the *Texas Register* (23 TexReg 12178).

Repeal of this section is necessary because the department has adopted mandatory standards for the resolution of utilization review disputes.

The purpose and objective of this repeal is to delete an admonition to resolve chemical dependency treatment disputes expeditiously, as the department is adopting contemporaneously a mandatory framework for such dispute resolution. Simultaneous to this repeal, adopted amendments to §3.8005 are published elsewhere in this issue of the Texas Register which incorporate the provisions of 28 TAC Chapter 19, Subchapter R (relating to Utilization Review Agents) into this subchapter.

No comments were received.

Repeal of §3.8006 is adopted pursuant to the Insurance Code Articles 21.58A, 3.51-9, and 1.03A. Insurance Code Article 21.58A, §13 provides that the Commissioner of Insurance may adopt rules and regulations to implement the provisions of that article. Insurance Code Article 3.51-9, §2A authorizes and requires the Texas Department of Insurance to adopt rules with standards for the reasonable control of costs necessary for the treatment of chemical dependency. Insurance Code Article 1.03A provides that the Commissioner of Insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance as authorized by statute.

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 January 25, 1999.

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Lynda H. Nesenholtz
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Chapter 7. Corporate and Financial Regulation

Subchapter A. Examination and Financial Analysis

28 TAC §7.68

The commissioner of insurance adopts new §7.68 concerning annual and quarterly statement blanks, other reporting forms, diskettes or electronic filings with the NAIC via the internet and instructions to be used by insurers and certain other entities regulated by the Texas Department of Insurance when reporting in 1999 their financial condition and business operations and activities, during the 1998 and 1999 calendar years, and the requirement to file such completed statement blanks and other reporting forms, including diskettes or electronic filings with the NAIC via the internet, with changes to the proposed text published in the December 18, 1998, issue of the *Texas Register* (23 TexReg 12857). A public hearing was held on January 13, 1999. The new section replaces repealed §7.68, concerning the adoption of the 1989 annual statement filings which was repealed in the October 15, 1996, issue of the *Texas Register* (21 TexReg 10212).

The annual and quarterly statement blanks, other reporting forms, and diskettes adopted by reference by the section are required by statute for reporting, in 1999, the financial condition and business operations and activities conducted by insurers and other entities regulated by the department during the 1998 and 1999 calendar years. The information provided is necessary for the department to monitor the solvency, business activities and statutory compliance of the insurers and other entities regulated by the department. Most of the forms adopted by reference by the section have been promulgated by the National Association of Insurance Commissioners and are used by other state insurance regulators. The use of these forms promotes uniformity and efficiency in the regulation of insurance companies and other entities regulated by the department. In addition to these standard forms, there are other forms adopted by reference by the section that are used only by the department. These forms are reviewed each year to assure that the information required to complete the form is necessary for the department to perform its duties. Subsection (d)(4)(C) was changed in response to a comment by adding clarifying language concerning the reporting requirements of plans that only provide administrative services.

The new section defines terms relevant to the statement blanks and reporting forms; provides the dates by which certain reports are to be filed; and adopts by reference the annual and quarterly statement blanks, other reporting forms, and instructions for reporting the financial condition and business operations and activities; and requires insurance companies and certain other regulated entities to file such annual and quarterly statements and other reporting forms with the department and/or the National Association of Insurance Commissioners as directed. The required documents will provide financial information to the public and regulatory agencies, and will be used by the department to monitor the financial condition of insurers and other regulated entities licensed in Texas to assure financial solvency and compliance with applicable laws and accounting requirements. The new section adopts several changes from the section adopting the forms for reporting in 1998. All companies subject to the section are directed to describe the status of their program to address issues arising with the year 2000 and their computer systems in the Management Discussion and Analysis. Information concerning Medicare supplement insurance experience and insurance options and futures have been moved from the annual statement form to supplemental filings in the adopted section. The HMO reporting forms have been reorganized and HMOs will be required to provide information to assist the department in monitoring the statutory deposits of an HMO on a quarterly basis. Certain life insurance companies will be required to report administrative services revenue (ASO business) as fees instead of premiums. Fraternal insurance companies will be required to file schedule DS if they include equity in undistributed income of unconsolidated subsidiaries in net gain from operations. The section clarifies the requirement for a title company to provide an actuarial opinion with its annual statement. The actuarial opinion is required by Insurance Code, Article 1.11 but has not previously been specified in previous rules adopting these forms. The phase out of the allowance of reserve discounts for property and casualty companies was completed last year and is not included in the section for this year. Form ALT/P/WC, Application for Alternative Excess Statutory Over Statement Reserves for workers' compensation insurance is omitted from this year's forms and property and casualty insurers will apply to the Chief Property and Casualty Actuary in the Financial Program for an exemption or alternative calculation for these reserves. The adopted section also requires the Texas Health Insurance Risk Pool to report its cash and special deposits in a Schedule E in addition to the other reports that were required last year. Finally, the section provides instructions to all companies that complete certain sections of Schedule D, Investments to file a paper copy of Schedule D with the department. The annual and quarterly statement blanks, other reporting forms, and manuals which are adopted by this section have been filed with the Office of the Secretary of State, Texas Register Division. Copies are available for inspection in the office of the Financial Monitoring Activity of the Texas Department of Insurance, William P. Hobby, Jr. State Office Building, 333 Guadalupe, Building 3, Third Floor, Austin, Texas.

One commenter requested clarification of the reporting for administrative services only plans. In response to the comment, clarifying language was added to subsection (d)(4)(C) of the adopted section.

Huges & Luce, L.L.P. commented against subsection (d)(4)(C) of the section as proposed.

The new section is adopted under the Insurance Code, Articles 1.03A, 1.10, 1.11, 3.07, 3.20-1, 3.27-2, 3.77, 6.11, 6.12, 8.07, 8.08, 8.21, 8.24, 9.22, 9.47, 10.30, 11.06, 11.19, 14.15, 14.39, 15.15, 15.16, 16.18, 16.24, 17.22, 17.25, 18.12, 19.08, 20.02, 20A.10, 20A.22, 21.39, 21.43, 21.49, 21.52F, 21.54, 22.06, 23.02, and 23.26. Article 1.11 authorizes the commissioner to make changes in the forms of the annual statements required of insurance companies of any kind, as shall seem best adapted to elicit a true exhibit of their condition and methods of transacting business, and requires certain insurers to make filings with the National Association of Insurance Commissioners. Article 1.10(9), requires the department to furnish the statement blanks and other reporting forms necessary for companies to comply with the filing requirements. Articles 3.07, 3.20-1, 3.27-2, 3.77, 6.11, 6.12, 8.07, 8.08, 8.21, 8.24, 9.22, 9.47, 10.30, 11.06, 11.19, 14.15, 14.39, 15.15, 15.16, 16.18, 16.24, 17.22, 17.25, 18.12, 19.08, 20.02, 20A.10, 20A.22, 21.49, 21.54, 22.06, 23.02, and 23.26, require the filing

of financial reports and other information by insurers and other regulated entities, and specify particular rule-making authority of the commissioner relating to those insurers and other regulated entities. Article 21.39 requires insurers to establish adequate reserves and provides for the adoption of each current formula for establishing reserves applicable to each line of insurance. Article 21.43 provides the conditions under which foreign insurers are permitted to do business in this state and requires foreign insurers to comply with the provisions of the Insurance Code. Article 21.52F authorizes the commissioner to adopt rules to implement the regulation of nonprofit health corporations holding a certificate of authority under the article. Article 1.03A provides that the commissioner may adopt rules for the conduct and execution of the duties and functions of the department as authorized by statute for general and uniform application.

§7.68. Requirements for Filing the 1998 Annual and 1999 Quarterly Statements, Other Reporting Forms, and Diskettes or electronic filings with the NAIC via the Internet.

(a) Scope. This section provides insurers and other regulated entities with the requirements for the 1998 annual statement, 1999 quarterly statements, other reporting forms, and diskettes or electronic filings with the NAIC via the internet necessary to report information concerning the financial condition and business operations and activities of insurers. This section applies to all insurers and other regulated entities authorized to do the business of insurance in this state and includes, but is not limited to, life insurers; accident insurers; life and accident insurers; life and health insurers; accident and health insurers; life, accident and health insurers; mutual life insurers; stipulated premium insurers; group hospital service corporations; fire insurers; fire and marine insurers; general casualty insurers; fire and casualty insurers; mutual insurers other than life; county mutual insurers; Lloyd's plans; reciprocal and inter-insurance exchanges; domestic risk retention groups; domestic joint underwriting associations; title insurers; fraternal benefit societies; local mutual aid associations; statewide mutual assessment companies; mutual burial associations; exempt associations; farm mutual insurers; health maintenance organizations; nonprofit health corporations; nonprofit legal services corporations; the Texas Health Insurance Risk Pool; the Texas Workers' Compensation Insurance Fund, and the Texas Windstorm Insurance Association. The commissioner adopts by reference the 1998 annual and 1999 quarterly statement blanks, instruction manuals, and other reporting forms specified in this section. The annual and quarterly statement blanks and other reporting forms are available from the department, Financial Monitoring Activity, Mail Code 303-1A, P. O. Box 149099, Austin, Texas 78714-9099. Insurers and other regulated entities shall properly report to the Texas Department of Insurance and the NAIC by completing the appropriate annual and quarterly statement blanks, prepared with laser quality print (hand written copies must be prepared legibly using black ink), other reporting forms, and diskettes or electronic filings with NAIC via the internet following the applicable instructions as outlined in subsections (d) - (m) of this section.

(b) Conflicts with Other Laws. In the event of a conflict between the Insurance Code, any currently existing departmental rule, form, instructions, or any specific requirement of this section and the NAIC manuals or instruction listed in the subsections listed below, then and in that event, the Insurance Code, the department's promulgated rule, form, instruction, or the specific requirement of subsections (d) - (m) of this section shall take precedence and in all respects control.

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

(1) Association edition - Blanks and forms promulgated by the National Association of Insurance Commissioners.

(2) Commissioner - The commissioner of insurance appointed under the Texas Insurance Code, Article 1.09.

(3) Department - The Texas Department of Insurance.

(4) Insurer - A person or business entity legally organized in and authorized by its domiciliary jurisdiction to do the business of insurance.

(5) NAIC - The National Association of Insurance Commissioners.

(6) Texas edition - Blanks and forms promulgated by the commissioner of insurance.

(d) Filing requirements for life, accident and health insurers. Each life, life and accident, life and health, accident and health, mutual life, or life, accident and health insurance company, stipulated premium insurance company, group hospital services corporation and the Texas Health Insurance Risk Pool (Article 3.77) shall complete and file the following blanks, forms, diskettes or electronic filings with the NAIC via the internet for the 1998 calendar year and the first three quarters of the 1999 calendar year. The forms and reports identified in paragraphs (1)(A)-(E); (2)(A),(B), (H); and (3)(A)-(K) of this subsection shall be completed in accordance with the 1998 NAIC Annual Statement Instructions, Life, Accident and Health, except as provided by subsection (b) of this section. The diskettes or electronic filings with the NAIC via the internet identified in paragraph (3)(L) and (M) of this subsection shall be completed in accordance with the 1998 NAIC Annual Statement Diskette Filing Specifications-Life, Accident & Health, except as provided by paragraph (4) of this subsection.

(1) Reports to be filed both with the department and the NAIC include the following:

(A) Annual Statement (association edition, with a blue colored cover made of minimum 65lb. paper), the 9 inch by 14 inch size, to be filed on or before March 1, 1999 (stipulated premium insurance companies, April 1, 1999);

(B) Annual Statement of the Separate Accounts (association edition, with a green colored cover made of minimum 65lb. paper) (required of companies maintaining separate accounts), the 9 inch by 14 inch size, to be filed on or before March 1, 1999 (stipulated premium insurance companies, April 1, 1999);

(C) Management's Discussion and Analysis (MD&A) (a narrative document setting forth information which enables regulators to enhance their understanding of the insurer's financial position, results of operations, changes in capital and surplus accounts and cash flow), to be filed on or before April 1, 1999 (stipulated premium insurance companies, May 1, 1999). The department has taken initiatives to promote awareness of the potential for serious and widespread problems, company readiness, and consequences of not planning or addressing the Year 2000 Issue. The department considers the Year 2000 Computer Issue material and relevant to the continuing operations of insurance companies and related entities to ensure uninterrupted policyholder service. As a material and relevant matter that would have an impact on the future operations of the company, the Year 2000 Issue should be discussed in the MD & A. At a minimum, the company should include a general description of

the Year 2000 Issue as it relates to their organization, the company's state of readiness and the company's contingency plans, i.e. plans to handle the most reasonably likely worst case scenarios;

(D) Life and Accident and Health Quarterly Statement (association edition) the 9 inch by 14 inch size, to be filed on or before May 15, August 15, and November 15, 1999. However, a Texas stipulated premium insurance company, unless specifically requested to do so by the department, is not required to file quarterly statements with the department or the NAIC if it meets all three of the following conditions:

(i) it is authorized to write only life insurance on its certificate of authority;

(ii) it collected premiums in the prior calendar year of less than $1 million; and

(iii) it had a profit from operations in the prior two calendar years.

(E) Actuarial Opinion (the statement of a qualified actuary, setting forth his or her opinion relating to policy reserves and other actuarial items; required of all companies), to be attached to the annual statement required by paragraph (1)(A) of this subsection.

(2) Reports to be filed only with the department:

(A) Schedule SIS, Stockholder Information Supplement (association edition) (required of domestic stock companies which have 100 or more stockholders), the 9 inch by 14 inch size, to be filed on or before March 1, 1999;

(B) Supplemental Compensation Exhibit (association edition) 9 inch by 14 inch size, (required of Texas domestic companies only), to be filed on or before March 1, 1999 (stipulated premium companies, April 1, 1999);

(C) Annual Statement (Texas edition, with a green colored cover made of minimum 65lb. paper) (required of companies writing prepaid legal business in 1998), 8 1/2 inch by 14 inch size, to be filed on or before March 1, 1999;

(D) Affidavit in Lieu of Annual Statement (Texas edition) (required of companies authorized to write prepaid legal business that did not write such business in 1998), to be filed on or before March 1, 1999;

(E) Texas Overhead Assessment Form (Texas edition) (required of Texas domestic companies only), to be filed on or before March 1, 1999 (stipulated premium insurance companies, April 1, 1999);

(F) Analysis of Surplus (Texas edition) for life, accident and health insurers, to be filed on or before March 1, 1999 (stipulated premium insurance companies, April 1, 1999); and

(G) Supplemental Investment Income Exhibit (Texas edition) (shows percent of net investment income by type of investment, as an attachment to page ten of the annual statement as required by paragraph (1)(A) of this subsection, to be filed on or before March 1, 1999 (stipulated premium companies, April 1, 1999).

(H) The Texas Health Insurance Risk Pool shall complete and file the following:

(i) NAIC Annual Statement Life, Accident and Health Annual Statement (association edition, with a blue colored cover made of minimum 65lb. paper), the 9 inch by 14 inch size, to be filed on or before March 1, 1999. However, only pages 1 - 5, 12, and the Notes to Financial Statements (page 31) and Schedule E (page 72) are required to be completed and filed on or before March 1, 1999; and

(ii) Life and Accident and Health Quarterly Statement (association edition) the 9 inch by 14 inch size, to be filed on or before May 15, August 15, and November 15, 1999.

(3) Reports, diskettes, or electronic filings via the internet filed only with the NAIC:

(A) Trusteed Surplus Statement (association edition), Life, Accident and Health Supplement (required of the U. S. branch of an alien insurer), 9 inch by 14 inch size to be filed on or before March 1, May 15, August 15, and November 15, 1999;

(B) Medicare Supplement Insurance Experience Exhibit (association edition) (for insurers writing medicare business), to be filed on or before March 1, 1999;

(C) Officers and Directors Information (association edition), to be filed on or before March 1, 1999 (stipulated premium insurance companies, April 1, 1999);

(D) Credit Insurance Experience Exhibit (association edition) (required of companies writing credit business), 9 inch by 14 inch size, to be filed on or before April 1, 1999;

(E) Long-Term Care Insurance Exhibit (association edition) (required of companies writing long-term care business), the 9 inch by 14-inch size, to be filed on or before March 1, 1999 (stipulated premium insurance companies, April 1, 1999);

(F) Long-Term Care Experience Reporting Forms (association edition) (required of companies writing long-term care business), the 9-inch by 14 inch size, to be filed on or before April 1, 1999;

(G) Interest Sensitive Life Insurance Products Report (association edition) (required of companies writing interest sensitive products), the 9 inch by 14 inch size, to be filed on or before April 1, 1999 (stipulated premium insurance companies, April 1, 1999);

(H) Life, Health and Annuity Guaranty Association Model Act Assessment Base Reconciliation Exhibit (association edition), the 9 inch by 14 inch size, to be filed on or before April 1, 1999;

(I) Adjustments to the Life, Health and Annuity Guaranty Association Model Act Assessment Base Reconciliation Exhibit (association edition), the 9 inch by 14 inch size, to be filed on or before April 1, 1999;

(J) Schedule DC (association edition) (for insurers engaged in insurance options and futures), the 9 inch by 14 inch size, to be filed on or before March 1, 1999 (stipulated premium insurance companies, April 1, 1999);

(K) Schedule DS (association edition) (required only of companies that have included "equity in the undistributed income of unconsolidated subsidiaries" in its "net gain from operations"), the 9 inch by 14 inch size, to be filed on or before March 1, 1999 (stipulated premium insurance companies, April 1, 1999);

(L) diskettes containing computerized annual statement data, to be filed on or before March 1, 1999 (stipulated premium insurance companies, April 1, 1999); and

(M) diskettes containing computerized quarterly statement data, to be filed on or before May 15, August 15, and November 15, 1999. A Texas stipulated premium insurance company, unless specifically requested to do so by the department, is not required to

file quarterly diskettes with the NAIC if it meets all three of the following conditions:

(i) it is authorized to write only life insurance on its certificate of authority;

(ii) it collected premiums in the prior calendar year of less than $1 million; and

(iii) it had a profit from operations in the prior two calendar years.

(4) The following provisions shall apply to the filings required in paragraphs (1)-(3) of this subsection.

(A) Texas domestic life, accident and health companies with more than $30 million in direct premiums in 1998 must establish Asset Valuation Reserves (AVR) and Interest Maintenance Reserves (IMR) in their financial statements in accordance with the instructions in the 1998 NAIC Annual Statement Instructions, Life, Accident and Health Companies. Texas domestic companies with $30 million or less in direct premiums and the Texas Health Insurance Risk Pool may establish AVR and IMR in their financial statements in accordance with the instructions in the 1998 NAIC Annual Statement Instructions, Life, Accident and Health Companies or they must value bonds and preferred stocks in compliance with the provisions of the NAIC Purposes and Procedures of the Securities Valuation Office Manual concerning companies not maintaining an AVR or IMR.

(B) Actuarial opinions required by paragraph (1)(E) of this subsection shall be in accordance with the following:

(i) Unless exempted, the statement of actuarial opinion should follow the applicable provisions of §§3.1601-3.1611 of this title (relating to Actuarial Opinion and Memorandum Regulation).

(ii) For those companies exempted from §§3.1601-3.1611 of this title (relating to Actuarial Opinion and Memorandum Regulation), instructions 1-12, established by the NAIC, must be followed.

(iii) Any stipulated premium company subject to §§3.1601-3.1611 of this title (relating to Actuarial Opinion and Memorandum Regulation) which does not insure or assume risk on contracts with death benefits, cash value, or accumulation values on any one life in excess of $10,000, except as permitted by Insurance Code, Article 22.13, §1(b), is exempt from submission of a statement of actuarial opinion is accordance with §3.1608 of this title (relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis), but must submit an actuarial opinion pursuant to §3.1607 of this title (relating to Statement of Actuarial Opinion Not Including an Asset Adequacy Analysis)

(C) Reporting for "administrative services only" (ASO) plans. Some insurers may act only as administrators of accident and health plans where the plan bears all of the risk of claims. Such plans are commonly referred to as "administrative services only" plans and are also referred to as "uninsured plans." The amounts received for ASO plans shall not be recorded in premiums. Claims paid by the insurer under uninsured accident and health plans should not be reported in the Summary of Operations. Commissions, expenses, and taxes incurred by an insurer for uninsured accident and health plans are to be reported on a gross basis by type of expense. The administration fees and expense reimbursements relating to uninsured business are deducted in the general expense exhibit and general insurance expenses are to be reported in the Summary of Operations net of such fees and reimbursement. Texas domestic insurers subject to this subsection that have reported amounts received for ASO plans as premiums under different reporting standards for at least five years prior to the effective date of this section may continue reporting amounts received for ASO plans as premiums. Under such circumstances, the insurer shall provide a general description of the source and amounts received for ASO plans as an attachment to the Summary of Operations and the Schedule T of the annual statement.

(D) Hard copy filing of Schedule D - Parts 1 through 5 and Schedule DA Part 1A. The annual statement instructions provide for hard copy filing of these schedules only with the state of domicile, the NAIC and any other state requesting such filings. The Texas Department of Insurance is requiring filing hard copy of these schedules for the 1998 year from both domestic and foreign insurers.

(e) Requirements for property and casualty insurers. Each fire, fire and marine, general casualty, fire and casualty, county mutual insurance company, mutual insurance company other than life, Lloyd's plan, reciprocal or inter-insurance exchange, domestic risk retention group, life insurance company that is licensed to write workers' compensation, any farm mutual insurance company that filed a property and casualty annual statement under paragraph (1)(A) of this subsection for the 1997 calendar year or had gross written premiums in 1998 in excess of $5,000,000, any Mexican non-life insurer licensed under any article of the Insurance Code other than or in addition to Insurance Code, Article 8.24, domestic joint underwriting association, the Texas Workers' Compensation Insurance Fund created under Article 5.76-3, and the Texas Windstorm Insurance Association shall complete and file the following blanks, forms, and diskettes or electronic filings with the NAIC via the internet for the 1998 calendar year and the first three quarters of the 1999 calendar year. The forms and reports identified in paragraphs (1)(A)-(G); (2)(A),(B), (J); and (3)(A)-(G) of this subsection shall be completed in accordance with the 1998 NAIC Annual Statement Instructions, Property and Casualty, except as provided by subsection (b) of this section. The diskettes or electronic filings with the NAIC via the internet identified in paragraph (3)(H) - (J) of this subsection shall be completed in accordance with the 1998 NAIC Annual Statement Diskette Filing Specifications - Property and Casualty.

(1) Reports to be filed both with the department and the NAIC:

(A) Annual Statement (association edition, with a yellow colored cover made of minimum 65lb. paper), the 9 inch by 14 inch size, to be filed on or before March 1, 1999;

(B) Management's Discussion and Analysis (a narrative document setting forth information which enables regulators to enhance their understanding of the insurer's financial position, results of operations, changes in capital and surplus accounts and cash flow), to be filed on or before April 1, 1999. The department has taken initiatives to promote awareness of the potential for serious and widespread problems, company readiness, and consequences of not planning or addressing the Year 2000 Issue. The department considers the Year 2000 Computer Issue material and relevant to the continuing operations of insurance companies and related entities to ensure uninterrupted policyholder service. As a material and relevant matter that would have an impact on the future operations of the company, the Year 2000 Issue should be discussed in the MD & A. At a minimum, the company should include a general description of the Year 2000 Issue as it relates to their organization, the company's state of readiness and the company's contingency plans, i.e. plans to handle the most reasonably likely worst case scenarios;

(C) Financial Guaranty Insurance Exhibit (association edition) (required of companies writing financial guaranty business), the 9 inch by 14 inch size, to be filed on or before March 1, 1999;

(D) Supplement "A" to Schedule T, Exhibit of Medical Malpractice Premiums Written (association edition) (required of companies writing medical malpractice business), the 9 inch by 14-inch size, to be filed on or before March 1, 1999;

(E) Property and Casualty Quarterly Statement (association edition) the 9 inch by 14 inch size, to be filed on or before May 15, August 15, and November 15, 1999;

(F) Actuarial Opinion (the statement of a qualified actuary, setting forth his or her opinion relating to policy reserves and other actuarial items; required of all companies), to be attached to the annual statement required by subparagraph (A) of this paragraph; and

(G) Combined Property/Casualty Annual Statement (association edition, with a yellow colored cover made of minimum 65lb. paper), the 9 inch by 14-inch size, to be filed on or before May 1, 1999, including the Insurance Expense Exhibit. This form is required only for those affiliated insurers that wrote more than $35 million in direct premiums as a group, in 1998 as defined in Schedule T of the Annual Statement.

(2) Reports to be filed only with the department:

(A) Schedule SIS, Stockholder Information Supplement (association edition) (required of domestic stock companies which have 100 or more stockholders), the 9 inch by 14 inch size, to be filed on or before March 1, 1999;

(B) Supplemental Compensation Exhibit (association edition) 9 inch by 14 inch size, (required of Texas domestic companies only), to be filed on or before March 1, 1999;

(C) Supplemental Investment Income Exhibit (Texas edition) (shows percent of net investment income by type of investment, as an attachment to page six of the annual statement required by paragraph (1)(A) of this subsection, to be filed on or before March 1, 1999;

(D) Annual Statement (Texas edition, with a green colored cover made of minimum 65lb. paper) (required of companies writing prepaid legal business in 1998), 8-1/2 inch by 14-inch size, to be filed on or before March 1, 1999;

(E) Affidavit in Lieu of Annual Statement (Texas edition) (required of companies authorized to write prepaid legal business that did not write such business in 1998), to be filed on or before March 1, 1999;

(F) Texas Overhead Assessment Form (Texas edition) (required of Texas domestic companies only), to be filed on or before March 1, 1999;

(G) Analysis of Surplus (Texas edition) for property and casualty insurers (required of all licensed companies, except Texas domestic county mutual companies), to be filed on or before March 1, 1999;

(H) Supplement for County Mutuals (Texas edition) (required of Texas domestic county mutual companies, as an attachment to page seventeen of the annual statement as required by paragraph (1)(A) of this subsection), to be filed on or before March 1, 1999; and

(I) Texas Supplemental A for County Mutuals (Texas edition) (required of Texas domestic county mutual companies, as an attachment to page nine of the annual statement as required by paragraph (1)(A) of this subsection, to be filed on or before March 1, 1999.

(J) The Texas Windstorm Insurance Association (Insurance Code Article §21.49) shall complete and file the following:

(i) Annual Statement, (association edition, with a yellow colored cover made of minimum 65lb. paper), the 9 inch by 14 inch size, to be filed on or before March 1, 1999, except as provided by subsection (b) of this section;

(ii) Property and Casualty Quarterly Statement (association edition), the 9 inch by 14 inch size, to be filed on or before May 15, August 15, and November 15, 1999; and

(iii) Management's Discussion and Analysis (a narrative document setting forth information which enables regulators to enhance their understanding of the insurer's financial position, results of operations, changes in capital and surplus accounts and cash flow), to be filed on or before April 1, 1999. The department has taken initiatives to promote awareness of the potential for serious and widespread problems, company readiness, and consequences of not planning or addressing the Year 2000 Issue. The department considers the Year 2000 Computer Issue material and relevant to the continuing operations of insurance companies and related entities to ensure uninterrupted policyholder service. As a material and relevant matter that would have an impact on the future operations of the company, the Year 2000 Issue should be discussed in the MD & A. At a minimum the company should include a general description of the Year 2000 Issue as it relates to their organization, the company's state of readiness and the company's contingency plans, i.e. plans to handle the most reasonably likely worst case scenarios.

(3) Reports, diskettes, or electronic filings via the internet filed only with the NAIC:

(A) Trusteed Surplus Statement (association edition, Property and Casualty Supplement) (required of the U. S. branch of an alien insurer), 9 inch by 14-inch size to be filed on or before March 1, May 15, August 15, and November 15, 1999;

(B) Medicare Supplement Insurance Experience Exhibit (association edition) (for insurers writing medicare business) to be filed on or before March 1, 1999;

(C) Officers and Directors Information (association edition), to be filed on or before March 1, 1999;

(D) Insurance Expense Exhibit (association edition), the 9 inch by 14 inch size, to be filed on or before April 1, 1999;

(E) Credit Insurance Experience Exhibit (association edition) (required of companies writing credit accident and/or health business), 9 inch by 14 inch size, to be filed on or before April 1, 1999;

(F) Long-Term Care Experience Reporting Forms (association edition) (required of companies writing long-term care business), the 9-inch by 14 inch size, to be filed on or before April 1, 1999;

(G) Schedule DC (association edition) (for insurers engaged in insurance options and futures), the 9 inch by 14 inch size, to be filed on or before March 1, 1999;

(H) diskettes containing computerized annual statement data, to be filed on or before March 1, 1999;

(I) diskettes containing combined annual statement data, to be filed on or before May 1, 1999; and

(J) diskettes containing computerized quarterly statement data, to be filed on or before May 15, August 15, and November 15, 1999.

(4) The following provisions shall apply to all filings required by paragraphs (1) - (3) of this subsection.

(A) No loss reserve discounts, other than as respects fixed and determinable payments such as those emanating from workers' compensation tabular indemnity reserves and long-term disability claims for which specific segregated investments have been established, shall be allowed. The commissioner shall have the authority to determine the appropriateness of, and may disallow such discounts.

(B) The commissioner shall have the authority to determine the appropriateness of, and may disallow anticipated salvage and subrogation.

(C) Texas domestic insurers that write only in Texas may apply for an alternative basis of calculating the excess of statutory reserves over statement reserves, also know as the Schedule P penalty reserve, by submitting a request to the Chief Property and Casualty Actuary of the Financial Program which outlines the reasons and basis for such request. The request should be mailed to the Chief Property and Casualty Actuary, Texas Department of Insurance, Financial Program, MC 305-3A P.O. Box 149104, Austin, Texas 78714-9104. Requests must be submitted to the department on or before December 31, 1998.

(D) Hard copy filing of Schedule D - Parts 1 through 5 and Schedule DA Part 1A. The annual statement instructions provide for hard copy filing of these schedules only with the state of domicile, the NAIC and any other state requesting such filings. The Texas Department of Insurance is requiring filing hard copy of these schedules for the 1998 year from both domestic and foreign insurers.

(f) Requirements for fraternal benefit societies. Each fraternal benefit society shall complete and file the following blanks, forms, and diskettes or electronic filings for the 1998 calendar year and the first three quarters of the 1999 calendar year. The forms, reports, and diskettes identified in paragraphs (1)(A)-(E); (2)(A),(D); and (3)(A)-(F),(H) of this subsection shall be completed in accordance with the 1998 NAIC Annual Statement Instructions, Fraternal, except as provided by subsection (b) of this section. The diskettes or electronic filings identified in paragraph (3)(G) of this subsection shall be completed in accordance with the 1998 NAIC Annual Statement Diskette Filing Specifications-Fraternal, except as provided by subsection (b)of this section.

(1) Reports to be filed both with the department and the NAIC:

(A) Annual Statement (association edition, with a brown colored cover made of minimum 65lb. paper), the 9 inch by 14 inch size, to be filed on or before March 1, 1999;

(B) Annual Statement of the Separate Accounts (association edition, with a green colored cover made of minimum 65lb. paper) (required of companies maintaining separate accounts), the 9 inch by 14-inch size, to be filed on or before March 1, 1999;

(C) Fraternal Quarterly Statement (association edition), the 9 inch by 14 inch size, to be filed on or before May 15, August 15, and November 15, 1999;

(D) Management's Discussion and Analysis (a narrative document setting forth information which enables regulators to enhance their understanding of the insurer's financial position, results of operations, changes in capital and surplus accounts and cash flow), to be filed on or before April 1, 1999. The department has taken initiatives to promote awareness of the potential for serious and widespread problems, company readiness, and consequences of not planning or addressing the Year 2000 Issue. The department considers the Year 2000 Computer Issue material and relevant to the continuing operations of insurance companies and related entities to ensure uninterrupted policyholder service. As a material and relevant matter that would have an impact on the future operations of the company, the Year 2000 Issue should be discussed in the MD & A. At a minimum, the company should include a general description of the Year 2000 Issue as it relates to their organization, the company's state of readiness and the company's contingency plans, i.e. plans to handle the most reasonably likely worst case scenarios; and

(E) Actuarial Opinion (the statement of a qualified actuary, setting forth his or her opinion relating to policy reserves and other actuarial items; to be filed by all companies), to be attached to the annual statement required by subparagraph (A) of this paragraph.

(2) Reports to be filed only with the department:

(A) Supplemental Compensation Exhibit (association edition) 9 inch by 14 inch size, (required of Texas domestic companies only), to be filed on or before March 1, 1999;

(B) Texas Overhead Assessment Form (Texas edition) (required of Texas domestic companies only), to be filed on or before March 1, 1999;

(C) Analysis of Surplus (Texas edition) for fraternal benefit societies, to be filed on or before March 1, 1999;

(D) Fraternal Benefit Societies Supplement to Valuation Report (Association edition) to be filed on or before June 30, 1999; and

(E) Supplemental Investment Income Exhibit (Texas edition) (shows percent of net investment income by type of investment, as an attachment to page ten of the annual statement as required by paragraph (1)(A) of this subsection, to be filed on or before March 1, 1999.

(3) Reports and diskettes or electronic filings via the internet to be filed only with the NAIC:

(A) Trusteed Surplus Statement (association edition, Fraternal Supplement) (required of the U. S. branch of an alien insurer), 9 inch by 14-inch size to be filed on or before March 1, May 15, August 15, and November 15, 1999;

(B) Medicare Supplement Insurance Exhibit (association edition) (for insurers writing medicare business) to be filed on or before March 1, 1999;

(C) Officers and Directors Information (association edition), to be filed on or before March 1, 1999;

(D) Long-Term Care Insurance Exhibit (association edition) (required of companies writing long-term care business), the 9 inch by 14 inch size, to be filed on or before March 1, 1999;

(E) Schedule DS (association edition) (required only of companies that have included "equity in the undistributed income of the subsidiary" in "net gain from operations"), the 9 inch by 14 in size, to be filed on or before March 1, 1999;

(F) Long-Term Care Experience Reporting Forms (association edition) (required of companies writing long-term care busi-

ness), the 9-inch by 14-inch size, to be filed on or before April 1, 1999;

(G) diskettes containing computerized annual statement data, to be filed on or before March 1, 1999; and

(H) Fraternal Interest Sensitive Life Insurance Products Report (association edition) (required of companies writing interest sensitive products), the 9 inch by 14 inch size, to be filed on or before April 1, 1999.

(4) The following provisions shall apply to the filings required in paragraph (1) - (3) of this subsection.

(A) Texas domestic fraternal companies with more than $30 million in direct premiums in 1998 must establish Asset Valuation Reserves and Interest Maintenance Reserves in their financial statements in accordance with the instructions in the 1998 NAIC Annual Statement Instructions Fraternal. Texas domestic fraternal companies with $30 million or less in direct premiums may establish Asset Valuation Reserves and Interest Maintenance Reserves in their financial statements in accordance with the instructions in the 1998 NAIC Annual Statement Instructions Fraternal or they must value bonds and preferred stocks in compliance with the provisions of §7.16 of this title (relating to NAIC Purposes and Procedures of the Securities Valuation Office Manual) concerning companies not maintaining an Asset Valuation Reserve or Interest Maintenance Reserve.

(B) Since fraternals are not subject to Article 3.28 Section 2A, Texas Insurance Code, the statement of actuarial opinion for fraternals should follow instructions 1 - 12, established by the NAIC.

(g) Requirements for title insurers. Each title insurance company shall complete and file the following blanks and forms for the 1998 calendar year and the first three quarters of the 1999 calendar year. The reports and forms identified in paragraphs (1)(A)-(D); (2)(A) and (E); and (3)(A) of this subsection shall be completed in accordance with the 1998 NAIC Annual Statement Instructions, Title, except as otherwise provided by subsection (b)of this section. The diskette identified in paragraph (3)(B) of this subsection shall be completed in accordance with the 1998 NAIC Annual Statement Diskette Filing Specifications- Title, except as provided by subsection (b) of this section.

(1) Reports to be filed with the department and the NAIC:

(A) Annual Statement (association edition, with a salmon colored cover made of minimum 65lb. paper), the 9 inch by 14 inch size, to be filed on or before March 1, 1999;

(B) Management's Discussion and Analysis (a narrative document setting forth information which enables regulators to enhance their understanding of the insurer's financial position, results of operations, changes in capital and surplus accounts and cash flow), to be filed on or before April 1, 1999. The department has taken initiatives to promote awareness of the potential for serious and widespread problems, company readiness, and consequences of not planning or addressing the Year 2000 Issue. The department considers the Year 2000 Computer Issue material and relevant to the continuing operations of insurance companies and related entities to ensure uninterrupted policyholder service. As a material and relevant matter that would have an impact on the future operations of the company, the Year 2000 Issue should be discussed in the MD & A. At a minimum, the company should include a general description of the Year 2000 Issue as it relates to their organization, the company's state of readiness and the company's contingency plans, i.e. plans to handle the most reasonably likely worst case scenarios;

(C) Actuarial Opinion (the statement of a qualified actuary, setting forth his or her opinion relating to policy reserves and other actuarial items; required of all companies), to be attached to the annual statement required; and

(D) Title Quarterly Statement (association edition), the 9 inch by 14 inch size, to be filed on or before May 15, August 15, and November 15, 1999.

(2) Reports to be filed only with the department:

(A) Supplemental Compensation Exhibit (association edition), 9 inch by 14 inch size, (required of Texas domestic companies only), to be filed on or before March 1, 1999;

(B) Texas Overhead Assessment Form (Texas edition) (required of Texas domestic companies only), to be filed on or before March 1, 1999;

(C) Analysis of Surplus (Texas edition) for title insurers to be filed on or before March 1, 1999;

(D) Supplemental Investment Income Exhibit (Texas edition) (shows percent of net investment income by type of investment, as an attachment to page six of the annual statement as required in paragraph (1)(A) of this subsection, to be filed on or before March 1, 1999; and

(E) Schedule SIS, Stockholder Information Supplement (association edition) (required of domestic stock companies which have 100 or more stockholders), the 9 inch by 14 inch size, to be filed on or before March 1, 1999.

(3) Reports to be filed only with the NAIC.

(A) Officers and Directors Information (association edition), to be filed on or before March 1, 1999;

(B) diskettes or electronic filings via the internet containing computerized annual statement data, to be filed on or before March 1, 1999.

(4) Hard copy filing of Schedule D - Parts 1 through 5 and Schedule DA Part 1A. The annual statement instructions provide for hard copy filing of these schedules only with the state of domicile, the NAIC and any other state requesting such filings. The Texas Department of Insurance is requiring filing hard copy of these schedules for the 1998 year from both domestic and foreign insurers.

(h) Requirements for health maintenance organizations. Each health maintenance organization and non-profit health corporation shall complete and file the following blanks and forms, and diskettes for the 1998 calendar year and the first three quarters of the 1999 calendar year. The forms, reports and diskettes identified in paragraphs (1)(A)-(D) and (2)(A),(B) of this subsection shall be completed in accordance with the NAIC Annual Statement Instructions, Health Maintenance Organizations. The forms, reports and diskettes identified in paragraphs (1)(A), (2)(B), (C), (E) and (F) of this subsection shall be completed in accordance with Annual and Quarterly HMO Supplement Instructions (provided by the department). The diskettes or electronic filings identified in paragraph (3) of this subsection shall be completed in accordance with the 1998 NAIC Annual Diskette Filing Specifications - Health Maintenance Organization.

(1) Reports to be filed both with the department and the NAIC:

(A) Annual Statement (association edition, with an orange colored cover made of minimum 65lb. paper), 8 1/2 inch by 14 inch size, to be filed on or before March 1, 1999;

(B) Management's Discussion and Analysis, (a narrative document setting forth information which enables regulators to enhance their understanding of the insurer's financial position, results of operations, changes in capital and surplus accounts and cash flow), to be filed on or before April 1, 1999. The department has taken initiatives to promote awareness of the potential for serious and widespread problems, company readiness, and consequences of not planning or addressing the Year 2000 Issue. The department considers the Year 2000 Computer Issue material and relevant to the continuing operations of insurance companies and related entities to ensure uninterrupted policyholder service. As a material and relevant matter that would have an impact on the future operations of the company, the Year 2000 Issue should be discussed in the MD & A. At a minimum, the company should include a general description of the Year 2000 Issue as it relates to their organization, the company's state of readiness and the company's contingency plans, i.e. plans to handle the most reasonably likely worst case scenarios;

(C) Actuarial Opinion (the statement of a qualified actuary, setting forth his or her opinion relating to policy reserves and other actuarial items; to be filed by all health maintenance organizations), to be attached to the annual statement required by subparagraph (A) of this paragraph; and the

(D) Medicare Supplement Insurance Experience Exhibit (association edition) (for insurers writing medicare business) to be filed on or before March 1, 1999.

(2) Reports to be filed only with the department:

(A) Supplemental Compensation Exhibit (association edition), 9 inch by 14 inch size, (required of Texas domestic companies only), to be filed on or before March 1, 1999;

(B) HMO Quarterly Statement (association edition), 8 1/2 inch by 14 inch size, together with quarterly data of Schedule E - Part 2 - Special Deposits, from the NAIC HMO Annual Statement Blank to be filed on or before May 15, August 15, and November 15, 1999;

(C) HMO Supplement (Texas edition), 8 1/2 inch by 14 inch size, to be filed on or before March 1, 1999. Exhibit II and Exhibit VI of the HMO Supplement are to be filed quarterly on or before March 1, 1999 and May 15, August 15, November 15, 1999;

(D) Texas Overhead Assessment Form (Texas edition) (required of Texas domestic companies only), to be filed on or before March 1, 1999;

(E) Department formatted diskettes containing annual statement data (diskettes provided by the department for entering of health maintenance organization or non-profit health corporation financial statement data), to be completed according to the instructions provided by the department and filed with the department on or before March 1, 1999; and

(F) Department formatted diskettes containing quarterly statement data (diskettes provided by the department for entering of health maintenance organization or non-profit health corporation financial statement data), to be completed according to the instructions provided by the department and filed with the department on or before May 15, August 15, and November 15, 1999.

(3) Reports and diskettes or electronic filings via the internet to be filed only with the NAIC. The diskettes containing computerized annual statement data must be filed on or before March 1, 1999;

(4) Hard copy filing of Schedule D - Parts 1 through 5 and Schedule DA Part 1A. The annual statement instructions provide for hard copy filing of these schedules only with the state of domicile, the NAIC and any other state requesting such filings. The Texas Department of Insurance is requiring filing hard copy of these schedules for the 1998 year from both domestic and foreign insurers.

(i) Requirements for farm mutual insurers not subject to the provisions of subsection (e) of this section relating to requirements for property and casualty insurers. Each farm mutual insurance company shall file the following completed blanks and forms for the 1998 calendar year with the department only:

(1) Annual statement (Texas edition, with a tan colored cover made of minimum 65lb. paper), 8 1/2 inch by 14 inch size, to be filed on or before March 1, 1999;

(2) Texas Overhead Assessment Form (Texas edition), to be filed on or before March 1, 1999;

(3) Actuarial Opinion (the statement of a qualified actuary, setting forth his or her opinion relating to policy reserves and other actuarial items), to be attached to the annual statement required by paragraph (1) of this subsection, unless otherwise exempted.

(j) Requirements for mutual assessment companies, mutual aid and mutual burial associations, and exempt companies. Each statewide mutual assessment company, local mutual aid association, local mutual burial association, and exempt company shall file the following completed blanks and forms for the 1998 calendar year with the department only:

(1) Annual Statement (Texas edition, with an orange colored cover made of minimum 65lb. paper), 8 1/2 inch by 14 inch size, to be filed on or before April 1, 1999, provided, however, exempt companies are not required to complete lines 22, 23, 24, 25, and 26 on page 3, the special instructions at the bottom of page 3, and pages 4, 5, 6, and 7. All other pages are required;

(2) Texas Overhead Assessment Form (Texas edition), to be filed on or before April 1, 1999;

(3) Release of Contributions Form (Texas edition), to be filed on or before April 1, 1999;

(4) 3 1/2 % Chamberlain Reserve Table (Reserve Valuation) (Texas edition), to be filed on or before April 1, 1999;

(5) Reserve Summary (1956 Chamberlain Table 3 1/2%) (Texas edition), to be filed on or before April 1, 1999;

(6) Inventory of Insurance in Force by Age of Issue or Reserving Year (Texas edition) to be filed on or before April 1, 1999; and

(7) Summary of Inventory of Insurance in Force by Age and Calculation of Net Premiums (Texas edition), to be filed on or before April 1, 1999.

(k) Requirements for non-profit legal service corporations. Each non-profit legal service corporation shall file the following completed blanks and forms for the 1998 calendar year with the department only;

(1) Annual Statement (Texas edition with a green colored cover made of minimum 65lb. paper), 8 1/2 inch by 14 inch size, to be filed on or before March 1, 1999; and

(2) Texas Overhead Assessment Form, to be filed on or before March 1, 1999.

(l) Requirements for Mexican casualty companies. Each Mexican casualty company doing business as authorized by a Certificate of Authority issued under Texas Insurance Code, Article 8.24, shall complete and file the following blanks and forms for the 1998 calendar year with the department only. All submissions shall be printed or typed in English and all monetary values shall be clearly designated in United States dollars. The form identified in paragraph (1) of this subsection shall be completed in accordance with the 1998 NAIC Annual Statement Instructions, Property and Casualty, except as provided by this section. An actuarial opinion is not required. It is the express intent of this subsection that it shall not repeal or otherwise modify or amend any department rule or the Insurance Code. The blanks or forms are as follows:

(1) Annual Statement (association edition, with a yellow colored cover made of minimum 65lb. paper), 9 inch by 14 inch size, provided, however, only pages 1 - 4, 15 - 19 and 130 are required to be completed and filed on or before March 1, 1999;

(2) A copy of the balance sheet and the statement of profit and loss from the Mexican financial statement (printed or typed in English), to be filed on or before March 1, 1999;

(3) A copy of the official documents issued by the COMISION NACIONAL DE SEGUROS Y FIANZAS approving the 1998 annual statement, to be filed on or before June 30, 1999; and

(4) A copy of the current license to operate in the Republic of Mexico, to be filed on or before March 1, 1999.

(m) Other financial reports. Nothing in this section prohibits the department from requiring any insurer or other regulated entity from filing other financial reports with the department.

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 January 25, 1999.

TRD-9900516

Lynda H. Nesenholtz

General Counsel and Chief Clerk

Texas Department of Insurance

Effective date: February 14, 1999

Proposal publication date: December 18, 1998

For further information, please call: (512) 463-6327

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Chapter 11. Health Maintenance Organizations

Subchapter F. Evidence of Coverage

28 TAC §11.506

The Commissioner of Insurance adopts amended §11.506, concerning mandatory contractual provisions of group, individual and conversion agreements and certificates. The section is adopted without changes to the proposed text as published in the December 11, 1998, issue of the *Texas Register* (23 TexReg 12632) and will not be republished.

This section is intended to address numerous complaints received by the department regarding the removal of prescription drugs from drug formularies. In some instances, enrollees select an HMO on the basis of a specific drug appearing on its drug formulary, only to be left without coverage for that drug upon a change in the HMO's formulary. Such a practice is unfair to enrollees, and is a common source of complaints to the department. By requiring notice of the removal of a drug from the formulary, enrollees are given the opportunity to appeal to continue using a drug as if it remained on the formulary without any loss of use of the drug.

This section requires prior notification to enrollees, physicians, and providers of the removal of a drug from an HMO's drug formulary and allows enrollees to appeal to continue using such a drug by invoking the complaint and appeals process specified in Chapter 20A and Articles 21.58A and 21.58C of the Insurance Code. By requiring the notice 90 days before the removal of the drug, an enrollee may appeal to continue using the drug without incurring a lapse in use of the prescribed medication during the pendency of the enrollee's appeal. Furthermore, the advance notice of removal of a drug from the formulary allows the enrollee and physician or provider to consider whether modification of the enrollee's medication is a viable alternative. If the removal of a drug from the formulary raises issues of medical necessity, the appropriate appeal route is via the utilization review and, if necessary, independent review organization process.

Comment: One commenter suggested that the section be revised to make clear that the 90 day notice requirement does not apply to benefit plans that utilize an open formulary or three tier benefit structure. In such cases, the enrollee still has coverage for a drug removed from the formulary, although it may be at a higher copayment.

Response: The department disagrees that open formulary or three tier benefit structure plans should be exempted from the notice requirements of the rule. Despite the continued availability of drugs removed from the formulary in such plans, the need for enrollees under such plans to be notified of the removal of a drug from the formulary is not diminished. This is an important disclosure requirement to enrollees who are chronically ill or otherwise require many prescription medications. The advance notice allows the enrollee and the physician time to explore other drug options before higher copayments become effective. Additionally, the department is allowing carriers to give notice via newsletters and other scheduled mailings to address cost issues. Moreover, an enrollee's complaint and appeal rights are not affected by the existence of an open formulary or three tier benefit structure plan. Even with open formulary or three tier benefit structure plans, an enrollee may pursue a complaint or appeal upon the removal of a drug from the formulary, pursuant to the requirements of Article 20A.12. Thus, the 90 day notice requirement applies to open formulary and three tier benefit plans.

Comment: One commenter supports the section as a reasonable requirement that protects enrollees.

Response: The Department appreciates the commenter's support.

For, and for with changes: Texas Society of Health System Pharmacists, Blue Cross Blue Shield of Texas.

The section is adopted under the Insurance Code, Chapter 20A, Article 21.21, and Article 1.03A. Insurance Code Article 20A.22(a) provides that the commissioner may promulgate rules and regulations as are necessary and proper to carry

out the provisions of the HMO Act (Insurance Code, Chapter 20A). Article 21.21, Section 13 authorizes the promulgation of rules necessary to prevent unfair competition and unfair practices under Article 21.21. Article 1.03A provides that the Commissioner of Insurance may adopt rules necessary for the conduct and execution of the duties and functions of the Texas Department of Insurance only as authorized by a statute.

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 January 19, 1999.

TRD-9900348
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: February 8, 1999
Proposal publication date: December 11, 1998
For further information, please call: (512) 463–6327

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Subchapter Y. Limited Service HMOS

28 TAC §§11.2401-11.2405

The Commissioner of Insurance adopts new Subchapter Y, Limited Service HMOs, §§11.2401-11.2405, concerning health maintenance organizations (HMOs). Sections 11.2401, 11.2404, and 11.2405 are adopted with changes to the proposed text as published in the December 4, 1998 issue of the *Texas Register* (23 TexReg 12182). Sections 11.2402 and 11.2403 are adopted without changes and will not be republished.

This new subchapter is necessary to implement legislation enacted by the 75th Legislature in Senate Bill 382, amending provisions of Article 20A to provide for the creation of limited service HMOs. Limited service HMOs will allow the growing number of provider sponsored networks, as well as other entities, to provide services in an HMO format for conditions that require a broader range of treatment than is available through a single service HMO, without requiring that the HMO provide the extensive range of services required of basic service HMOs.

After reviewing public comment on the proposed amendments, the department has made the following changes: Section 11.2401 was revised to clarify the definition of several terms contained in the rule. Section 11.2404 was changed to clarify that services provided by telephone shall not count toward the annual outpatient visit total for mental illness treatment, and to modify the term "basic mental illness" to "non-serious mental illness." Section 11.2405 was revised to differentiate clearly between services provided for mental health and services provided for chemical dependency and to clarify that limited service HMOs shall cover court ordered mental health/chemical dependency treatment in accord with its standards of medical necessity. All other changes were made to correct punctuation, grammatical, or typographical errors.

New §11.2401 defines terms relating to limited service HMOs. New §11.2402 describes in general the requirements for description of coverages provided by limited service HMOs to enrollees and the contents of limited service HMO evidences of coverage. New §11.2403 sets forth prohibited provisions of limited service HMO evidences of coverage. New §11.2404 sets forth prohibited practices for single service HMOs. New §11.2405 sets forth the minimum benefits limited service mental health care HMOs must provide.

General. A commenter recommended that the department require limited service HMOs to disclose their benefit limits in marketing materials to employers.

Agency Response: The department agrees that it is important for employers to recognize benefit limits in any plan they are considering purchasing. However, the department believes §11.2402(a) & (b) adequately address this problem.

Comment. A commenter noted that the department did not discuss costs with the Texas Commission on Alcohol and Drug Abuse (TCADA) in researching the costs of this proposal. The commenter suggested the department's cost figures are excessive and expressed concern that these elevated cost estimates resulted in a lower number of covered days in the benefit standards of the rule.

Agency Response: While the department did not obtain estimates from TCADA, staff did consult private industry as well as the Texas Department of Mental Health/Mental Retardation in preparing the cost figures for this proposal. Staff did consult TCADA throughout the development of the rule. Moreover, the purpose of these figures is to comply with Government Code (2001.024(5)(B) and to assist interested persons in assessing the probable economic cost of compliance with the rule. The cost figures have no bearing on the minimum benefit standards set out in the rule. Finally, the cost figures for inpatient treatment in the rule proposal represent the cost for hospital treatment. The department recognizes that other modes of mental health/chemical dependency treatment will cost less. The department, however, utilized the hospital treatment figure to insure that interested persons would not underestimate the economic cost of compliance.

Comment. A commenter stated that the rule fails to address the treatment needs of individuals with a dual diagnosis of mental illness and substance abuse.

Agency Response: Rules governing chemical dependency utilization review (28 TAC ((3.8001 et seq.) recognize that an individual may receive a dual diagnosis. The rules provide direction for coordination of treatment between various providers. Since limited service HMOs must provide services in accordance with these rules, the department believes the existing regulatory framework adequately addresses individuals with a dual diagnosis.

11.2401. A commenter noted that some terms used in the rule are not included in the listed definitions, and that some of the definitions presented do not relate to the rule.

Agency Response: Some of the terms in the rule for which the commenter has requested definition/clarification are not intended to have more than their common meaning. Other terms were not expressly defined because there is consensus about their meaning within the context of mental health/chemical dependency treatment. However, the department believes it would be beneficial to amend some of the definitions and has incorporated the suggested revisions to acute day treatment, assessment, case management, crisis respite, intensive outpatient, medication administration, medication monitoring, medication training, partial hospitalization, pharmacological management, screening and treatment planning into the text of the rule.

§11.2404(c). A commenter inquired whether a mental health/chemical dependency limited service HMO is expected to pay for medical services rendered to an individual during the emergency psychiatric treatment of the individual.

Agency Response: The purpose of limited health care service plans, under Insurance Code Article 20A.02, is to provide, arrange, pay for, or reimburse limited health care services. Limited health care services under this rule are those provided for treatment of mental health/chemical dependency. Limited service HMOs are thus only responsible for payment of mental health/chemical dependency services, regardless of the circumstances giving rise to the need for treatment. §11.2404(d). A commenter expressed concern with the provision prohibiting limited service HMOs from counting medication related services toward the annual outpatient visit total for serious and non-serious mental illness.

Agency Response: Texas Insurance Code Article 3.51-14 Sec. (3)(b) states that a health benefit plan may not count "an outpatient visit for the purpose of medication management" toward the required annual number of covered outpatient visits. While this statute only applies to the treatment of serious mental illness, the department believes it is important to apply the same standard to non-serious mental illness to provide for consistency of mental health treatment regardless of degree. This provision has particular significance as the rule requires coverage of only 30 annual outpatient visits for the treatment of non-serious mental illness, compared to 60 for treatment of serious mental illness. §11.2404(d). A commenter expressed concern that the rules allow HMOs to count services provided by telephone toward the annual number of outpatient visits.

Agency Response: The department appreciates and agrees with the commenter's concern. To clarify that telephone services are not to count toward an individual's annual covered outpatient visit total, the department has added language prohibiting a limited service HMO from counting services provided by telephone toward the outpatient visit total for either serious or non-serious mental illness. (11.2405. A commenter questioned whether the rule excludes from coverage substance abusers who are not chemically dependent.

Agency Response: This rule does not exclude from coverage substance abusers who are not chemically dependent. This rule requires limited service HMOs to provide care in accord with the levels of care and clinical criteria specified in 28 TAC §§3.8001 et seq., which defines chemical dependency as "the abuse of or psychological dependence on or addiction to alcohol or a controlled substance." 11.2405. Commenters suggested that this section needs clarification regarding its application to chemical dependency treatment. One commenter expressed concern that the minimum benefit standards for chemical dependency treatment are excessively low.

Agency Response: The department agrees and has adopted language clarifying that standards for treatment of chemical dependency are separate standards from those governing mental health treatment. Chemical dependency standards are codified at 28 TAC §§3.8001 et seq. While the rule proposal incorporated those standards at §11.2405(c), the department has added express language to clarify that the limits on mental health coverage do not apply to chemical dependency treatment. §11.2405(a). A commenter inquired whether the rule's reference to CDT codes is intended to be CPT codes; if so, the commenter expressed concern that the CPT is not sufficiently extensive to meet billing needs.

Agency Response: The department agrees with the commenter's concerns. TCADA and TDMHMR are developing a comprehensive list of CPT codes, and the department has deleted this subsection pending promulgation of a suitable list of codes. (11.2405(a). A commenter suggested the rule require limited service HMOs to cover court ordered treatment only in accord with the HMO's standards of medical necessity.

Agency Response: The department agrees and has adopted the suggested language.

For: Texas Association of Health Plans, Texas Community Solutions.

For with changes: Austin Family House, Texas Department of Mental Health/Mental Retardation, Texas Commission on Alcohol and Drug Abuse, Office of Public Insurance Counsel.

The new sections are adopted under the Insurance Code, Chapter 20A, as amended by the 75th Legislature in Senate Bill 385, and Article 1.03A. Insurance Code Article 20A.02(b) provides that basic health care services mean health care services which the commissioner determines an enrolled population might reasonably require to maintain good health, including, at a minimum, services designated as basic health services under Section 1302, Title XIII, Public Health Service Act (42 U.S.C., Section 300e - 1(1)). Insurance Code Article 20A.22(a) provides that the commissioner may promulgate rules and regulations as are necessary and proper to carry out the provisions of the HMO Act (Insurance Code, Chapter 20A). Article 20A.22(b) provides that the commissioner is specifically authorized to promulgate rules to ensure that enrollees have adequate access to health care services and to establish minimum physician/patient ratios, mileage requirements for primary and specialty care, maximum travel times, and maximum waiting times for obtaining appointments. Article 20A.04(b) provides that the commissioner may by rule require an operational HMO to timely notify the commissioner when it modifies documents it submitted in applying for a certificate of authority. Article 20A.37 provides that the commissioner by rule may establish minimum standards and requirements for ongoing internal quality assurance programs for HMOs, including, but not limited to, standards for assuring availability, accessibility, quality, and continuity of care. Article 1.03A provides that the Commissioner of Insurance may adopt rules necessary for the conduct and execution of the duties and functions of the Texas Department of Insurance only as authorized by statute.

§11.2401. Definitions.

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

(1) Acute Day Treatment–Program-based services focused on the short-term, acute treatment of individuals who require multi-disciplinary treatment in order to obtain maximum control of psychiatric symptoms. Services are provided in a highly structured and safe environment with constant supervision. Contacts with staff are frequent, activities and services constantly available, and developmental and social supports encouraged and facilitated. Staff receive specialized training in crisis management. Activities are goal oriented, focusing on improving peer interaction, appropriate social behavior, and stress tolerance.

(2) Assessment–The clinical process of obtaining and evaluating historical, social, functional, psychiatric, developmental, or other information from the individual and family seeking services to determine, level of need (including urgency) and specific treatment needs (including the preferences of the individual seeking services).

(3) Case Management–Case management activities are provided to assist individuals in gaining access to medical, social, educational, and other appropriate services that will help them achieve a quality of life and community participation acceptable to each individual. The role of persons who provide case management activities is to support and assist the person in achieving goals.

(4) Crisis Hotline–A continuously available staffed telephone service providing information, support, and referrals to callers 24 hours per day, seven days per week.

(5) Crisis Respite–Those services provided for temporary, short term, periodic relief to individuals or their primary caregivers during a crisis. Program-based respite services involve temporary residential placement outside the usual living situation. Community-based respite services involve introducing respite staff into the usual living situation or providing a place for the individual to go during the day or other services considered to provide respite.

(6) Crisis Services–Services including crisis hotline, crisis intervention, and crisis respite.

(7) Intensive outpatient–An organized non-residential service providing structured group and individual therapy, educational services, and life skills training which is less than 24 hours per day.

(8) Medication administration–A service provided to an individual by a licensed nurse (or other appropriately trained and certified person under the supervision of a physician or registered nurse as provided by state law) to ensure the direct application of a medication to the body of the individual by any means including handing the individual a single dose of medication to be taken orally.

(9) Medication monitoring–A service provided to an individual and/or family member or other collateral by a licensed nurse (or other appropriately trained and certified person under the supervision of a physician or registered nurse as provided by state law) for the purpose of assessment of medication actions, target symptoms, side effects and adverse effects, potential toxicity, and the impact of medication for the individual and family in accordance with the plan of care.

(10) Medication training–A service to an individual and/or family member or other collateral by a licensed nurse (or other appropriately trained professional or paraprofessional as provided by state law) for the purpose of teaching the knowledge and skills needed by the individual/family/collateral in the proper administration and monitoring of prescribed medication in accordance with the individual's plan of care.

(11) Medication-related services–Services including medication administration, medication monitoring, medication training, and pharmacological management.

(12) Partial hospitalization–The provision of treatment for mental health care or chemical dependency for individuals who require care or support or both in a hospital or chemical dependency treatment center but who do not require 24-hour supervision.

(13) Pharmacological management–Service provided to an individual or collateral by a physician or other appropriately trained and certified professional as provided by state law for the purpose of determining symptom remission and the medication regimen needed to initiate and/or maintain an individual's plan of care.

(14) Screening–Gathering triage information necessary to determine a need for in-depth assessment. This information is collected through interview or by phone with the individual or collateral as part of the admission/intake process or as necessary.

(15) Treatment planning–Activities for the purpose of medically necessary, prioritized, comprehensive, collaborative, and measurable treatment that reflects the needs and wishes of the individual and builds upon the strengths of the individual.

§11.2404. Prohibited Practices.

(a) A limited service HMO shall not limit or otherwise interfere with an enrollee's right to terminate his or her membership in the plan before the end of the enrollment year.

(b) A limited service HMO shall not limit coverage for emergency services under a limited health care service plan.

(c) A limited service HMO shall not charge an emergency fee in addition to a copayment for emergency services.

(d) A limited service HMO shall not count medication related services and services provided by telephone toward the annual outpatient visit total for either serious or non-serious mental illness.

§11.2405. Minimum Standards, Mental Health and Chemical Dependency Services and Benefits.

(a) Each limited service HMO evidence of coverage providing coverage for mental health/chemical dependency services and benefits shall cover, in accord with the limited service HMO's standards of medical necessity, court ordered mental health/chemical dependency treatment and may, if clearly disclosed, require the enrollee to have such treatment completed by a participating provider in the Health Maintenance Organization Delivery Network, as defined under Insurance Code Article 20A.02(w), or as otherwise arranged by the limited service HMO.

(b) Each limited service HMO evidence of coverage providing coverage for mental health/chemical dependency services and benefits shall provide primary mental health/chemical dependency services and benefits, including, but not limited to:

(1) For treatment of serious mental illness (as defined in Texas Insurance Code Article 3.51-14), up to 45 inpatient days per year, up to 60 outpatient visits per year, which include assessment/screening, treatment planning, and crisis services.

(2) For treatment of non-serious mental illness, up to 30 inpatient days per year, up to 30 outpatient visits per year, which include assessment/screening, treatment planning, and crisis services.

(3) Treatment of chemical dependency that shall be provided in accord with the levels of care and clinical criteria specified in 28 TAC ((3.8001 et seq. (relating to Standards for Reasonable Cost Control and Utilization Review for Chemical Dependency Treatment Centers).

(4) Any other services necessary and appropriate to treat mental health/chemical dependency or required by the Insurance Code, Health and Safety Code, and other applicable laws and regulations of this State.

(c) Each limited service HMO evidence of coverage providing coverage for mental health/chemical dependency services and benefits shall demonstrate the capacity to provide, and may provide, secondary intensive rehabilitative and community support services for mental illness/chemical dependency, including, but not limited to,

case management, partial hospitalization, residential, acute day treatment, intensive outpatient, ACT teams, and habilitative/rehabilitative services for pervasive developmental disorders .

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 January 25, 1999.

TRD-9900515
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: February 14, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 37. Financial Assurance

Subchapter O. Financial Assurance for Public Drinking Water Systems and Utilities

30 TAC §§37.5001, 37.5002, 37.5011

The Texas Natural Resource Conservation Commission (commission) adopts new §§37.5001, 37.5002, and 37.5011, relating to Financial Assurance for Public Drinking Water Systems and Utilities. Section 37.5011 is adopted with changes to the proposed text as published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10803). Sections 37.5001 and 37.5002 are adopted without changes and will not be republished.

EXPLANATION OF THE ADOPTED RULE

The purpose of the adopted amendments is to specify acceptable forms of financial assurance required of public drinking water systems, water and wastewater utilities. The rules are intended in part to comply with the requirements of the Safe Drinking Water Act Amendments of 1996, which require states to ensure that new community water systems and new nontransient, noncommunity water systems demonstrate financial capacity. Senate Bill 1, Article 6, 75th Legislature, 1997, granted the commission the authority to require financial assurance in certain defined circumstances. Financial assurance may be required for systems that were constructed without approval; have a history of non- compliance; for applicants requesting approval for a certificate of convenience; for a person establishing, purchasing, or acquiring a retail public utility; for a person acquiring a controlling interest through a purchase of stock in a utility; or for a utility that is subject to commission enforcement action to ensure continuous and adequate utility service. The commission has made changes in the adopted rule to more closely follow statutory authority.

Concurrently with this amendment, the commission is adopting amendments to Chapters 290 and 291 that specify under what conditions financial assurance will be required. Please refer to the preambles to Chapters 290 and 291 for additional information. The amendments in this chapter specify acceptable forms of financial assurance when required by provisions of these rules.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of "major environmental rule" because the specific intent of the rule is to regulate the form of financial assurance required of certain water and sewer service utilities, not to protect the environment or reduce the risks to human health from environmental exposure. The rules will not materially affect the economy, a sector of the economy, productivity, competition, jobs, or the environment. The effect is not material because it is estimated that the cost to a utility to comply with the financial assurance requirement will range from one half of a percent to ten percent of the amount of the financial assurance. Furthermore the rules are adopted under the following specific state laws: Texas Water Code, §§13.246, 13.253, 13.301, and 13.302, and the Health and Safety Code, §341.035 and §341.0355. Those statutes do not expressly limit the form and amount of financial assurance that the commission may require of public drinking water systems and utilities, and therefore the rules do not exceed the limitation of those statutes. The financial assurance provision is adopted in part to comply with the requirements of the Safe Drinking Water Act Amendments of 1996, but there are no specific limitations on the amount or form of financial assurance in those statutes, therefore the rules do not exceed the requirements of that statute.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that Assessment. The specific purpose of the rules is to specify acceptable forms of financial assurance required of public drinking water systems and utilities. The rules will substantially advance this specific purpose by specifying acceptable forms of financial assurance that may be required by the commission. Promulgation and enforcement of these rules will not burden private real property because these rules only prescribe the form of financial assurance that may be otherwise imposed on a water or sewer service provider by the commission.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the adopted rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will they affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rules are not subject to the CMP.

HEARING AND COMMENTERS

A public hearing on the proposed rules was held on November 2, 1998, in Austin. The comment period closed November 23, 1998.

Consumers Union (CU) submitted comments that were generally supportive of the proposed rules, but suggested changes. The following paragraph summarizes written and oral comments received.

CU commented that surcharges and rate increases should not be the sole form of financial assurance for prospective owners or operators as proposed in §37.5011. In the case of acquisitions, CU believes an acquiring utility which relies solely on ratepayer funds as financial assurance has not added financial strength to the new utility.

The commission agrees and has modified §290.39(n) to clarify the circumstances under which surcharges and rate increases may be allowed as a form of financial assurance. The commission has limited the scope as to who may be allowed to use rate increases or surcharges. The commission has done this by moving the text of §290.39(o) into §290.39(n)(3) which specifically allows the use of rate increases or surcharges under specific conditions. These conditions include a public drinking water supply system constructed without approval, or a public drinking water supply system with a history of noncompliance, or one subject to a commission enforcement action.

The commission has made additional changes to §37.5011(b) to correct references.

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and to implement Texas Water Code, §§13.246, 13.253, 13.301, and 13.302, and the Health and Safety Code, §341.035 and §341.0355.

§37.5011. Financial Assurance for a Public Water System or Retail Public Utility.

(a) Financial assurance demonstrations shall comply with the wordings of the mechanisms as described in Subchapter A of this chapter (relating to General Financial Assurance Requirements), Subchapter B of this chapter (relating to Financial Assurance Requirements for Closure), Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure), and Subchapter D of this chapter (relating to Wording of the Mechanisms for Closure), except operation should be substituted for closure and the appropriate statutory reference to Public Drinking Water or Utility Regulation should be cited in the mechanism.

(b) The prospective owner or operator of a public water system may be ordered to provide adequate financial assurance to operate the system as specified in §290.39(f) of this title (relating to General Provisions.) A public water system that was constructed without approval or has a history of noncompliance or is subject to commission enforcement action as specified in §290.39(n) of this title, may be required to provide financial assurance to operate the system in accordance with applicable laws and rules. Financial assurance may be required of an applicant requesting approval for a certificate or a certificate amendment or a person establishing, purchasing or acquiring a retail public utility as specified in §291.102(d) of this title (relating to Criteria for Considering and Granting Certificates or Amendments), and §291.109(c) of this title (relating to Report of Sale, Merger, Etc: Investigation; Disallowance of Transaction). A person acquiring a controlling interest in a utility may be required to demonstrate adequate financial assurance as specified in §291.111(c) of this title (relating to Purchase of Voting Stock in Another Utility). The commission may order a utility that has failed to provide continuous and adequate service to provide financial assurance to ensure that the system will be operated as required by §291.114 of this title, (relating to Requirements to Provide Continuous and Adequate Service). Such financial assurance will allow for payment of improvements and repairs to the water or sewer system.

(c) If rate increases or customer surcharges are determined by the executive director to be an acceptable form for demonstrating financial assurance in accordance with §290.39(n)(3) of this title, such funds shall be deposited into an escrow account with an escrow agent that has the authority to act as an escrow agent and whose escrow operations are regulated and examined by a Federal or State agency. At least annually a statement of the account shall be submitted to the executive director.

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

Filed with the Office of the Secretary of State on January 15, 1999.

TRD-9900316
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: February 4, 1999
Proposal publication date: October 23, 1998
For further information, please call: (512) 239–1966

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Chapter 80. Contested Case Hearings

Subchapter A. General Rules

30 TAC §80.3

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §80.3, relating to Judges, without changes to the proposed text as published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10805). The text of the rule will not be republished.

EXPLANATION OF THE ADOPTED RULE

The purpose of the adopted amendment is to delegate to Administrative Law Judges the authority to issue interim rate orders under Texas Water Code, Chapter 13 as provided by Texas Water Code, §5.311, as amended by Senate Bill 1, Article 6, 75th Legislature, 1997. This authorization to issue interlocutory orders will save time and unnecessary expense by providing a simplified procedure for setting interim rates prior to final commission action on the rate case.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of "major environmental rule" because the specific intent of the amendment is to make the rule consistent with statutory authority, by allowing an Administrative Law Judge to issue interim rate orders under Texas Water Code, Chapter 13, not to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to delegate the authority to the State Office of Administrative Hearings (SOAH) to set interim rates under Texas Water Code, Chapter 13. The rule will substantially advance this specific purpose by expressly granting SOAH judges the authority to issue interim rate orders under Texas Water Code, Chapter 13. Promulgation and enforcement of the rule will not burden private real property which is the subject of the rules because the rule is a procedural rule that provides a more streamlined administrative process for setting interim rates.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the adopted rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the CMP.

HEARING AND COMMENTERS

A public hearing on the proposed rule was held on November 2, 1998, in Austin. The comment period closed November 23, 1998.

No written or oral comments were received on the proposed amendment to §80.3, relating to Judges.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the State of Texas, and to implement Texas Water Code, §5.311, which allows the commission to delegate to SOAH the authority to issue interlocutory orders related to interim rates under Texas Water Code, Chapter 13.

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 January 15, 1999.

TRD-9900317

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

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

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Chapter 290. Public Drinking Water

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§290.38-290.40, 290.42-290.47, 290.102, and 290.116, relating to public drinking water. Section 290.38, relating to public drinking water supply systems, §290.39, relating to general provisions, and §290.45, relating to minimum water system capacity requirements, are adopted with changes to the proposed text as published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10807). Amendments to §§290.40, 290.42-290.44, 290.46, 290.47, 290.102, and 290.116 are adopted without changes and will not be republished.

EXPLANATION OF THE ADOPTED RULE

The purpose of the adopted amendments is to implement sections of Senate Bill 1, Article 6, 75th Legislature, 1997 related to ensuring the technical, managerial and financial capacity of public water systems; clarify the delineation of responsibility with the State Board of Plumbing Examiners regarding plumbers, customer service inspections, and backflow prevention devices; update definitions to maintain consistency with the federal Safe Drinking Water Act Amendments of 1996; and make organizational and wording changes to improve the readability of the rules.

In §290.38, relating to Public Drinking Water Supply Systems, several definitions of technical terms have been moved from Subchapter F, §290.102, relating to Definitions. The intent is to place all technical words common to both subchapters in §290.38. Technical terms only used in Subchapter F are now defined in §290.102. Definitions of "connection" and "public water system" have been amended in response to the Safe Drinking Water Act Amendments of 1996. The intent is to expand the definition of those terms as broadly as the federal definitions, but not to regulate any public water system or activity not encompassed in the federal definitions. The term "licensed professional engineer" is defined to be consistent with the terminology contained in recent amendments to Article 3271a, Texas Civil Statutes. Accordingly, in the rules, use of the words "registered engineer" have been changed to "licensed professional engineer."

Amendments to §290.39, relating to General Provisions, implement new Texas Water Code, §13.241, changes to Texas Water Code, §13.253, and changes to Health and Safety Code, §341.0315 and §341.035, as enacted by Senate Bill 1, Article 6, 75th Legislature, 1997 related to public drinking water supply system requirements, approval of plans and specifications, business plans, and financial assurance required of some public water systems. The section specifies when approvals, business plans, and financial assurance are required.

Amendments to §290.46, relating to Minimum Acceptable Operating Practices for Public Drinking Water Systems, are to clarify the relationship between the commission's rules regarding customer service inspections, the prevention of cross connections and illegal lead materials in public water systems and the State Board of Plumbing Examiners' rules regulating plumbers. A customer service inspection under these rules is not a plumbing inspection as defined by the State Board of Plumbing Examiners. Similarly §290.47(d), Appendix D, relating to Sample Service Inspection Certification, is amended to remove any acts from the customer service inspection that might be construed as a plumbing inspection.

Section 290.102, relating to Definitions, deletes technical terms now defined in §290.38. Definitions contained in Title 40 Code of Federal Regulations §141.2 and a standard industry source are incorporated into this section by reference to maintain consistency between the state and federal safe drinking water programs. Definitions in §290.102 have been expanded to include terms from §290.116, relating to Control of Trihalomethanes in

Drinking Water, and subsections of that provision have been renumbered.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of "major environmental rule" because the specific intent of the adopted amendments is to ensure the technical, managerial and financial capacity of public water systems; clarify the delineation of responsibility between the commission and the State Board of Plumbing Examiners regarding plumbers and customer service inspections; update definitions to maintain consistency with the federal Safe Drinking Water Act; and make organizational and wording changes to improve readability of the rules. The rules do not exceed any requirement of state or federal law. The rules do not exceed any requirement of a delegation agreement or contract between the commission and an agency or representative of the federal government. These rules would implement Senate Bill 1, Article 6, 75th Legislature, 1997.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that Assessment. The specific purpose of the rules is to implement sections of Senate Bill 1, Article 6, 75th Legislature, 1997 related to ensuring the technical, managerial and financial capacity of public water systems; clarify the delineation of responsibility between the commission and the State Board of Plumbing Examiners regarding plumbers and customer service inspections; update definitions to maintain consistency with the federal Safe Drinking Water Act; and make organizational and wording changes to update definitions and improve readability of the rules. The rules will substantially advance this specific purpose by requiring public water suppliers, including some mobile home parks and investor owned utilities, to prepare a business plan or provide financial assurance of its ability to provide service. These mobile home parks and investor owned utilities may own private real property. The preparation of a business plan will not burden private real property, because this is a procedural requirement designed to demonstrate the financial capability of the public water system. Preparation of the business plan and requirements for financial assurance are part of the agency's efforts to comply with the Safe Drinking Water Act Amendments of 1996, specifically §1420 which would reduce federal funds to the state revolving loan fund unless the agency has the "legal authority or other means to ensure that all new ... water systems ... demonstrate technical, managerial, and financial capacity ...." Other than the public water systems required to prepare business plans, private real property is not subject to these regulations.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the adopted rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will they affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rules are not subject to the CMP.

RULES REVIEW

The commission, concurrently with these adopted amendments to Chapter 290, has completed its review of Chapter 290, Subchapters D through G, concerning Public Drinking Water. This review was in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997. See the January 29, 1999, issue of the *Texas Register* Adopted Rules Review section for additional information on the rules review of this chapter.

HEARING AND COMMENTERS

A public hearing on the proposed rules was held on November 2, 1998, in Austin. The comment period closed November 23, 1998.

Consumers Union (CU), Independent Water and Sewer Companies of Texas, Inc. (IWSCOT), the City of Irving, and Texas Rural Water Association (TRWA), submitted comments. The City of Irving generally supported the proposed rules, but suggested changes to §290.46. The following paragraphs summarize the comments received.

The City of Irving commented that the rules should contain a definition for customer service inspection.

The commission has made no change in response to this comment. The term, customer service inspection is only used in §290.46(j), relating to customer service inspections, where the term is explained in paragraph (5). Because the term is only used in that one section, a separate definition is not warranted. The commission has further elected to define the term in the rules so that important limitations and qualifications on the term are clearly brought to the attention of the reader.

CU submitted general comments that supported proposed amendments to §290.39. TRWA and IWSCOT commented that §290.39(a) requiring business plans for new systems does not apply to counties and retail public utilities.

The commission agrees with the TRWA and IWSCOT comment and has clarified the rule to reference the Health and Safety Code provision setting forth the exemptions to required business plans.

Simultaneous with the publication of these proposed amendments to Chapter 290, the commission had published proposed amendments to Chapter 37. Consumers Union (CU) submitted comments to the proposed amendments to Chapter 37. CU commented that surcharges and rate increases should not be the sole form of financial assurance for prospective owners or operators as proposed in 37.5011.

In order to respond to the comment on proposed amendments to Chapter 37, the commission modified §290.39(n) to clarify the circumstances under which surcharges and rate increases may be allowed as a form of financial assurance. See the preamble to the adopted amendments to Chapter 37 for additional details.

TRWA and IWSCOT commented that the last sentence in §290.39(a) goes beyond statutory authority and lists the statutory provisions it believes the rule implements as Health and Safety Code, §§341.035, 341.0355, and 341.0356.

The commission has deleted the last sentence because it is not necessary, and because the mere editing of it could be

misinterpreted as the commission's declaration on issues that are broader than the point raised by the commenters.

The City of Irving commented that in §290.46(j)(5) the language regarding how a customer service inspection may be part of a more comprehensive plumbing inspection and a customer service inspector should report any violations immediately to the local entity's plumbing inspection department, should be moved to a guidance document or made clear that these are options not requirements.

The commission has made no changes in response to this comment. The commission has used the terms "may" and "should" which are intended as discretionary language. Further clarification is not necessary. The commission notes that reporting of violations to the local plumbing inspection department may be either an enforceable state or local requirement.

The City of Irving further objected to the lack of a definition of contaminant. The City of Irving commented that such a definition should either be as defined in 40 CFR 141.2 or as defined in the American Water Works Association (AWWA) M-14 manual.

The commission has made no changes in response to this comment. The commission notes that it does define contamination. Contamination is used in the rules to cover not only cross- connection control, but also other subject areas, such as Drinking Water Standards, §290.101 et. seq. Because the term is used by the rules to cover other situations, an industry definition in current manuals of practice for cross-connection control would be too narrow a definition.

Subchapter D. Rules and Regulations for Public Water Systems

30 TAC §§290.38-290.40, 290.42-290.47

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Health and Safety Code, §341.031 which gives the commission the power to establish standards for public drinking water and to adopt rules to implement the federal Safe Drinking Water Act. Section 290.39 implements Health and Safety Code, §§341.0315, 341.035, 341.0355, and 341.0356.

§290.38. Public Drinking Water Supply Systems.

The following words and terms, when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise. If a word or term used in this title is not contained in the following list, its definition shall be as shown in Title 40 Code of Federal Regulations §141.2. Other technical terms used shall have the meanings or definitions listed in the latest edition of "Glossary, Water and Wastewater Control Engineering," prepared by a joint editorial board representing the American Public Health Association, American Society of Civil Engineers, American Water Works Association, and the Water Pollution Control Federation.

(1) ABPA-The American Backflow Prevention Association, P.O. Box 1563, Akron, Ohio 44309-1563.

(2) ANSI standards-The standards of the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018.

(3) Approved laboratory-A laboratory certified and approved by the Texas Department of Health to analyze water samples to determine their compliance with maximum allowable constituent levels.

(4) ASME standards-The standards of the American Society of Mechanical Engineers, 346 East 47th Street, New York, New York 10017.

(5) ASSE-The American Society of Sanitary Engineering, P.O. Box 40362, Bay Village, Ohio 44140.

(6) ASTM standards-The standards of the American Society for Testing and Materials, 1916 Race Street, Philadelphia, Pennsylvania 19102.

(7) Auxiliary power-Either mechanical power or electric generators which can enable the system to provide water under pressure to the distribution system in the event of a local power failure. With the approval of the executive director, dual primary electric service may be considered as auxiliary power in areas which are not subject to large scale power outages due to natural disasters.

(8) AWWA standards-The latest edition of the applicable standards as approved and published by the American Water Works Association, 6666 W. Quincy Avenue, Denver, Colorado 80235.

(9) Community water system-A public water system which has a potential to serve at least 15 residential service connections on a year-round basis or serves at least 25 residents on a year-round basis.

(10) Connection-A single family residential unit or each commercial or industrial establishment to which drinking water is supplied from the system. As an example, the number of service connections in an apartment complex would be equal to the number of individual apartment units. When enough data is not available to accurately determine the number of connections to be served or being served, the population served divided by three will be used as the number of connections for calculating system capacity requirements. Conversely, if only the number of connections is known, the connection total multiplied by three will be the number used for population served. For the purposes of this definition, a dwelling or business which is connected to a system that delivers water by a constructed conveyance other than a pipe shall not be considered a connection if:

(A) the water is used exclusively for purposes other than those defined as human consumption (see human consumption definition);

(B) the commission determines that alternative water to achieve the equivalent level of public health protection provided by the drinking water standards is provided for residential or similar human consumption, including, but not limited to, drinking and cooking; or

(C) the commission determines that the water provided for residential or similar human consumption is centrally treated or is treated at the point of entry by a provider, a pass through entity, or the user to achieve the equivalent level of protection provided by the drinking water standards.

(11) Contamination-The presence of any foreign substance (organic, inorganic, radiological or biological) in water which tends to degrade its quality so as to constitute a hazard or impair the usefulness of the water.

(12) Cross-connection-A physical connection between a public water system and either another supply of unknown or

questionable quality, any source which may contain contaminating or polluting substances, or any source of water treated to a lesser degree in the treatment process.

(13) Disinfectant-Any oxidant, including but not limited to chlorine, chlorine dioxide, chloramines, and ozone added to the water in any part of the treatment or distribution process, that is intended to kill or inactivate pathogenic microorganisms.

(14) Disinfection-A process which inactivates pathogenic organisms in the water by chemical oxidants or equivalent agents.

(15) Drinking water-All water distributed by any agency or individual, public or private, for the purpose of human consumption or which may be used in the preparation of foods or beverages or for the cleaning of any utensil or article used in the course of preparation or consumption of food or beverages for human beings. The term "Drinking Water" shall also include all water supplied for human consumption or used by any institution catering to the public.

(16) Drinking water standards-The commission rules covering drinking water standards in §§290.101-290.121 of this title (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Supply Systems).

(17) Elevated storage capacity-That portion of water which can be stored at least 80 feet above the highest service connection in the pressure plane served by the storage tank.

(18) Emergency power-Either mechanical power or electric generators which can enable the system to provide water under pressure to the distribution system in the event of a local power failure. With the approval of the executive director, dual primary electric service may be considered as emergency power in areas which are not subject to large scale power outages due to natural disasters.

(19) Ground water under the influence of surface water-Any water beneath the surface of the ground with:

(A) significant occurrence of insects or other macroorganisms, algae, or large-diameter pathogens such as Giardia Lambia or Cryptosporidium, or

(B) significant and relatively rapid shifts in water characteristics such as turbidity, temperature, conductivity, or pH which closely correlate to climatological or surface water conditions.

(20) Health hazard-Any conditions, devices or practices in the water supply system and/or its operation which create, or may create, a danger to the public health and well-being of the water consumer. An example of a health hazard is a structural defect in the water supply system, whether of location, design, or construction, which may regularly or occasionally prevent satisfactory purification of the water supply or cause it to be contaminated from extraneous sources.

(21) High health hazard-A cross-connection, potential cross-connection, or other situation involving any substance that could cause death, illness, spread of disease, or has a high probability of causing such effects if introduced into the potable drinking water supply.

(22) Human consumption-Uses by humans in which water can be ingested into or absorbed by the human body. Examples of these uses include, but are not limited to drinking, cooking, brushing teeth, bathing, washing hands, washing dishes, and preparing foods.

(23) Interconnection-A physical connection between two public water supply systems.

(24) Intruder-resistant fence-A fence six feet or more in height, constructed of wood, concrete, masonry, or metal with three strands of barbed wire extending outward from the top of the fence at a 45 degree angle and have the smooth side of the fence on the outside wall. In lieu of the barbed wire, the fence must be eight feet in height. The fence must be in good repair and close enough to surface grade to prevent intruder passage.

(25) Licensed Professional Engineer-An engineer who maintains a current license through the Texas Board of Professional Engineers in accordance with its requirements for professional practice.

(26) Maximum daily demand-In the absence of verified historical data, maximum daily demand means 2.4 times the average daily demand of the system.

(27) MCL-Maximum Contaminant Level.

(28) mg/l-Milligrams per liter, a measure of concentration, equivalent to and replacing parts per million (ppm) in the case of dilute solutions.

(29) Monthly Reports of Water Works Operations-The daily record of data relating to the operation of the system facilities compiled in a monthly report.

(30) NFPA standards-The standards of the National Fire Protection Association, 1 Batterymarch Park, Quincy, Massachusetts, 02269-9101.

(31) NSF-The National Sanitation Foundation and refers to the listings developed by the Foundation, P.O. Box 1468, Ann Arbor, Michigan 48106.

(32) Noncommunity water system-Any public water system which is not a community system.

(33) Nontransient noncommunity water system-A public water system that is not a community water system and regularly serves at least 25 of the same persons at least six months out of the year.

(34) psi-Pounds per square inch.

(35) Peak hourly demand-In the absence of verified historical data, peak hourly demand means 1.25 times the maximum daily demand (prorated to an hourly rate) if a public water supply meets the commission's minimum requirements for elevated storage capacity and 1.85 times the maximum daily demand (prorated to an hourly rate) if the system uses pressure tanks or fails to meet the commission's minimum elevated storage capacity requirement.

(36) Plumbing inspector-Any person employed by a political subdivision for the purpose of inspecting plumbing work and installations in connection with health and safety laws and ordinances, who has no financial or advisory interest in any plumbing company, and who has successfully fulfilled the examinations and requirements of the Texas State Board of Plumbing Examiners.

(37) Plumbing ordinance-A set of rules governing plumbing practices which are at least as stringent and comprehensive as one of the following nationally recognized codes:

(A) Southern Standard Plumbing Code.

(B) Uniform Plumbing Code.

(C) National Standard Plumbing Code.

(38) Public health engineering practices-Requirements in these sections or guidelines promulgated by the commission.

(39) Public water system-A system for the provision to the public of water for human consumption through pipes or other constructed conveyances, which includes all uses described under the definition for drinking water. Such a system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year. This term includes any collection, treatment, storage, and distribution facilities under the control of the operator of such system and used primarily in connection with such system; and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. Two or more systems with each having a potential to serve less than 15 connections or less than 25 individuals but owned by the same person, firm, or corporation and located on adjacent land will be considered a public water system when the total potential service connections in the combined systems are 15 or greater or if the total number of individuals served by the combined systems total 25 or more at least 60 days out of the year. Without excluding other meanings of the terms "individual" or "served," an individual shall be deemed to be served by a water system if he lives in, uses as his place of employment, or works in a place to which drinking water is supplied from the system.

(40) Sanitary control easement-A legally binding document securing all land, within 150 feet of a public water supply well location, from pollution hazards. This document must fully describe the location of the well and surrounding lands and must be filed in the County records to be legally binding.

(41) Sanitary survey-An onsite review of the water source, facilities, equipment, operation and maintenance of a public water system, for the purpose of evaluating the adequacy for producing and distributing safe drinking water.

(42) Service pump-Any pump that takes treated water from storage and discharges to the distribution system.

(43) Transfer pump-Any pump which conveys water from one point to another within the treatment process or which conveys water to storage facilities prior to distribution.

(44) Transient noncommunity water system-A public water system that is not a community water system and serves at least 25 persons at least 60 days out of the year, yet by its characteristics, does not meet the definition of a nontransient noncommunity water system.

(45) Uniform Fire Code-The standards of the International Conference of Building Officials, 5360 Workman Mill Rd., Wittier, California, 90601-2298.

(46) Water Supply Protection Specialist-Any person who holds a license endorsement issued by the Texas State Board of Plumbing Examiners to engage in the inspection, in connection with health and safety laws and ordinances, of the plumbing work or installation of a public water system distribution facility or of customer owned plumbing connected to that system's water distribution lines.

§290.39. General Provisions.

(a) Authority for requirements. The Texas Health and Safety Code, Chapter 341, Subchapter C prescribes the duties of the commission relating to the regulation and control of public drinking water systems in the State. These statutes require that the commission ensure that public water systems: supply safe drinking water in adequate quantities, are financially stable and technically sound, promote use of regional and area-wide drinking water systems, and review completed plans and specifications and business plans for all contemplated public water systems not exempted by Health and Safety Code §341.035(d). The statutes also require the commission be notified of any subsequent material changes, improvements, additions, or alterations in existing systems and, consider compliance history in approving new or modified public water systems.

(b) Reason for these sections and minimum criteria. These sections have been adopted to ensure regionalization and area-wide options are fully considered, the inclusion of all data essential for comprehensive consideration of the contemplated project, or improvements, additions, alterations or changes thereto and to establish minimum standardized public health design criteria in compliance with existing state statutes and in accordance with good public health engineering practices. In addition, minimum acceptable financial, managerial, technical and operating practices must be specified to ensure that facilities are properly operated to produce and distribute a safe, potable water.

(c) Required actions and approvals prior to construction. A person may not begin construction of a public drinking water supply system unless the executive director determines the following requirements have been satisfied and approves construction of the proposed system.

(1) A person proposing to install a public drinking water system within the extraterritorial jurisdiction of a municipality; or within one-half mile of the corporate boundaries of a district, or other political subdivision providing the same service; or within one-half mile of a certificated service area boundary of any other water service provider shall provide to the executive director evidence that:

(A) written application for service was made to that provider; and

(B) all application requirements of the service provider were satisfied, including the payment of related fees.

(2) If a person is not required to complete the steps in paragraph (1) of this subsection or if a person completes the steps in paragraph (1) of this subsection, and is denied service or determines the existing provider's cost estimate is not feasible for the development to be served, the person shall submit to the executive director:

(A) plans and specifications for the system; and

(B) a business plan for the system.

(d) Submission of plans.

(1) Plans, specifications, and related documents will not be considered unless they have been prepared under the direction of a licensed professional engineer. All engineering documents must have engineering seals, signatures and dates affixed in accordance with the rules of the Texas State Board of Registration for Professional Engineers.

(2) Detailed plans must be submitted for examination at least 30 days prior to the time that approval, comments or recommendations are desired. From this, it is not to be inferred that final action will be forthcoming within the time mentioned.

(3) The limits of approval are as follows.

(A) The commission's Water Utilities Division furnishes consultation services as a reviewing body only, and its licensed professional engineers may neither act as design engineers nor furnish detailed estimates.

(B) The commission's Water Utilities Division does not examine plans and specifications in regard to the structural features of design, such as strength of concrete or adequacy of

reinforcing. Only the features covered by these sections will be reviewed.

(C) The consulting engineer and/or owner must provide surveillance adequate to assure that facilities will be constructed according to approved plans and must notify the commission's Water Utilities Division in writing upon completion of all work.

(e) Submission of planning material. In general, the planning material submitted shall conform to the following requirements.

(1) Engineering reports are required for new water systems and all surface water treatment plants. Engineering reports are also required when design or capacity deficiencies are identified in an existing system. The engineering report shall include, at least, coverage of the following items:

(A) statement of the problem or problems;

(B) present and future areas to be served, with population data;

(C) the source, with quantity and quality of water available;

(D) present and estimated future maximum and minimum water quantity demands;

(E) description of proposed site and surroundings for the water works facilities;

(F) type of treatment, equipment, and capacity of facilities;

(G) basic design data, including pumping capacities, water storage and flexibility of system operation under normal and emergency conditions; and

(H) the adequacy of the facilities with regard to delivery capacity and pressure throughout the system.

(2) All plans and drawings submitted may be printed on any of the various papers which give distinct lines. All prints must be clear, legible and assembled to facilitate review.

(A) The relative location of all facilities which are pertinent to the specific project shall be shown.

(B) The location of all abandoned or inactive wells within 1/4 mile of a proposed wellsite shall be shown or reported.

(C) If staged construction is anticipated, the overall plan shall be presented, even though a portion of the construction may be deferred.

(D) A general map or plan of the municipality, water district, or area to be served shall accompany each proposal for a new water supply system.

(3) Specifications for construction of facilities shall accompany all plans. If a process or equipment which may be subject to probationary acceptance because of limited application or use in Texas is proposed, the commission, at its discretion, may give limited approval. In such case, the owner must be given a bonded guarantee from the manufacturer covering acceptable performance. The specifications shall include a statement that such a bonded guarantee will be provided the owner and shall also specify those conditions under which the bond will be forfeited. Such bond will be transferrable. The bond shall be retained by the owner and transferred when a change in ownership occurs.

(4) Copies of each fully executed sanitary control easement shall be provided to the commission prior to placing the well into service. Each original easement document must be recorded in the deed records at the county courthouse. See §290.47(c) of this title (relating to Appendices) for a suggested form.

(f) Submission of business plans. The prospective owner of the system or the person responsible for managing and operating the system must submit a business plan to the executive director that demonstrates that the owner or operator of the proposed system has available the financial, managerial, and technical capability to ensure future operation of the system in accordance with applicable laws and rules. The executive director may order the prospective owner or operator to demonstrate financial assurance to operate the system in accordance with applicable laws and rules as specified in Chapter 37, Subchapter O, of this title (relating to Financial Assurance for Public Drinking Water Systems and Utilities), or as specified by commission rule, unless the executive director finds that the business plan demonstrates adequate financial capability. A business plan shall include the information and be presented in a format prescribed by the executive director. For community water systems, the business plan shall contain, at a minimum, the following elements:

(1) description of areas and population to be served by the potential system;

(2) description of drinking water supply systems within a two mile radius of the proposed system, copies of written requests seeking to obtain service from each of those drinking water supply systems, and copies of the responses to the written requests;

(3) time line for construction of the system and commencement of operations;

(4) identification of and costs of alternative sources of supply;

(5) selection of the alternative to be used and the basis for that selection;

(6) identification of the person or entity which owns or will own the drinking water system and any identifiable future owners of the drinking water system;

(7) identification of any other businesses and public drinking water system(s) owned or operated by the applicant, owner(s), parent organization, and affiliated organization(s);

(8) an operations and maintenance plan which includes sufficient detail to support the budget estimate for operation and maintenance of the facilities;

(9) assurances that the commitments and resources needed for proper operation and maintenance of the system are, and will continue to be, available, including the qualifications of the organization and each individual associated with the proposed system;

(10) for retail public utilities as defined by Texas Water Code, §13.002:

(A) projected rate revenue from residential, commercial, and industrial customers; and

(B) pro forma income, expense, and cash flow statements;

(11) identification of any appropriate financial assurance, including those being offered to capital providers;

(12) a notarized statement signed by the owner or responsible person that the business plan has been prepared under his direction and that he is responsible for the accuracy of the information; and

(13) other information required by the executive director to determine the adequacy of the business plan or financial assurance.

(g) Business plans not required. A person is not required to file a business plan if the person:

(1) is a county;

(2) is a retail public utility as defined by Texas Water Code, §13.002, unless that person is a utility as defined by that section;

(3) has executed an agreement with a political subdivision to transfer the ownership and operation of the water supply system to the political subdivision; or

(4) is a noncommunity nontransient water system and the person has demonstrated financial assurance under Texas Health & Safety Code, Chapter 361 or 382 or Texas Water Code, Chapter 26.

(h) Beginning and completion of work.

(1) No person may begin construction on a new public water system before receiving written approval of plans and specifications and, if required, approval of a business plan from the executive director. No person may begin construction of modifications to a public water system without providing notification to the executive director and submitting and receiving approval of plans and specifications if requested in accordance with subsection (j) of this section.

(2) The commission's Water Utilities Division shall be notified in writing by the design engineer or the owner when construction is started.

(3) Upon completion of the water works project, the engineer or owner will notify the commission's Water Utilities Division in writing as to its completion and attest to the fact that the completed work is substantially in accordance with the plans and change orders on file with the commission.

(i) Changes in plans and specifications. Any addenda or change orders which may involve a health hazard or relocation of facilities, such as wells, treatment units, and storage tanks, shall be submitted to the executive director for review and approval.

(j) Changes in existing systems or supplies. Changes or additions to existing systems which result in an increase in production, treatment, or storage capacity shall require written notification to the executive director. Changes or additions in existing distribution systems shall require written notification to the executive director when the change or addition is greater than 10% of the existing distribution capacity or 250 connections, whichever is smaller. The executive director shall determine whether engineering plans and specifications will be required after initial notification of the extent of the modifications. The owner shall submit plans and specifications as determined by the executive director in accordance with subsection (c) of this section. The commission will not require planning material on distribution line extensions from a political entity (county, municipality, district or water authority) when the entity has its own internal engineering review staff or is required, by local ordinance, to submit the material to another political entity for review and approval. The review staff must be separate and apart from the engineering staff or firm charged with the design of the distribution extension under review. The planning material must be reviewed and certified to be in compliance with §290.44 of this title (relating to Water Distribution) by a licensed professional engineer in the employ of the review entity. The effect of the distribution system improvements on compliance with §290.45 of this title (relating to Minimum Water System Capacity Requirements) must be evaluated. Should the proposed distribution system improvements result in an exceedance of the capacity requirements, written notice of the extent of the proposed improvements must be submitted to the executive director.

(k) Planning material acceptance. Planning material for improvements to an existing system which does not meet the requirements of all sections of these regulations will not be considered unless the necessary modifications for correcting the deficiencies are included in the proposed improvements, or unless the executive director determines that reasonable progress is being made toward correcting the deficiencies and no immediate health hazard will be caused by the delay.

(l) Exceptions. Requests for exceptions to one or more of these sections shall be considered on an individual basis. Any water system which requests an exception must demonstrate to the satisfaction of the executive director that the exception will not compromise the public health or result in a degradation of service or water quality.

(1) The exception must be requested in writing and must be substantiated by carefully documented data. The request for an exception should precede the submission of engineering plans and specifications for a proposed project.

(2) Any exception granted by the commission is subject to revocation.

(3) Any request for an exception which is not approved by the commission in writing is denied.

(m) Notification of system startup or reactivation. The owner or responsible official must provide written notification to the commission of the startup of a new public water supply system or reactivation of an existing public water supply system. This notification must be made immediately upon meeting the definition of a public water system as defined in §290.38 of this title (relating to Definitions).

(n) The commission may require the owner or operator of a public drinking water supply system that was constructed without the approval required by Texas Health & Safety Code, §341.035, that has a history of noncompliance with Texas Health and Safety Code, Chapter 341, Subchapter C or commission rules, or that is subject to a commission enforcement action to take the following action:

(1) Provide the executive director with a business plan that demonstrates that the system has available the financial, managerial, and technical resources adequate to ensure future operation of the system in accordance with applicable laws and rules. The business plan must fulfill all the requirements for a business plan as set forth in subsection (f) of this section.

(2) Provide adequate financial assurance of the ability to operate the system in accordance with applicable laws and rules. The executive director will set the amount of the financial assurance, after the business plan has been reviewed and approved by the executive director. The amount of the financial assurance will equal the difference between the amount of projected system revenues and the projected cash needs for the period of time prescribed by the executive director. The form of the financial assurance will be as specified in Chapter 37, Subchapter O, of this title (relating to Financial Assurance for Public Drinking Water Systems and Utilities), and will be as specified by the executive director.

(3) If the executive director relies on rate increases or customer surcharges as the form of financial assurance, such funds shall be deposited in an escrow account as specified in Chapter 37,

Subchapter O, of this title (relating to Financial Assurance for Public Drinking Water Systems and Utilities), and released only with the approval of the executive director.

§290.45. Minimum Water System Capacity Requirements.

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

(g) Exceptions. Requests for exceptions to one or more of these Minimum Water System Capacity Requirements shall be considered on an individual basis. Any water system which requests an exception must demonstrate to the satisfaction of the executive director that the exception will not compromise the public health or result in a degradation of service or water quality as specified in §290.39(l) of this title (relating to General Provisions).

(1) (No change.)

(2) Although elevated storage is the preferred method of pressure maintenance for systems of over 2,500 connections, it is recognized that local conditions may dictate the use of alternate methods utilizing hydropneumatic tanks and on-site emergency power equipment. Exceptions to the elevated storage requirements may be obtained based on application to and approval of the executive director. Special conditions apply to systems qualifying for an elevated storage exception.

(A) The system must submit documentation sufficient to assure that the alternate method of pressure maintenance is capable of providing a safe and uninterrupted supply of water under pressure to the distribution system during all demand conditions.

(i) A signed and sealed statement by a licensed professional engineer must be provided which certifies that the pressure maintenance facilities are sized, designed and capable of providing a minimum pressure of at least 35 psi at all points within the distribution network at flow rates of 1.5 gpm per connection or greater. In addition, the engineer must certify that the emergency power facilities are capable of providing the greater of the average daily demand or 0.35 gpm per connection while maintaining distribution pressures of at least 35 psi, and that emergency power facilities powering production and treatment facilities are capable of supplying at least 0.35 gpm per connection to storage.

(ii) The system's licensed professional engineer must conduct a hydraulic analysis of the system under peak conditions. This must include an analysis of the time lag between the loss of the normal power supply and the commencement of emergency power as well as the minimum pressure that will be maintained within the distribution system during this time lag. In no case shall this minimum pressure within the distribution system be less than 20 psi. The results of this analysis must be submitted to the commission for review.

(iii) For existing systems, the system's licensed professional engineer must provide continuous 24 hour pressure chart recordings of distribution pressures maintained during past power failures, if available. The period reviewed should not be less than three years.

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

(3) (No change.)

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

Filed with the Office of the Secretary of State on January 15, 1999.

TRD-9900318

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Effective date: February 4, 1999

Proposal publication date: October 23, 1998

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

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Subchapter F. Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Supply Systems

30 TAC §290.102, §290.116

The amendments are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Health and Safety Code, §341.031 which gives the commission the power to establish standards for public drinking water and to adopt rules to implement the federal Safe Drinking Water Act.

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

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Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

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

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Chapter 291. Utility Regulations

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§291.1, 291.3, 291.21, 291.25, 291.29, 291.31, 291.32, 291.41, 291.76, 291.87, 291.93, 291.101-291.103, 291.106, 291.107, 291.109, 291.111, 291.113, 291.114, and 291.138; the repeal of §291.15 and §291.16; and new §§291.15, 291.34, 291.140, 291.144, and 291.150-291.153, concerning Utility Regulation. Sections 291.3, 291.29, 291.31, 291.32, 291.34, 291.41, 291.87, 291.93, 291.102, 291.106, 291.109, 291.111, 291.114, 291.144, 291.151, and 291.152 are adopted with changes to the proposed text as published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10818). The amendments to §§291.1, 291.21, 291.25, 291.76, 291.101, 291.103, 291.107, 291.113, and 291.138; the repeal of §291.15 and §291.16; and new §§291.15, 291.140, 291.150, and 291.153 are adopted without changes and will not be republished.

Simultaneous with the publication of the proposed rules on October 23, 1998, the commission also proposed amendments to 30 TAC §§291.121-291.127, concerning Utility Submetering. The commission will take final action on those Utility Submetering rules at a later date and will publish those final rules in a later *Texas Register.*

EXPLANATION OF THE ADOPTED RULES

The purpose of the adopted amendments is to implement sections of Senate Bill 1, Article 5, for Notice of Wholesale Water Supply Contract, and Article 6, 75th Legislature, 1997, related to ensuring the technical, managerial, and financial capacity of public water and sewer utility service providers and rate flexibility; streamline or clarify existing rules, and update references and definitions.

The provisions of the current §291.15, relating to Jurisdiction of Municipality: Surrender of Jurisdiction, are moved to a new §291.150, relating to Jurisdiction of Municipality: Surrender of Jurisdiction. A new provision is adopted for §291.15, Notice of Wholesale Water Supply Contract. This section is intended to implement new Texas Water Code, §13.143 enacted by Senate Bill 1, 75th Legislature, 1997. The provisions of the current §291.16, relating to Applicability of Commission Service Rules Within the Corporate Limits of a Municipality, are moved to a new §291.151, relating to the same subject matter.

Section 291.21, relating to Form and Filing of Tariffs, adds provisions regarding rate adjustments to implement phased rates under §291.34, relating to Alternative Rate Methods, and downward rate adjustments to the list of minor changes the executive director may make to tariffs. Subsection (c)(8) is added to add the requirement that the tariff must address the form of payments that will be accepted for utility services.

Section 291.29, relating to Interim Rates, was reworded to clarify that certain actions taken by the commission may also be taken by an administrative law judge as provided by Texas Water Code, §5.311, as amended by Senate Bill 1 (1997). The section also updates references to the State Office of Administrative Hearings (SOAH). Both the word "Judge" and "SOAH" are defined in 30 TAC Chapter 3, concerning Definitions. This section also makes other minor amendments designed to clarify meaning.

Section 291.31(e), relating to Cost of Service, provides for, over and above what is allotted under traditional cost of service in a rate case, a positive acquisition adjustment for utility plant, property, and equipment acquired from another retail public utility in a sale, merger, etc., of utility service areas. A positive acquisition adjustment is intended to provide an incentive for utilities to facilitate consolidation and regionalization. The subsection provides eligibility criteria for when an acquisition adjustment is allowed, a methodology for calculating the amount of the adjustment, and procedural requirements. The rule would only allow an acquisition adjustment for a sale and transfer of a utility that has filed an application on or after September 1, 1997, and the sale on that application closed thereafter.

The adopted §291.31(d), relating to Recovery of Positive Acquisition Adjustment, would allow a positive acquisition adjustment for transfers where the utility is acquired through a stock purchase with a subsequent asset transfer and which is a part of what is essentially a single sale transaction.

Amendments to §291.32, relating to Rate Design, authorize a utility to seek and obtain, in a rate change proceeding, a water conservation surcharge. The water conservation surcharge would allow a utility to generate revenue above the utility's usual cost of service as authorized by Texas Water Code, §13.183, as amended by Senate Bill 1, 75th Legislature, 1997. The subsection sets out criteria for when a water conservation surcharge would be permissible, and establishes restrictions on the disposition of funds collected by the surcharge. Subsection (d) provides that the commission may, in a rate proceeding, authorize collection of an additional surcharge to provide funds for debt repayments and reserve funds.

The new §291.34, relating to Alternative Rate Methods, implements Texas Water Code, §13.183 and §13.184, as amended by Senate Bill 1, 75th Legislature, 1997, which authorize the commission to set utility rates on factors other than rate of return and those specified in Texas Water Code, §13.185. The new section implements three non-traditional rate methods: single issue rate changes, phased and multi-step rate changes, and the cash needs method. The single issue rate change allows a utility to file a simplified rate case limited to only one issue. A utility may wish to consider a single issue rate change when faced with a cost increase in a single cost component. Phased and multi-step rate changes allow a utility to phase in a rate increase approved in one rate case rather than filing several separate rate cases. The cash needs method of rate setting allows the recovery of reasonable and prudently incurred debt service cost, including principal, interest, and reasonable cash reserves and other expenses not allowed under standard methods of establishing rates. The new section sets out criteria and conditions for the use of each of these alternative rate methods.

The commission intends that the alternative rate method of §291.34 would be available only for rate applications filed after the effective date of the final rule. Rate applications filed before the effective date of the final rule must use the traditional rate methods specified in the current rules.

Amendments to §291.41, relating to Appeal of Ratemaking Pursuant to the Texas Water Code, §13.043, update statutory references, add a notice requirement, and are intended to relate to actions for which the commission has express statutory authority. The notice requirement expressly provides for the existing practice of the commission to require the retail public utility to provide written notice of a hearing being held pursuant to §291.41(c) to all affected customers, rather than having notice provided by the chief clerk.

Amendments to §291.76, relating to Regulatory Assessment, are intended to require the utility to remit the regulatory assessment fee to the commission on an annual basis, rather than allowing the utility the option of paying on a quarterly basis, and to remove the allowance for retaining 10% when payments are made quarterly, in order to be consistent with statutory authority.

Amendments to §291.87, relating to Billing, set out procedures for a utility to implement a voluntary program to collect voluntary contributions to a volunteer fire department or emergency medical service as part of the utility's regular customer bill.

Amendments to §291.93, relating to Adequacy of Water Utility Service, change the time for filing a report regarding system capacity. Under the adopted rule, a retail public utility must analyze its system capacity after a commission field inspection. If the retail public utility has reached 85% of its capacity, it must file a planning report explaining how it will provide service to the remaining areas within its certificated area, within 90 days from the date of the commission letter detailing the results of the inspection. This change was made to conform to the statute and agency practice.

Amendments to Subchapter G, relating to Certificates of Convenience and Necessity, implement provisions of Senate Bill 1, Article 6, 75th Legislature, 1997. Section 291.101, relating to Certificate Required, would add a condition that a water

district may not provide service within an area where a retail public utility holds a certificate of convenience and necessity, or within the boundaries of another water district, without the district's consent unless the water district proposing to provide service has obtained a certificate of convenience and necessity for that area from the commission. Amendments to §291.102, relating to Criteria for Considering and Granting Certificates or Amendments, update the section to conform to amendments to Texas Water Code, §13.241 and §13.246 made by Senate Bill 1, 75th Legislature, 1997, and to add requirements to demonstrate that regionalization or consolidation is not economically feasible. Amendments to §291.103, relating to Certificates Not Required, update the section to conform to amendments to Texas Water Code, §49.352. The amendments to §291.109, relating to Report of Sale, Merger, etc.; Investigation; Disallowance of Transaction, add requirements for the applicant in a sale or merger of a water or sewer system to demonstrate the financial, managerial, and technical capability to provide continuous and adequate service. If the entity acquiring the system cannot demonstrate adequate financial capability, the commission may require the provision of financial assurance in an amount determined by the commission. The form of the financial assurance will be as provided in the new 30 TAC Chapter 37, Subchapter O, concerning Financial Assurance for Public Drinking Water Systems and Utilities. The amendments to §291.111, relating to Purchase of Voting Stock in Another Utility, are similar to the provisions of §291.109, except those provisions that relate to purchase of a water system by transferring of voting stock in a utility. Amendments to §291.113, relating to Revocation or Amendment of Certificate, implement Texas Water Code, §13.254 as amended by Senate Bill 1, 75th Legislature, 1997, and generally track that statute. Other amendments in this subchapter update references to current statutes.

Section 291.106(b)(1), relating to Notice for Application for Certificates of Convenience and Necessity, provides that cities and other retail public utilities within a specified distance from the proposed service area must receive notice of an application for issuance or amendment of a certificate of public convenience and necessity. The adopted rule increases the specified distance from a two-mile radius to a five-mile radius for applications for a new Certificate of Convenience and Necessity. By this amendment, the commission intends in applications for Certificates of Convenience and Necessity to solicit comment from a wider audience on the appropriateness of the proposed system versus regional service from an existing system. The commission believes that a more rigorous inquiry on regionalization than is the current practice is legislatively mandated by Health and Safety Code, §341.0315(b) and Water Code, §26.003.

Section 291.138, relating to Filing of Rate Data, is intended to remove a requirement that providers of water or sewer service for resale must file an annual report. In place of the mandatory report, the rule would allow the commission the option to require that a report be filed. Providers of water or sewer service for resale would only have to file a report within 30 days of receiving a written request for the report from the executive director.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of "major environmental rule" because the specific intent of the amendment is to regulate water and sewer service utilities and not to protect the environment or reduce risks to human health from environmental exposure. The provisions in the adopted rules related to demonstrating the technical, managerial, and financial capacity of utilities are in partial response to the federal Safe Drinking Water Act Amendments of 1996, and are also specifically required by Senate Bill 1, Article 5 (Notice of Wholesale Water Supply Contract), and Article 6, 75th Legislature, 1997. The adopted rules do not exceed an express requirement of state or federal law.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rules is to implement sections of Senate Bill 1, 75th Legislature, 1997, specifically Article 5, relating to Notice of Wholesale Water Supply Contracts, and Article 6, relating to ensuring the technical, managerial, and financial capacity of utilities; to allow the commission to set water and sewer utility rates based on factors other than rate of return and those specified in Texas Water Code, §13.185; streamline existing rules; and to make the rules consistent with recent statutory changes. The rules will substantially advance this specific purpose by requiring applicants for Certificates of Convenience and Necessity to demonstrate or provide financial assurance of its ability to provide service; specifying alternative rate methodologies for water and sewer utilities; eliminating certain required reports to the agency; clarifying existing rules; and amending rules to reflect recent legislative changes. Promulgation and enforcement of these rules will not burden private real property because the requirement to demonstrate its ability to provide service is a procedural requirement designed to demonstrate the financial capability of the utility; and because existing methodologies for setting water or sewer rates are retained in effect. The adopted rules only provide additional methodologies that a water or sewer utility may choose to use in a rate case.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the adopted rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rules are not subject to the CMP.

RULES REVIEW

The commission, concurrently with these adopted amendments to Chapter 291, has completed its review of Chapter 291, concerning Utility Regulation. This review is in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997. See the Adopted Rules Review section of this issue of the *Texas Register* for additional information on the rules review of this chapter.

HEARING AND COMMENTERS

A public hearing on these proposals was held on November 2, 1998, in Austin, and the comment period closed November 23, 1998.

Consumers Union (CU) and the Public Interest Counsel (PIC) of the commission submitted comments and generally supported the proposed amendments, while also offering specific changes.

The Independent Water and Sewer Companies of Texas, Inc., AquaSource, Inc., Associates Utility Company, Astro Commercial Enterprises, Bandera River Ranch Water Company, BBR Water Company, BBS Water Company, Blue Bell Manor Utility Company, Bradberry Water Supply, Bulverde Utility Company, Calico Water Supply, Castle Water, Champ's Water Company, Clear Lakes Water System, Comal Water Company, Council Creek Village, Crystal Springs Water Company, C & P Utilities, C-Willow Water Company, Deercreek Water Works, Deer Run Water System, Diamond Water Company, G & S Utilities, Harper Water Company, Hays Water Company, Highland Utilities, Hi-Texas Water Company, Holiday Oaks Water System, Industrial Utilities Services, Jones-Owen Company, Kerrville South Water Company, Lake McQueeny Estates Water Company, Lake Vista Utility Company, Lake Whitney Water Company, Lakewood Water Corporation, Lomas Water Company, Mitchell County Utility Company, Payne Utilities, Inc., Pine Trails Utilities, Plum Creek Water Company, Quadvest, Rivercrest Water Supply, Silverleaf Resorts, Southern Sanitary Corporation, Southern Utilities Company, Southern Water Corporation, Southwest Utilities, Tall Timbers Estates Utilities, Tall Timbers Utility Company, Inc., Tanglewood Water Company (Tanglewood), Technology/Hydraulics, Tecon Water Companies (Tecon), Texas Water Systems, Texoma Services Corporation (Texoma), Walker Water Works, Water Services, and Woodmark Utilities, submitted similar suggested changes. These commenters will hereinafter be referred to collectively as IWSCOT.

Also offering specific changes were: Texas Rural Water Association (TRWA), Philip Utilities Management Corporation (Philip), Tecon Water Companies (Tecon), and the City of Austin. The following paragraphs summarize the written and oral comments received.

COMMENTS ON RATE FLEXIBILITY AND RATEMAKING

IWSCOT questioned the intent and purpose of including the form of payment to be accepted by the utility in its tariff.

This language was included to allow the utility to be able to restrict the form of payment to reasonable forms of payment and to be allowed to reject payment for unreasonable forms of payment, such as paying the bill in pennies.

IWSCOT proposed that a capital reserve account including a debt service reserve be allowed in the cost of service.

The commission has made no changes in response to this comment. The commission recognizes that there can be a seasonal shortfall of revenues and that there is a need for planning and budgeting on the utility's part. Current ratemaking formulas include an extra allowance of 1/8th of operations and maintenance expense to be included in the cost of service. Additionally, while not designed specifically to fund a reserve, the inclusion of an allowance for depreciation does provide funds that are not cash flow related. Proposed rules would allow for the establishment of a debt service and debt reserve fund. Reserves for future capital needs have the effect of requiring current customers to pay for future improvements, the benefits of which they may not enjoy.

Texoma commented that the language related to the period of refund or surcharge which results from interim rates should be consistent. Subsection (f) requires that the retail public utility refund or credit against future bills all sums collected in excess of the rate finally ordered by the commission. Subsection (g) allows the retail public utility to collect the difference, in a reasonable number of monthly installments, from its customers for the amounts by which the rate finally ordered exceeds the interim rates.

The commission agrees with this comment and has added "...in a reasonable number of monthly installments..." to §291.29(f) to make the time periods consistent.

Tanglewood commented that the commission should ensure that the amount of an acquisition adjustment is sufficient to assure regionalization statewide.

The commission has made no changes in response to this comment. The rule includes adequate incentives to ensure that the acquisition adjustment will be effective statewide. If experience with the adopted rule does not bear this out, the commission will consider changes in future rule packages.

IWSCOT and Tecon commented that wording in §291.31(d)(1) should be changed from "...as part of a sale and transfer of utility service area..." to "...as part of a sale, transfer, or merger of utility service area...."

The commission agrees in part with the need for a change and has modified the language to agree with statutory language by changing it to "...as part of a sale, merger, etc. of utility service area...."

IWSCOT, Philip, and Tecon all recommended that the effective date of the acquisition adjustments be September 1, 1997. CU commented that the effective date should be the effective date of the rules and should not be retroactively applied. PIC commented that the rules should apply prospectively to all rate applications filed after the effective date of the rules.

The commission has made changes in response to these comments. Senate Bill 1 granted the commission the authority to promulgate alternative ratemaking rules and the use of an acquisition adjustment is included as an alternative ratemaking process. The authority was permissive, not mandatory, and it is not clear that the legislature mandated that an acquisition adjustment be included in these rules. While industry knew that the commission was considering including an acquisition adjustment in the rules, they were also kept informed and were told on a number of occasions that there were no assurances that they would be eligible for one prior to the effective date of the rules or that one would even be included in the proposed rules.

The commission believes that acquisition adjustments could help create an incentive for regionalization. There has been considerable discussion related to the criteria that must be included for a utility to obtain an adjustment. The proposed rules went through several iterations. CU, IWSCOT, and Tecon were included in several stakeholders meetings where the adjustment and other modifications to the rules were discussed.

Notwithstanding the arguments that purchasers should not be penalized for delays in the rulemaking process, many of the purchase agreements in question were tied to final adoption of the rules. Many other sales were consummated with the understanding that the purchaser may not be able to obtain an acquisition adjustment.

In many cases, the purchase prices were not based on actual value of the system assets, but set at an arbitrary per connection value, suggesting that, in several cases, the purchasers had not done a thorough evaluation of the system.

Additionally, the Notice of Intent to Sell Facilities and Transfer the Certificate of Convenience and Necessity form includes language that "[t]his transaction will have the following effect on the current customer's rates and services: _____." Because most of the sales are between regulated entities and: (1) rates cannot be changed as a result of the transaction; AND (2) acquisition adjustments have not been allowed, the typical response is "NONE." It should be pointed out that the notice is sent only to the customers of the system being acquired, not to any of the existing customers of the acquiring utility. As a result, none of the customers were given the opportunity at the time of the sale to evaluate the impact of the sales price and subsequent acquisition adjustment on their rates. The commission believes that the original notice is not sufficient to allow the effective date of this provision to be September 1, 1997, unless additional notice is provided. Without requiring additional notice provisions, the customers will not have been given an opportunity to know of the impact on their rates as a result of the sale and will only learn of the impact on their rates when they are provided notice of a rate change. The notice should also contain sufficient information to allow each customer to calculate the impact of the adjustment on an individual water bill.

In order for the commission to allow an acquisition adjustment on sales since September 1, 1997, that acquisition adjustment must meet the standards which will apply for all sales after the effective date of these rules. This means that the utility will be required to provide an analysis of the purchase price as described in the response to the next comment. Without a definitive standard, the determination of an adjustment would undoubtedly lead to contested hearings to determine the amount of the adjustment. And the final result would likely turn on the actual value of the system versus the purchase price with the commission having to be the final arbiter.

The commission agrees in part with the PIC comments that acquisition adjustments should be considered in all rate cases filed after the effective date of the rules; however, the commission believes that this would then make acquisition adjustments available to all previous sales, including those which occurred prior to September 1, 1997, during a time when there was no authority to consider them.

After considering all of the comments, the commission has changed §291.31(d)(1) to reflect that a positive acquisition adjustment will be considered for all sales resulting from applications filed on or after September 1, 1997, and the sale on that application closed thereafter, and that the adjustment is subject to the cap discussed in response to the next comment. The amount of the acquisition adjustment will be determined as part of a rate case.

CU, IWSCOT, Philip, and Tecon all commented on the need for a clearly defined standard for determining the amount of an eligible acquisition adjustment. IWSCOT and Tecon jointly requested a change to the guidelines for establishing the amount of an acquisition adjustment. They suggested that the standard should be based on a range of amounts based on a per capita impact to customers and the size of the customer base of the acquiring utility. Texoma agreed with using a range, but proposed different levels and also urged adoption of a method that did not favor only systems with a large customer base. Philip requested an alternative change to the guidelines. They suggested that the standard be limited to the difference between: the current depreciated replacement cost of the plant, property, and equipment being acquired; and its original cost less accumulated depreciation.

The commission agrees in part with these comments and has added language to the rules which further clarifies and defines the criteria for an acquisition adjustment. Basing the standard on a range of amounts based on per capita impacts still leaves the actual determination of the adjustment open to dispute and is not based on information that relates to the actual value of the assets being purchased. Because it is based on an arbitrary impact on rates, it can also have the effect of setting the sales price at artificial levels of value. It would also seem to give an unfair advantage to utilities with a large customer base. There are a number of smaller well-run utilities that should be included in the pool of potential buyers. The standard now included relates to the replacement cost of the assets being purchased. There are a number of indices that are accepted by the engineering and construction industry. The information could be easily verified by all parties. It would provide an even playing field for all size utilities. It would be the cap for the amount of the purchase price to be included in the rates of the customers. It would not restrict the amount of the purchase price. A purchaser could pay more, but it would have to look for economies of scale and improved operations to provide a return on those excess funds. This proposal would also ensure that the purchaser has done a thorough investigation into the infrastructure and reliability of the system, an important criteria for demonstrating financial, managerial, and technical capacity.

IWSCOT and Tecon commented that wording in §291.31(d)(1) should be changed from "...a positive acquisition adjustment may be allowed..." to "...a positive acquisition adjustment will be allowed...."

The commission agrees with the proposed language and has changed the wording accordingly. It should be noted that the purchaser bears the burden of proof that it has met all of the other criteria associated with this section.

IWSCOT, Philip, and Tecon either commented on or supported the recommendation that an acquisition adjustment should be allowed to the extent that the property is used and useful either at the time of the acquisition or as a result of the acquisition.

The commission agrees with the recommendation and has modified §291.31(d)(1) to reflect that.

Philip commented that there is no reason for an acquisition adjustment to be considered in light of the financial impact on the acquiring utilities existing customers.

The commission has made no changes in response to these comments. Acquisition adjustments can have an impact on the rates of the acquiring utility's customers if the utility intends to develop system-wide rates. Uncontrolled continued acquisitions can have an impact on the utility's ability to provide adequate service. There should be a benefit to the customers if they are going to have their rates increased.

Philip proposed that in addition to the requirement that the sale be the result of an arm's length transaction that there should be a requirement for full disclosure of any and all transactions

between the buyer and seller entered into as a part or condition of the sale being proposed.

The commission agrees, and has modified §291.31(d)(1)(D) to include that requirement.

IWSCOT and Tecon commented that the definition of a multi-stage sale found in §291.31(d)(1)(F) be changed to eliminate the word "concurrently."

The commission agrees in part with this comment. The commission's intent for the use of "concurrently" was to identify those transactions which really are just vehicles for tax savings and it never intended to limit the period of time for which they would be considered. However, the commission fully intended that the use of such a sales vehicle would be fully disclosed at the time of the application for a sale. The commission has modified §291.31(d)(1)(F) to remove the word "concurrently" and to add a requirement for full disclosure.

IWSCOT, Philip, and Tecon commented that an acquisition adjustment should be applied to a stand- alone stock purchase, not just as a part of a multi-staged stock purchase/asset transfer agreement. IWSCOT commented that the beneficial tax consequences of selling stock would result in lower sales prices and that without a stock sale, the price would be higher and the purchaser would have to pay more for the acquisition and would therefore have less funds with which to make necessary repairs and improvements.

The commission has made no changes in response to these comments. The commission has acknowledged that a multi-stage stock purchase/asset transfer is an acceptable reason for establishing an acquisition adjustment and it is included in the rules to address the concern that an acquisition adjustment would not be allowed because the transaction would have been between affiliated parties. Without allowing this multistage stock purchase/asset transfer, the new shareholder and the subsequent owner would be affiliates and would then be unable to obtain an acquisition adjustment. It was never contemplated that stock transfers would in and of themselves qualify for an acquisition adjustment.

Stand-alone stock transfers do not change the legal entity responsible for the utility. The corporation continues to be the responsible entity for maintaining the utility. Stock transfers are off-book transactions which have no effect on the financial records of the utility. There is no acceptable way to record the cost of purchasing the shares on the corporation's books.

It may be true that by disallowing a positive acquisition adjustment on a stand-alone stock sale, the purchase price and acquisition adjustment would be higher. However, with the implementation of a cap on the amount of an acquisition adjustment, this argument is moot.

The commission is not persuaded by the argument that the higher the purchase price, the lower the amount of funds the purchaser will have available to make necessary repairs and improvements. If a purchaser is to be considered to have financial, managerial, and technical capacity, then it must be able to show that it has not only the financial wherewithal to purchase the system and make the improvements, but also the managerial capacity to negotiate a sales price which will enable it to do both. Failing to consider the consequences of the sales price on its ability to maintain the utility for the long run is an indication that it does not have that capacity and perhaps should not have made the purchase.

Philip commented that the period of amortization for the acquisition adjustment should not exceed the weighted average remaining life of the acquired assets. CU commented that the return allowed on the acquisition adjustment should be limited to a risk-free rate of return.

The commission agrees with the Philip comment and has changed §291.31(d)(2) to include that language.

The commission has made no changes as a result of the CU comments. The use of the cap previously discussed would require that return is to be applied only to those costs which are related to the assets being purchased. Additionally, under the new rules, the purchaser will be required to meet other criteria for including the acquisition adjustment including improved service and quality of water. Operating the utility, even with an acquisition adjustment, carries an element of risk. Therefore, using the utility's weighted cost of capital as the rate of return acknowledges that risk.

IWSCOT, Philip, and Tecon commented that the determination of the amount of an acquisition could be determined at the time of the approval of the sale; however they recognize that an acquisition adjustment can only be implemented as a part of a rate change application. CU commented that allowing the determination of the acquisition adjustment as a part of the sale application can facilitate some sales. CU further commented that it would be appropriate only if the customers are provided with the same rights of notice and intervention as in a regular rate case and if the purchaser meets its burden of proof regarding specific, measurable, and verifiable customer benefits.

The commission has made no changes in response to this comment. The use of a cap for determining the amount of an acquisition adjustment provides the purchaser with a degree of certainty about the amount of the acquisition adjustment. Additionally, there is no statutory authorization to hold a hearing on a sale when the purchase price is in dispute. The commission does agree that the acquisition adjustment can only be implemented as a part of a rate change application.

IWSCOT and Tecon commented that language should be added which limits the amount of an acquisition adjustment in future sale/purchases.

The commission has made no changes in response to this comment. Since all acquisition adjustments are determined by relating the depreciated replacement cost to the book value of the assets, the argument is moot.

Tanglewood and Texoma commented that the rules relating to rate design need to be expanded to specifically detail the rate-making process to provide consistency of application of the rules.

The commission has made no changes in response to this comment. Consistency with the process is important, and the commission strives to maintain that consistency. However, no two utilities will have the same set of conditions or expenses. Promulgating rules to cover every variation and situation is not possible.

CU commented that the rules related to conservation rates should be applied to both residential and commercial customers equally.

The commission agrees with this comment and has modified the rules to include all customer classes.

CU commented that the commission needs to set a reasonable standard for the first block of usage for all customer classes.

The commission agrees that this is a worthy goal, but does not have the data necessary to make this determination at this time. Therefore, no changes were made in response to this comment.

CU commented that the authority for alternative rates is contained in Article 6 of Senate Bill 1, which is entitled "Small Community Assistance." CU further commented that the rules related to alternative rates do not contain such a distinction and therefore the rules should be limited to use by small systems.

The commission has made no changes in response to these comments. Small communities were not defined in Senate Bill 1, Article 6, 75th Legislature, 1997. Senate Bill 1 was divided into various sections for organizational purposes. The title is not determinative. One must look to the individual statutory provisions for applicability.

CU commented that Article 6 of Senate Bill 1 contains a requirement that "[I]n determining to use alternative ratemaking methodologies, the regulatory authority shall assure that rates, operations, and service are just and reasonable to the consumers and to the utilities."

The commission agrees with this comment and has added this language to §291.34(a).

CU commented that the rules would allow a utility to use several alternate rate methods at the same time or successively and that this should not be allowed.

The commission has made no changes in response to this comment. The rules contain three methodologies for alternate ratemaking: 1) single issue rate changes; 2) phased and multi-step rate changes; and 3) the cash needs method.

The single issue rate change may not be used if the utility is using the cash needs method. Additionally, the utility must file a complete rate change application within three years following the effective date of the single issue rate change request.

The phased or multi-step rate change may be used under either the utility or cash needs method. However, unless the utility meets certain criteria, it may not apply for another rate increase during the period of the phase-in rate intervals.

If the cash needs method is being used, the utility is barred from using the utility method for five years after beginning to use the cash needs method.

IWSCOT commented that a single issue rate case should be extended to include all of the ancillary costs associated with that single issue.

The commission disagrees in part with this comment. The basis for the rules related to Single Issue Rate Cases was that utilities often have a significant increase in a single cost, either from the addition of capital items or an increase in an operations and maintenance cost. Rather than require a full rate case filing for that one item, this provision would allow the utility to increase its rates for that one item. By limiting any proceedings to a single item with all other costs remaining the same, the utility could react quickly to that increase and not have to incur costs for a consultant or a protracted rate appeal process. However, the rules have been changed to include both depreciation and return for capital items. This would be a benefit to the customers for the same reasons.

CU commented that the rules should delineate the type and/or magnitude of the expenditures that would be eligible for this single issue treatment and that they should be limited to one per year.

The commission has made no changes in response to this comment. While designed to allow the utility to limit the costs associated with a full rate change application, it will still be required to meet all notice requirements and possible contested hearings. The utility will have to weigh the cost of the process against the cost of the increased expense. This alone should have the effect of limiting the size of the expense for which a single issue rate change is requested.

The rules limiting the timing for subsequent rate change applications apply to this type of change. The utility may not file any kind of rate change more often than every 12 months unless it meets the criteria set forth in the rules.

CU commented that the use of the word "elect" for both the phased and multi-step method and the cash needs method is inappropriate, but that the utility may "request" and the commission may approve the use of these methods.

The commission agrees with this comment and has replaced "elect" with "request" in the sections related to alternative rates. Further, it has changed the language of §291.34(c)(1) to improve the readability of that section.

CU commented that §291.34(c)(1)(G) would allow the utility to use the phased and multi- step rate methodology for any reason.

The commission is making no additional changes in response to this comment. As noted in the prior comment, the commission has changed the rules to reflect that a utility may request the use of this methodology. Section 291.34(c)(1)(G) was included to ensure that the utility had the opportunity to request the use of this methodology if there were other conditions not listed, but which are known and could have an impact on the financial capacity of the utility. The utility is required to provide information in the original notice of the phased rate.

IWSCOT commented that the Cash Needs method should be expanded to include a return for the utility's business and regulatory risks, even if there are no financial risks.

The commission has made no changes in response to this comment. The commission's intent was not to allow this method to be used in every instance. The rules contain criteria that limit its applicability to those cases where there is a clear indication that its use will enable a troubled utility to survive and acquire financial, managerial, and technical capacity and improve service to its customers. In most cases, this method eliminates most if not all of the risk for operating the utility.

CU commented that in order for a utility to share in any excess funds in the cash reserve account, that the utility must also demonstrate that it has also improved its financial, managerial, and technical capacity. CU further commented that customers should be provided notice and allowed comment on the distribution of the excess funds.

The commission agrees in part with these comments and has included language which ties the utility's share to both cost savings and an improvement in its financial, managerial, and technical capacity. The commission has also added language to this provision that requires that the utility provide an explanation of how the excess funds were distributed at the same time as the refund or credit is issued to the customers. In order for the utility

to keep a portion of the excess it must first demonstrate to the executive director that it has improved its financial, managerial, and technical capacity.

IWSCOT commented that the requirements that records be available at "all reasonable hours" as required by §291.74 needs to be clarified.

The commission has made no changes in response to this comment. The relevant section was not opened as a part of this package and therefore there was no notice of potential changes. However, the comment is being considered for inclusion in a subsequent rule package.

IWSCOT commented that late payment penalties should be increased from $2.00 or 5.0%, to $15 for residential customers and 10% for all other customers.

The commission agrees in part with this comment and has increased the late payment penalty to $5.00 or 10% for all customers.

The City of Austin commented that the phrase "the billed amount" relating to provisions for including voluntary contributions for certain emergency services is misleading.

The commission has modified the language in this provision to make it clear that the charge is voluntary and does not have to be paid by the customer.

IWSCOT and Water Services commented that the commission should include water rights held for future use in the cost of service and the rates to be charged to the customers.

The commission has made no change is response to this comment. The issue of whether water rights are used and useful in providing water service hinges on a number of factors. The commission believes that the treatment of water rights in a rate proceeding should be on a case- by-case basis.

TRWA commented that the §291.41(j) notice requirement on appeals is not authorized by Senate Bill 1, is unreasonable, and is burdensome as written.

The commission agrees, and has modified the rule to limit the notice requirement to appeals by ratepayers filed under Water Code, §13.043(b).

COMMENTS ON CERTIFICATES OF CONVENIENCE AND NECESSITY

In written comment and oral testimony IWSCOT commented that the two-mile radius provision in §291.102(e)(1) and (2) is overly broad because it presents an applicant with the responsibility of identifying water and sewer service providers within that area, rather than only "public" drinking water and sewer service providers. IWSCOT also commented that applicants should only have to consider providers within the radius who are registered with the commission. IWSCOT and TRWA commented that proposed §291.102 exceeds statutory authority if applied to applications to amend existing Certificates of Convenience and Necessity. TRWA cites Water Code, §13.241 in support of its comment.

The commission agrees that the word "public" in the appropriate places in §291.102(e)(1) and (2) should be added to clarify which systems should be contacted. However, the commission disagrees that the rule should be limited to those public drinking water and sewer service providers "registered with the commission." The word "registered" could mean providers who hold public water system identification numbers (in the case of water suppliers) but are not certificated, such as municipalities and districts. Generally, persons needing to secure water and sewer utility services often call on the staff in the Water Utilities Division to help them identify existing certificated providers. However, since all providers may not be certificated and not identified on agency maps, applicants should not limit their search, but should take extra steps to thoroughly assess the availability of service from an existing provider.

The commission agrees in part and disagrees in part with the comment as to the applicability of §291.102 to applications for new certificates and certificate amendments. In drafting a rule to implement new §13.241 in Senate Bill 1, the commission modified existing 291.102. However, the effort to integrate the requirements of new §13.241 into an existing rule which serves to implement the long-standing statutory requirements of §13.246 (which applies to new certificates and amendments) has created some confusion. Therefore, the commission has modified §291.102 to recite rule requirements for §13.241 first, to be followed by existing rules which implement §13.246. However, it should be noted that the commission has, and will use, the authority to require business plans from public water systems that were constructed without approval, that have a history of noncompliance with commission rules, or that are subject to a commission enforcement action.

In written comment and oral testimony IWSCOT commented that the requirement in §291.102(e)(6) that persons seeking to install a new system provide an analysis of the cost of obtaining alternative service from an existing provider within the two-mile radius creates a virtual barrier for such persons because the rule assumes such information is available.

The commission disagrees with this comment. The purpose of this requirement is to force these persons to diligently pursue service from existing providers maximizing regionalization goals. The major portion of this analysis prepared by a potential applicant will be a summary and personal analysis of the information satisfying §291.102(a)(3)(A)-(E).

IWSCOT commented that the notice requirement in §291.106 to neighboring utilities within five miles be limited to applicants for new service areas which would require the construction of new stand-alone water or sewer systems.

The proposed rule does impose the five-mile notice requirement on applications for new certificates, but has been clarified to distinguish it from the notice requirement in §291.106(b)(2) for applications to amend a certificate.

GENERAL COMMENTS

IWSCOT commented on the requirement for providing the commission with a certified copy of any wholesale water supply contract by asking how a utility can comply with the rules if there is no written contract and if the rules cover all wholesale water sales.

The commission has made no changes in response to this comment. The rules track the statutory language. The lack of a written contract does not relieve the utility of the notice requirements. It is also the position of the commission that these types of arrangements should be reduced to writing. The statute is clear that it applies to any and all wholesale water supply contracts.

Texoma commented that a waiver for the requirement to submit a report when the system's capacity has reached 85% would not be necessary if capacity is increased to meet or exceed demand above 85% capacity.

The commission agrees with this comment, but has made no changes in response to this comment. If the system is no longer in violation of this rule, no action would be necessary. However, the commission has made changes in the wording to reflect actual commission practices related to inspections.

IWSCOT commented that the definitions and other sections of 30 TAC Chapters 290 and 291, specifically noting §291.3 and §291.89(a)(4), do not adequately define the meter requirements for multiple unit service such as apartments, condominiums, and mobile home parks.

The commission agrees that clarification of the definitions and requirements for meters in Chapters 290 and 291 are needed. However, §291.89(a)(4) is not open for comment. The commission will propose clarifying amendments in a subsequent rule package. At that time, it will make any necessary changes to the definitions in §291.3.

IWSCOT commented that §291.14(a)(2), relating to Emergency Interconnections, should be modified to prohibit the issuance of an emergency order if it could unreasonably diminish service to customers of the retail public utility required to serve.

The commission disagrees with the need to clarify this section. When the commission issues an emergency order for an interconnection, it considers the impacts on both retail public utilities and should have the flexibility to make the decision which is in the public interest. Since determination of whether the interconnection will "unreasonably diminish" service by the retail public utility being ordered to serve will in any event be a judgement call by the commission based on the facts of the case at hand, addition of this language will not add any clarity to this section and could only serve to limit the commission's ability to effectively address crisis situations.

IWSCOT commented that there is a need for more clarity about alternate systems of accounts, but there is no process for the commission to adopt an alternate system of accounts as provided under §291.72(1).

The commission agrees with the comment that more clarity needs to be provided for "approved systems of accounts" as alternates to the National Association of Regulatory Utility Commissioners (NARUC) system, but disagrees with the comment that there is no process for the executive director to approve alternate accounting systems. The executive director has in the past "approved" individual accounting systems for utilities when rate cases were filed by accepting the systems in use by the utilities without requiring changes. The executive director should be allowed the flexibility of amending such a system through the publication process. Accordingly, the executive director will publish, in 1999, a system of accounts and recordkeeping guide which will address these concerns. These publications will clarify the "approved" system and add more uniformity.

IWSCOT commented that the requirements that records be available at "all reasonable hours" as required by §291.74 needs to be clarified.

The commission agrees that clarification of "all reasonable hours" is appropriate, but does not agree that the proposed language "normal business hours" will necessarily provide enough clarity. The commission will propose clarifying language to address the concern that requests for records might be made at times that would be unnecessarily burdensome to the utility.

IWSCOT commented that §291.83(a)(3), related to Disputed Debt to Another Utility, needs to be clarified to prevent abuse by a new service applicant.

The commission agrees that the rule should be clarified as to which utilities the rule refers and the type of documentation that a service applicant must provide. The commission does not agree that time limits on resolution of disputes should be established over issues which the commission rules already address or over which the commission has no jurisdiction or that the service applicant be required to notify the new utility of the resolution of the dispute. Once service is established, service cannot be disconnected for failure to pay a bill to another utility. The customer is required to pay a deposit if required by the new utility's tariff so the new utility does not incur any unreasonable risk if it provides service to the service applicant. The current rule does not provide a payment exemption from any charges due to the new utility.

IWSCOT commented that in §291.84(j), better documentation is needed to demonstrate that a new service applicant has a right to receive service at a specified location.

The commission agrees that such a provision is needed. However, the type of documentation should be specified by the rule and not left up to the utility to decide if it is satisfactory. The commission notes that the section is not open for comment. The commission will propose clarifying language in a subsequent rule package.

IWSCOT commented that in §291.84(f), a utility should be allowed to require additional deposits any time a utility amends its tariff from a current customer who has not been disconnected for nonpayment, or if the customer has paid late payment penalties in three of the last 12 months.

The commission disagrees that additional deposits should be required of a current customer except for those reasons currently specified in this subsection. This subsection already authorizes additional deposits for customers that are truly credit risks. A customer with a history of late payments would not have been entitled to a refund of the deposit paid when service was established under §291.84(h), so the scenario described is unlikely.

IWSCOT commented that in §291.85(a)(3) and (4) a utility needs longer time periods to provide service.

The commission agrees that the time to restore service where service has previously been provided should be extended to three working days and the time where construction is required should be extended to ten working days. However, the relevant section is not open as a part of this rule package. The commission will propose this change in a subsequent rule package.

IWSCOT commented that a new service applicant should be required to install a cut-off valve on the customer side of the meter before receiving service in §291.86(a)(2)(B).

The commission agrees that it is reasonable. However, the relevant section is not open as a part of this rule package. The commission will propose this change in a subsequent rule package.

IWSCOT commented that extension policies as currently written in §291.86(d)(2)(A) and (B) are unreasonable or result in preferential treatment of individual service applicants. IWSCOT further suggested that the rebate period in §291.86(d)(2)(C) should be limited to five years.

The commission has made no changes in response to this comment. Utilities are expected to make investments in facilities and recover their investment through depreciation and return on the investment over the useful life of the assets. To require a new customer to pay up front for the cost of all of the facilities used to serve him would mean that the new customer would have a greater investment than existing customers, even though the new customer would be required to pay the same monthly rates, which would in fact be discriminatory to the new customer. There is a provision for exceptions to be granted in certain situations. The commission has no evidence that using a five-year period for rebates to customers is substantially more expensive or burdensome than the current seven-year period, which provides more opportunity for the customer to receive some of the investment back.

IWSCOT commented that in §291.86(d)(4) a residential customer with a one-inch meter and sprinkler system should be treated as a developer when determining extension costs.

The commission agrees that a residential customer with a one-inch meter and sprinkler system may place a somewhat higher demand than a standard residential customer with a 5/8- inch meter but disagrees that the difference is significant enough to place that customer in the same category as a developer for purposes of determining extension fees. The commission has not made changes to this section.

IWSCOT commented that in §291.87(e)(2)(F) surcharges should not be required to be listed as a separate line item on bills.

The commission has not made any changes in response to this comment. Surcharges have been used in this manner for many years with little apparent problems due to billing programs. Because surcharges are for a definite time period and for a specific amount, customers need to be able to see these special charges as a line item and in addition when the surcharge ends, it should drop off the bill rather than having the monthly charge drop without an apparent reason.

IWSCOT commented that the limitations on refunds and backbilling in §291.87(g) violate Water Code, §13.001(c) and §13.189 and should be repealed.

The commission agrees in part, but disagrees that the limitations on refunds and backbilling violate §13.001(c) and §13.189. Unless a customer has tampered with the meter, bypassed the meter, or diverted service, the utility controls meter reading and billing. If the utility is monitoring its meters, billing, and collections in a prudent manner, it should catch errors within a reasonable time period. However, the commission agrees that a longer period than six months, perhaps one year, is reasonable for the utility to catch and correct the errors. However, the relevant section is not open as a part of this rule package. The commission will propose a modification in accordance with this response in a subsequent rule package.

IWSCOT commented that under §291.87(n) a utility should be allowed to disconnect a customer for failure to pay for negligence or damages.

The commission agrees in part that a utility should be allowed to disconnect a customer for failure to pay for some negligence or damages other than meter tampering or service diversion. However, the commission disagrees that a customer should be disconnected for all charges related to the situations mentioned in this subsection. This area can be very contentious because only in rare instances does a utility employee or some other disinterested person actually observe the damage being committed by a customer. In addition, some of the costs incurred by a utility in dealing with these situations are already being recovered in its rates. However, the relevant section is not open as a part of this rule package. The commission will propose revisions to this subsection in a subsequent rule package.

IWSCOT commented that in §291.87(k)(1) a customer should not be allowed to avoid disconnection by disputing a bill at the last minute.

The commission agrees in part with this comment. However, the relevant section is not open as a part of this rule package. The commission will propose changes to this rule in a subsequent rule package.

IWSCOT commented that in §291.88(g) a utility should not be required to disconnect service upon a customer request within 24 hours of receiving the request, but should be allowed a full working day.

The commission agrees in part that it is reasonable to allow the utility to disconnect on the next working day, but may propose slightly different wording. However, the relevant section is not open as a part of this rule package. The commission will propose a modification to this rule in a subsequent rule package.

IWSCOT commented that §291.88(h)(1) relating to reconnection time period after a customer that has been disconnected for nonpayment pays the outstanding balance should be changed from 24 hours to "one working day."

The commission agrees in part that the current rule may require modified dates for disconnections and allow extra time for customers to pay and that modifications to the rule should be made. However, the commission does not agree that the wording change proposed is the best way to deal with the issue, so a modified rule will be proposed. The relevant section is not open as a part of this rule package. The commission will propose a modification to this rule in a subsequent rule package.

Texoma and Plum Creek Water Company commented that the current limitation of $25 for a reconnect fee in §291.88(h)(2)(C) is too low and does not cover the actual cost to the utility.

The commission has made no changes in response to this comment. The commission agrees that utilities do not recover the cost in full in the $25 fee, but disagrees that it should be set at $50 or more. The commission believes that water service is essential and a customer who is struggling to pay a $25 or $30 water bill should not be unnecessarily punished by having to pay $50 or more additional dollars for a reconnect fee. Expenses not included in the $25 fee may be collected by the utility through rates which are distributed over the whole customer base. The commission believes that the current $25 fee coupled with having service disconnected for some time period is a sufficient deterrent to encourage customers who are able to pay to do so before being disconnected.

IWSCOT commented that §291.89(n) is not a complete listing of situations that should be included in meter tampering, bypass, or diversion.

The commission agrees. However, the relevant section is not open as a part of this rule package. The commission will propose a revised rule in a subsequent rule package.

ADDITIONAL CHANGES

Senate Bill 1, 75th Legislature, 1997, had amended the Health and Safety Code, §341.0485 to create a Water Utility Improvement Account. The account was to receive civil or administrative penalties for violation of Health and Safety Code, Chapter 341. Funds deposited in the account could be used for capital improvements or operating and maintenance expenses for certain qualified water and sewer systems. The 75th Legislature also passed House Bill (HB) 2948, which abolished special accounts not enumerated in the bill. The Water Utility Improvement Account was not listed in HB 2948. Accordingly, the commission has not adopted any rules referring to the Water Utility Improvement Account.

The commission has made some other changes to the adopted rules to update references, correct grammar, or typographical errors. These changes do not result in any change in the intent expressed in the proposed rules.

Subchapter A. General Provisions

30 TAC §§291.1, 291.3, 291.15

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction. Section 291.15 implements Texas Water Code, §13.143 (Notice of Wholesale Water Supply Contract). Section 291.31 implements Texas Water Code, §13.183. Section 291.34 implements Texas Water Code, §13.183 and 13.184. Section 291.87 implements Texas Water Code, §13.143 (Voluntary Contributions). Section 291.101 implements Texas Water Code, §49.215(d). Section 291.102 implements Texas Water Code, §13.241 and §13.246. Section 291.103 implements Texas Water Code, 49.352. Section 291.109 implements Texas Water Code, §13.301. Section 291.111 implements Texas Water Code, §13.302. Section 291.113 implements Texas Water Code, 13.254. Section 291.114 implements Texas Water Code, §13.252. Section 291.125(c) implements Texas Water Code, §13.504. Section 291.140 implements Texas Water Code, 13.411. Section 291.144 implements Texas Water Code, §13.418 and Texas Health and Safety Code, §341.0485. Section 291.152 implements Texas Water Code, §13.045. Section 291.153 implements Texas Water Code, §13.086.

§291.3. Definitions of Terms.

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

(1) Acquisition adjustment-

(A) The difference between:

(i) the lesser of the purchase price paid by an acquiring utility or the current depreciated replacement cost of the plant, property, and equipment comparable in size, quantity, and quality to that being acquired, excluding customer contributed property; and

(ii) the original cost of the plant, property, and equipment being acquired, excluding customer contributed property, less accumulated depreciation.

(B) A positive acquisition adjustment results when subparagraph (A)(i) of this paragraph is greater than subparagraph (A)(ii) of this paragraph.

(C) A negative acquisition adjustment results when subparagraph (A)(ii) of this paragraph is greater than subparagraph (A)(i) of this paragraph.

(2) Affected county-A county:

(A) that has a per capita income that averaged 25% below the state average for the most recent three consecutive years for which statistics are available and an unemployment rate that averaged 25% above the state average for the most recent three consecutive years for which statistics are available; and

(B) any part of which is within 50 miles of an international border.

(3) Affected person-Any retail public utility affected by any action of the regulatory authority; any person or corporation, whose utility service or rates are affected by any proceeding before the regulatory authority; or any person or corporation that is a competitor of a retail public utility with respect to any service performed by the retail public utility or that desires to enter into competition.

(4) Affiliated interest or affiliate-

(A) any person or corporation owning or holding directly or indirectly 5.0% or more of the voting securities of a utility;

(B) any person or corporation in any chain of successive ownership of 5.0% or more of the voting securities of a utility;

(C) any corporation 5.0% or more of the voting securities of which is owned or controlled directly or indirectly by a utility;

(D) any corporation 5.0% or more of the voting securities of which is owned or controlled directly or indirectly by any person or corporation that owns or controls directly or indirectly 5.0% or more of the voting securities of any utility or by any person or corporation in any chain of successive ownership of 5.0% of those utility securities;

(E) any person who is an officer or director of a utility or of any corporation in any chain of successive ownership of 5.0% or more of voting securities of a public utility;

(F) any person or corporation that the commission, after notice and hearing, determines actually exercises any substantial influence or control over the policies and actions of a utility or over which a utility exercises such control or that is under common control with a utility, such control being the possession directly or indirectly of the power to direct or cause the direction of the management and policies of another, whether that power is established through ownership or voting of securities or by any other direct or indirect means; or

(G) any person or corporation that the commission, after notice and hearing, determines is exercising substantial influence over the policies and action of the utility in conjunction with one or more persons or corporations with which they are related by

ownership or blood relationship, or by action in concert, that together they are affiliated within the meaning of this section, even though no one of them alone is so affiliated.

(5) Agency-Any state board, commission, department, or officer having statewide jurisdiction (other than an agency wholly financed by federal funds, the legislature, the courts, the Workers' Compensation Commission, and institutions for higher education) which makes rules or determines contested cases.

(6) Allocations-For all retail public utilities, the division of plant, revenues, expenses, taxes, and reserves between municipalities, or between municipalities and unincorporated areas, where such items are used for providing water or sewer utility service in a municipality or for a municipality and unincorporated areas.

(7) Base rate-The portion of a consumer's utility bill which is paid for the opportunity of receiving utility service, excluding stand-by fees, which does not vary due to changes in utility service consumption patterns.

(8) Billing period-The usage period between meter reading dates for which a bill is issued or in nonmetered situations, the period between bill issuance dates.

(9) Class of service or customer class-A description of utility service provided to a customer which denotes such characteristics as nature of use or type of rate.

(10) Code-The Texas Water Code.

(11) Corporation-Any corporation, joint-stock company, or association, domestic or foreign, and its lessees, assignees, trustees, receivers, or other successors in interest, having any of the powers and privileges of corporations not possessed by individuals or partnerships, but shall not include municipal corporations unless expressly provided otherwise in the Texas Water Code.

(12) Customer-Any person, firm, partnership, corporation, municipality, cooperative, organization, or governmental agency provided with services by any retail public utility.

(13) Customer service line or pipe-The pipe connecting the water meter to the customer's point of consumption or the pipe which conveys sewage from the customer's premises to the service provider's service line.

(14) Facilities-All the plant and equipment of a retail public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any retail public utility.

(15) Incident of tenancy-Water or sewer service, provided to tenants of rental property, for which no separate or additional service fee is charged other than the rental payment.

(16) License-The whole or part of any commission permit, certificate, registration, or similar form of permission required by law.

(17) Licensing-The commission process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license, certificates of convenience and necessity, or any other authorization granted by the commission pursuant to its authority under the Texas Water Code.

(18) Main-A pipe operated by a utility service provider which is used for transmission or distribution of water or to collect or transport sewage.

(19) Mandatory water use reduction-The temporary reduction in the use of water imposed by court order, government agency, or other authority with appropriate jurisdiction. This does not include water conservation measures which seek to reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling or reuse of water so that a water supply is made available for future or alternative uses.

(20) Member-A person who holds a membership in a water supply or sewer service corporation and who is a record owner of a fee simple title to property in an area served by a water supply or sewer service corporation, or a person who is granted a membership and who either currently receives or will be eligible to receive water or sewer utility service from the corporation. In determining member control of a water supply or sewer service corporation, a person is entitled to only one vote regardless of the number of memberships the person owns.

(21) Membership fee-A fee assessed each water supply or sewer service corporation service applicant which entitles the applicant to one connection to the water or sewer main of the corporation. The amount of the fee is generally defined in the corporation's bylaws and payment of the fee provides for issuance of one membership certificate in the name of the applicant, for which certain rights, privileges, and obligations are allowed pursuant to said bylaws. For purposes of Texas Water Code, §13.043(g), a membership fee is a fee not exceeding approximately 12 times the monthly base rate for water or sewer service or an amount that does not include any materials, labor, or services required for or provided by the installation of a metering device for the delivery of service, capital recovery, extension fees, buy-in fees, impact fees, or contributions in aid of construction.

(22) Municipality-A city, existing, created, or organized under the general, home rule, or special laws of this state.

(23) Municipally-owned utility-Any retail public utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities.

(24) Person-Any natural person, partnership, cooperative corporation, association, or public or private organization of any character other than an agency or municipality.

(25) Physician-Any public health official, including, but not limited to, medical doctors, doctors of osteopathy, nurse practitioners, registered nurses, and any other similar public health official.

(26) Point of use or point of ultimate use-The primary location where water is used or sewage is generated; for example, a residence or commercial or industrial facility.

(27) Potable water-Water that is used for or intended to be used for human consumption or household use.

(28) Premises-A tract of land or real estate including buildings and other appurtenances thereon.

(29) Public utility-The definition of public utility is that definition given to water and sewer utility in this subchapter.

(30) Purchased sewage treatment-Sewage treatment purchased from a source outside the retail public utility's system to meet system requirements.

(31) Purchased water-Raw or treated water purchased from a source outside the retail public utility's system to meet system demand requirements.

(32) Rate-Includes every compensation, tariff, charge, fare, toll, rental, and classification or any of them demanded, observed, charged, or collected, whether directly or indirectly, by any retail public utility, or water or sewer service supplier, for any service, product, or commodity described in the Texas Water Code, §13.002(23), and any rules, regulations, practices, or contracts affecting any such compensation, tariff, charge, fare, toll, rental, or classification.

(33) Ratepayer-Each person receiving a separate bill shall be considered as a ratepayer, but no person shall be considered as being more than one ratepayer notwithstanding the number of bills received. A complaint or a petition for review of a rate change shall be considered properly signed if signed by any person, or spouse of any such person, in whose name utility service is carried.

(34) Reconnect fee-A fee charged for restoration of service where service has previously been provided. It may be charged to restore service after disconnection for reasons listed in §291.88 of this title (relating to Discontinuance of Service) or to restore service after disconnection at the customer's request.

(35) Retail public utility-Any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation.

(36) Retail water or sewer utility service-Potable water service or sewer service, or both, provided by a retail public utility to the ultimate consumer for compensation.

(37) Safe drinking water revolving fund-The fund established by the Texas Water Development Board to provide financial assistance in accordance with the Federal program established pursuant to the provisions of the Safe Drinking Water Act and as defined in Water Code, §15.602.

(38) Service-Any act performed, anything furnished or supplied, and any facilities used by a retail public utility in the performance of its duties under the Texas Water Code to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.

(39) Service line or pipe-A pipe connecting the utility service provider's main and the water meter or for sewage, connecting the main and the point at which the customer's service line is connected, generally at the customer's property line.

(40) Sewage-Ground garbage, human and animal, and all other waterborne type waste normally disposed of through the sanitary drainage system.

(41) Standby fee-A charge imposed on unimproved property for the availability of water or sewer service when service is not being provided.

(42) Tap fee-A tap fee is the charge to new customers for initiation of service where no service previously existed. A tap fee for water service may include the cost of physically tapping the water main and installing meters, meter boxes, fittings, and other materials and labor. A tap fee for sewer service may include the cost of physically tapping the main and installing the utility's service line to the customer's property line, fittings, and other material and labor. Water or sewer taps may include setting up the new customer's account, and allowances for equipment and tools used. Extraordinary expenses such as road bores and street crossings and grinder pumps may be added if noted on the utility's approved tariff. Other charges, such as extension fees, buy-in fees, impact fees, or contributions in aid of construction (CIAC) are not to be included in a tap fee.

(43) Tariff-The schedule of a retail public utility containing all rates, tolls, and charges stated separately by type or kind of service and the customer class, and the rules and regulations of the retail public utility stated separately by type or kind of service and the customer class.

(44) Temporary water rate provision-A provision in a utility's tariff that allows a utility to adjust its rates in response to mandatory water use reduction.

(45) Test year-The most recent 12-month period for which representative operating data for a retail public utility are available. A utility rate filing must be based on a test year that ended less than 12 months before the date on which the utility made the rate filing.

(46) Utility-The definition of utility is that definition given to water and sewer utility in this subchapter.

(47) Water and sewer utility-Any person, corporation, cooperative corporation, affected county, or any combination of those persons or entities, other than a municipal corporation, water supply or sewer service corporation, or a political subdivision of the state, except an affected county, or their lessees, trustees, and receivers, owning or operating for compensation in this state equipment or facilities for the production, transmission, storage, distribution, sale, or provision of potable water to the public or for the resale of potable water to the public for any use or for the collection, transportation, treatment, or disposal of sewage or other operation of a sewage disposal service for the public, other than equipment or facilities owned and operated for either purpose by a municipality or other political subdivision of this state or a water supply or sewer service corporation, but does not include any person or corporation not otherwise a public utility that furnishes the services or commodity only to itself or its employees or tenants as an incident of that employee service or tenancy when that service or commodity is not resold to or used by others.

(48) Water rationing-Restrictions implemented to reduce the amount of water which may be consumed by customers of the system due to emergency conditions or drought.

(49) Water supply or sewer service corporation-Any nonprofit, corporation organized and operating under the Texas Water Code, Chapter 67, that provides potable water or sewer service for compensation and that has adopted and is operating in accordance with by-laws or articles of incorporation which ensure that it is member-owned and member controlled. The term does not include a corporation that provides retail water or sewer service to a person who is not a member, except that the corporation may provide retail water or sewer service to a person who is not a member if the person only builds on or develops property to sell to another and the service is provided on an interim basis before the property is sold. For purposes of this chapter, to qualify as member-owned, member-controlled a water supply or sewer service corporation must also meet the following conditions.

(A) All members of the corporation meet the definition of "member" under this section, and all members are eligible to vote in those matters specified in the articles and bylaws of the corporation. Payment of a membership fee in addition to other conditions of service may be required provided that all members have paid or are required to pay the membership fee effective at the time service is requested.

(B) Each member is entitled to only one vote regardless of the number of memberships owned by that member.

(C) A majority of the directors and officers of the corporation must be members of the corporation.

(D) The corporation's by-laws include language indicating that the factors specified in subparagraphs (A)-(C) of this paragraph are in effect.

(50) Wholesale water or sewer service-Potable water or sewer service, or both, provided to a person, political subdivision, or municipality who is not the ultimate consumer of the service.

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 January 15, 1999.

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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: February 4, 1999
Proposal publication date: October 23, 1998
For further information, please call: (512) 239-1966

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30 TAC §291.15, §291.16

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §5.103, which provides the Texas Natural Resource Conservation Commission with the authority to adopt any rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the State of Texas, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction.

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

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TRD-9900321
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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Subchapter B. Rates, Ratemaking, and Rate/Tariff Changes

30 TAC §§291.21, 291.25, 291.29, 291.31, 291.32, 291.34

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction. Section 291.31 implements Texas Water Code, §13.183. Section 291.34 implements Texas Water Code, §13.183 and §13.184.

§291.29. Interim Rates.

(a) The commission or judge may on a motion by the executive director or by the appellant under the Texas Water Code, §13.043 (a), (b), or (f), as amended, establish interim rates to remain in effect until a final decision is made.

(b) At any time after the filing of a statement of intent to change rates under the Texas Water Code, §13.187, as amended, the executive director may petition the commission or judge to set interim rates to remain in effect until further commission action or a final rate determination is made. After a hearing is convened, any party may petition the judge or commission to set interim rates.

(c) Interim rates may be established by the commission or judge in those cases under the commission's original or appellate jurisdiction where the proposed increase in rates could result in an unreasonable economic hardship on the utility's customers, unjust or unreasonable rates, or failure to set interim rates could result in an unreasonable economic hardship on the utility.

(d) In making a determination under subsection (c) of this section:

(1) The commission or judge may limit its consideration of the matter to oral arguments of the affected parties and may:

(A) set interim rates not lower than the authorized rates prior to the proposed increase nor higher than the requested rates;

(B) deny interim rate relief;

(C) require that all or part of the requested rate increase be deposited in an escrow account in accordance with rules set forth in §291.30 of this title (relating to Escrow of Proceeds Received Under Rate Increase); or

(2) The commission may remand the request for interim rates to SOAH for an evidentiary hearing on interim rates. The presiding judge will issue a non-appealable interlocutory ruling setting interim rates to remain in effect until a final rate determination is made by the commission.

(e) The establishment of interim rates does not preclude the commission from establishing, as a final rate, a different rate from the interim rate.

(f) Unless otherwise agreed to by the parties to the rate proceeding, the retail public utility shall refund or credit against future bills all sums collected in excess of the rate finally ordered plus interest as determined by the commission in a reasonable number of monthly installments.

(g) Unless otherwise agreed to by the parties to the rate proceeding, the retail public utility shall be authorized by the commission to collect the difference, in a reasonable number of monthly installments, from its customers for the amounts by which the rate finally ordered exceeds the interim rates.

(h) The retail public utility must provide a notice to its customers including the interim rates set by the commission or judge with the first billing at the interim rates with the following wording: "The Texas Natural Resource Conservation Commission (or judge) has established the following interim rates to be in effect until the final decision on the requested rate change (appeal) or until another interim rate is established."

(i) If the commission or judge establishes interim rates or an escrow account in a proceeding under Texas Water Code, §13.187, the commission must make a final determination on the rates within 335 days after the effective date of the interim rates or escrowed rates or the rates are automatically approved as requested by the utility in its application.

§291.31. Cost of Service.

(a) (No change.)

(b) Allowable expenses. Only those expenses which are reasonable and necessary to provide service to the ratepayers shall be included in allowable expenses. In computing a utility's allowable expenses, only the utility's historical test year expenses as adjusted for known and measurable changes will be considered.

(1) Components of allowable expenses. Allowable expenses, to the extent they are reasonable and necessary, and subject to this section, may include, but are not limited to, the following general categories:

(A) operations and maintenance expense incurred in furnishing normal utility service and in maintaining utility plant used by and useful to the utility in providing such service (payments to affiliated interests for costs of service, or any property, right, or thing, or for interest expense shall not be allowed as an expense for cost of service except as provided in the Texas Water Code, §13.185(e));

(B)-(F) (No change.)

(2) (No change.)

(c) Return on invested capital. The return on invested capital is the rate of return times invested capital.

(1) (No change.)

(2) Invested capital, also referred to as rate base. The rate of return is applied to the rate base. Components to be included in determining the rate base are as follows:

(A) original cost, less accumulated depreciation, of utility plant, property and equipment used by and useful to the utility in providing service:

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

(B) (No change.)

(3) Items not included in rate base. Unless otherwise determined by the commission, for good cause shown, the following items will not be included in determining the overall rate base.

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

(d) Recovery of positive acquisition adjustments.

(1) For utility plant, property, and equipment acquired by a utility from another retail public utility as a sale, merger, etc. of utility service area for which an application for approval of sale has been filed with the commission on or after September 1, 1997, and that sale application closed thereafter, a positive acquisition adjustment will be allowed to the extent that the acquiring utility proves that:

(A) the property is used and useful in providing water or sewer service at the time of the acquisition or as a result of the acquisition;

(B) reasonable, prudent, and timely investments will be made if required to bring the system into compliance with all applicable rules and regulations;

(C) as a result of the sale , merger, etc.:

(i) the customers of the system being acquired will receive higher quality or more reliable water or sewer service or that the acquisition was necessary so that customers of the acquiring utility's other systems could receive higher quality or more reliable water or sewer service;

(ii) regionalization of retail public utilities (meaning a pooling of financial, managerial, or technical resources which achieve economies of scale or efficiencies of service) was achieved; or

(iii) the acquiring system will become financially stable and technically sound as a result of the acquisition, or the system being acquired which is not financially stable and technically sound will become a part of a financially stable and technically sound utility;

(D) any and all transactions between the buyer and the seller entered into as a part or condition of the sale are fully disclosed to the executive director and were conducted at arm's length;

(E) the actual purchase price is reasonable in consideration of the condition of the plant, property, and equipment being acquired; the impact on customer rates if the acquisition adjustment is granted; the benefits to the customers; and, the amount of contributions in aid of construction in the system being acquired;

(F) in a single or multi-stage sale, the owner of the acquired retail public utility and the final acquiring utility are not affiliated. A multi-stage sale is where a stock transaction is followed by a transfer of assets in what is essentially a single sales transaction. A positive acquisition adjustment is allowed only in those cases where the multi-stage transaction was fully disclosed to the executive director in the application for approval of the initial stock sale. Any multi-stage sale occurring between September 1, 1997, and the effective date of these rules is exempt from the requirement for executive director notification at the time of the approval of the initial sale, but must provide such notification within 60 days of the effective date of these rules; and

(G) the rates charged by the acquiring utility to its preacquisition customers will not increase unreasonably because of the acquisition.

(2) The amount of the acquisition adjustment approved by the regulatory authority, shall be amortized using a straight line method over a period equal to the weighted average remaining useful life of the acquired plant, property, and equipment, at an interest rate equal to the rate of return determined under subsection (c) of this section. The acquisition adjustment may be treated as a surcharge and may be recovered using non-system-wide rates.

(3) The authorization for and the amount of an acquisition adjustment can only be determined as a part of a rate change application.

(4) The acquisition adjustment can only be included in rates as a part of a rate change application.

§291.32. Rate Design.

(a) General. In fixing the rates of a utility, the commission shall fix its overall revenues at a level which will permit such utility a reasonable opportunity to earn a reasonable return on its invested capital used and useful in rendering service to the public, over and above its reasonable and necessary operating expenses (unless an alternative rate method is used as set forth in §291.34 of this title

(relating to Alternative Rate Methods), and preserve the financial integrity of the utility.

(b) Conservation.

(1) In order to encourage the prudent use of water or promote conservation, water and sewer utilities shall not apply rate structures which offer discounts or encourage increased usage within any customer class.

(2) After receiving final authorization from the regulatory authority through a rate change proceeding, a utility may implement a water conservation surcharge using an inclining block rate or other conservation rate structure. A utility may not implement such a rate structure to avoid providing facilities necessary to meet the commission's minimum standards for public drinking water systems. A water conservation rate structure may generate revenues over and above the utility's usual cost of service:

(A) to reduce water usage or promote conservation either on a continuing basis or in specified restricted use periods identified in the utility's tariff in order to:

(i) comply with mandatory reductions directed by a wholesale supplier or underground water district; or

(ii) maintain acceptable pressure or storage during drought periods, or other water rationing conditions authorized by an approved water rationing plan;

(B) to generate additional revenues necessary to provide facilities for maintaining or increasing water supply, treatment, production, or distribution capacity.

(3) All additional revenues over and above the utility's usual cost of service collected under paragraph (2) of this subsection:

(A) must be accounted for separately and reported to the executive director, as requested;

(B) are considered customer contributed capital unless otherwise specified in a commission order; and

(C) may only be used in a manner approved by the executive director for applications not subject to hearing under Texas Water Code, §13.187(b).

(c) Volume charges. Charges for additional usage above the base rate shall be based on metered usage over and above any volume included in the base rate rounded up or down as appropriate to the nearest 1,000 gallons or 100 cubic feet, or the fractional portion of the usage.

(d) Surcharges.

(1) Capital improvements. In a rate proceeding, the commission may authorize collection of additional revenues from the customers to provide funds for capital improvements necessary to provide facilities capable of providing adequate and continuous utility service, and for the preparation of design and planning documents.

(2) Debt repayments. In a rate proceeding, the commission may authorize collection of additional revenues from customers to provide funds for debt repayments and associated costs, including funds necessary to establish contingency funds and reserve funds. Surcharge funds may be collected to meet all of the requirements of the Texas Water Development Board in regard to financial assistance from the Safe Drinking Water Revolving Fund.

§291.34. Alternative Rate Methods.

(a) To ensure that retail customers receive a higher quality or more reliable water or sewer service, to encourage regionalization, or to maintain financially stable and technically sound utilities, the commission may utilize alternate methods of establishing rates. The commission shall assure that rates, operations, and service are just and reasonable to the consumers and to the utilities. The executive director may prescribe modified rate filing packages for these alternate methods of establishing rates.

(b) Single issue rate change. Unless a utility is using the cash needs method, it may request approval to increase rates to reflect a change in any one specific cost component. The following conditions shall apply to this type of request.

(1) The proposed effective date of the single issue rate change request must be within 24 months of the effective date of the last rate change request in which a complete rate change application was filed.

(2) The change in rates is limited to those amounts necessary to recover the increase in the specific cost component and the increase will be allocated to the rate structure in the same manner as in the previous rate change.

(3) The scope of a single issue rate proceeding is limited to the single issue prompting a change in rates. For capital items this includes depreciation and return determined using the rate of return established in the prior rate change proceeding.

(4) The utility shall provide notice as described in §291.22(a)-(e) of this title (relating to Notice of Intent to Change Rates), and the notice shall describe the cost component and reason for the increased cost.

(5) A utility exercising this option is required to submit a complete rate change application within three years following the effective date of the single issue rate change request.

(c) Phased and multi-step rate changes. In a rate proceeding, the commission may authorize a phased, stepped, or multi-year approach to setting and implementing rates to eliminate the requirement that a utility file another rate application.

(1) A utility may request to use the phased or multi-step rate method :

(A) to include the capital cost of installation of utility plant items that are necessary to improve service or achieve compliance with commission regulations in the utility's rate base and operating expenses in the revenue requirement when facilities are placed in service;

(B) to provide additional construction funds after major milestones are met;

(C) to provide assurance to a lender that rates will be immediately increased when facilities are placed in service;

(D) to allow a utility to move to metered rates from unmetered rates as soon as meters can be installed at all service connections;

(E) to phase in increased rates when a utility has been acquired by another utility with higher rates;

(F) to phase in rates when a utility with multiple rate schedules is making the transition to a system- wide rate structure; or

(G) when requested by the utility.

(2) Construction schedules and cost estimates for new facilities which are the basis for the phased or multi-step rate increase must be prepared by a licensed professional engineer.

(3) Unless otherwise specified in the commission order, the next phase or step cannot be implemented without verification of completion of each step by a licensed professional engineer, agency inspector, or agency subcontractor.

(4) At the time each rate step is implemented, the utility must review actual costs of construction versus the estimates upon which the phase-in rates were based. If the revenues received from the phased or multi-step rates are higher than what the actual costs indicate, the excess amount must be reported to the executive director prior to implementing the next phase or step. Unless otherwise specified in a commission order or directed by the executive director, the utility may:

(A) refund or credit the overage to the customers in a lump sum; or

(B) retain the excess to cover shortages on later phases of the project. Any revenues retained but not needed for later phases must be proportioned and refunded to the customers at the end of the project with interest paid at the rate on deposits.

(5) The original notice to customers must include the proposed phased or multi-step rate change and informational notice must be provided to customers and the executive director 30 days prior to the implementation of each step.

(6) A utility that requests and receives a phased or multi step rate increase cannot apply for another rate increase during the period of the phase-in rate intervals unless:

(A) the utility can prove financial hardship; or

(B) the utility is willing to void the next steps of the phase-in rate structure and undergo a full cost of service analysis.

(d) Cash needs method. The cash needs method of establishing rates allows a utility to recover reasonable and prudently incurred debt service, a reasonable cash reserve account, and other expenses not allowed under standard methods of establishing rates.

(1) A utility may request to use the cash needs method of setting rates if:

(A) the utility is a nonprofit corporation controlled by individuals who are customers and who represent a majority of the customers; or

(B) the utility can demonstrate that use of the cash needs basis:

(i) is necessary to preserve the financial integrity of the utility;

(ii) will enable it to develop the necessary financial, managerial, and technical capacity of the utility; and

(iii) will result in higher quality and more reliable utility service for customers.

(2) Under the cash needs method, the allowable components of cost of service are: allowable operating and maintenance expenses; depreciation expense; reasonable and prudently incurred debt service costs; recurring capital improvements, replacements, and extensions which are not debt-financed; and a reasonable cash reserve account.

(A) Allowable operating and maintenance expenses: only those expenses which are reasonable and necessary to provide service to the ratepayers shall be included in allowable operations and maintenance expenses and shall be based on the utility's historical test year expenses as adjusted for known and measurable changes and reasonably anticipated, prudent projected expenses.

(B) Depreciation expense: depreciation expense may be included on any used and useful depreciable plant, property, or equipment which was paid for by the utility and which has a positive net book value on the effective date of the rate change.

(C) Debt service costs. Cash outlays to an unaffiliated interest necessary to repay principal and interest on reasonably and prudently incurred loans. If required by the lender, debt service costs may also include amounts placed in a debt service reserve account in escrow or as required by the commission, Texas Water Development Board, or other state or federal agency or other financial institution. Hypothetical debt service costs may be used for:

(i) self-financed major capital asset purchases where the useful life of the asset is ten years or more. Hypothetical debt service costs may include the debt repayments using an amortization schedule with the same term as the estimated service life of the asset using the prime interest rate at the time the application is filed;

(ii) prospective loans to be executed after the new rates are effective. Any pre-commitments, amortization schedules or other documentation from the financial institution pertaining to the prospective loan must be presented for consideration.

(D) Recurring capital improvements, replacements, and extensions which are not debt-financed. Capital assets, repairs, or extensions which are a part of the normal business of the utility may be included as allowable expenses. This does not include routine capital expenses which are specifically debt-financed.

(E) Cash reserve account: a reasonable cash reserve account, up to 10% of annual operation and maintenance expenses, shall be maintained and revenues to fund it may be included as an allowable expense. Funds from this account may be used to pay expenses incurred before revenues from rates are received and for extraordinary repair and maintenance expenses and other capital needs or unanticipated expenses if approved in writing by the executive director. The utility shall account for these funds separately and report to the commission as required by the executive director. Unless the utility requests an exception in writing and the exception is explicitly allowed by the executive director in writing, any funds in excess of 10%, shall be refunded to the customers each year with the January billing either as a credit on the bill or refund accompanied by a written explanation which explains the method used to calculate the amounts to be refunded. Each customer shall receive the same refund amount. These reserves are not for the personal use of the management or ownership of the utility and may not be used to compensate an owner, manager, or individual employee above the amount approved for that position in the most recent rate change request unless authorized in writing by the executive director.

(3) If the revenues collected exceed the actual cost of service, defined in subsection (d)(2) of this section, during any calendar year, these excess cash revenues must be placed in the cash reserve account described in subsection (d)(2)(D) of this section and become subject to the same restrictions.

(4) If the utility demonstrates to the executive director that it has reduced expenses through its efforts, and has improved its financial, managerial, and technical capability, the executive director may allow the utility to retain 50% of the savings which result for the personal use of the management or ownership of the utility rather than pass on the full amount of the savings through lower rates or refund all of the amounts saved to the customers.

(5) If a utility elects to use the cash needs method, it may not elect to use the utility method for any rate change application initiated within five years after beginning to use the cash needs method. If after the five-year period, the utility does elect to use the utility method, it may not include in rate base, or recover the depreciation expense, for the portion of any capital assets paid for by customers as a result of including debt service costs in rates. It may, however, include in rate base, and recover through rates, the depreciation expense for capital assets which were not paid for by customers as a result of including debt service costs in rates. The net book value of these assets may be recovered over the remaining useful life of the asset.

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

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Subchapter C. Ratemaking Appeals

30 TAC §291.41

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction.

§291.41. Appeal of Ratemaking Pursuant to the Texas Water Code, §13.043.

(a) Any party to a rate proceeding before the governing body of a municipality may appeal the decision of the governing body to the commission. This subsection does not apply to a municipally-owned utility, but does include privately-owned utilities operating within the corporate limits of a municipality. An appeal under this subsection may be initiated by filing with the commission a petition signed by a responsible official of the party to the rate proceeding or its authorized representative and accompanied by the filing fee as required by the Texas Water Code, §5.235 and by serving a copy of the petition on all parties to the original proceeding. The appeal must be initiated within 90 days after the date of notice of the final decision of the governing body.

(b) An appeal under the Texas Water Code, §13.043(b) must be initiated within 90 days after the effective date of the rate change or, if appealing under §13.043(b)(2) or (5), within 90 days after the date on which the governing body of the municipality or affected county makes a final decision. An appeal is initiated by filing an original and four copies of a petition for review with the commission and by filing a copy of the petition with the entity providing service and with the governing body whose decision is being appealed if it is not the entity providing service. The petition must be signed by the lesser of 10,000 or 10% of the ratepayers whose rates have been changed and who are eligible to appeal under subsection (c) of this section.

(c) Retail ratepayers of the following entities may appeal the decision of the governing body of the entity affecting their water or sewer utility rates to the commission:

(1) a nonprofit water supply or sewer service corporation created and operating under Texas Water Code, Chapter 67;

(2)-(5) (No change.)

(6) in an appeal under this subsection, the retail public utility shall provide written notice of hearing to all affected customers in a form prescribed by the executive director.

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

(g) An applicant requesting service from an affected county or a water supply or sewer service corporation may appeal to the commission a decision of the county or water supply or sewer service corporation affecting the amount to be paid to obtain service other than the regular membership or tap fees. An appeal under Texas Water Code, §13.043(g) must be initiated within 90 days after written notice of the amount to be paid to obtain service is provided to the service applicant or member of the decision of an affected county or water supply or sewer service corporation affecting the amount to be paid to obtain service as requested in the applicant's initial request for that service. The appeal must be accompanied by a $100 filing fee as required by the Texas Water Code, §5.235.

(1) If the commission finds the amount charged to be clearly unreasonable, it shall establish the fee to be paid and shall establish conditions for the applicant to pay any amounts due to the affected county or water supply or sewer service corporation. Unless otherwise ordered, any portion of the charges paid by the applicant which exceed the amount determined in the commission's order shall be repaid to the applicant with interest at a rate determined by the commission within 30 days of the signing of the order.

(2) In an appeal brought under this subsection, the commission shall affirm the decision of the water supply or sewer service corporation if the amount paid by the applicant or demanded by the water supply or sewer service corporation is consistent with the tariff of the water supply or sewer service corporation and is reasonably related to the cost of installing on-site and off-site facilities to provide service to that applicant, in addition to the factors specified under subsection (i) of this section.

(3) A determination made by the commission on an appeal from an applicant for service from a water supply or sewer service corporation under this subsection is binding on all similarly situated applicants for service, and the commission may not consider other appeals on the same issue until the applicable provisions of the tariff of the water supply or sewer service corporation are amended.

(h) The commission may, on a motion by the executive director or by the appellant under subsection (a), (b), or (f) of this section, establish interim rates to be in effect until a final decision is made.

(i) In an appeal under this section, the commission shall ensure that every rate made, demanded, or received by any retail public utility or by any two or more retail public utilities jointly shall be just and reasonable. Rates shall not be unreasonably preferential, prejudicial, or discriminatory but shall be sufficient, equitable, and consistent in application to each class of customers. The commission shall use a methodology that preserves the financial integrity of the retail public utility.

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

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Subchapter D. Records and Reports

30 TAC §291.76

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction.

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

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Subchapter E. Customer Service and Protection

30 TAC §291.87

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction. Section 291.87 implements Texas Water Code, §13.143.

§291.87. Billing.

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

(c) Penalty on delinquent bills for retail service. Unless otherwise provided, a one-time penalty of either $5.00 or 10% for all customers may be made on delinquent bills. If, after receiving a bill including a late fee, a customer pays the bill in full except for the late fee, the bill may be considered delinquent and subject to termination after proper notice under §291.88 of this title (relating to Discontinuance of Service). An additional late fee may not be applied to a subsequent bill for failure to pay the prior late fee. The penalty on delinquent bills may not be applied to any balance to which the penalty was applied in a previous billing. No such penalty may be charged unless a record of the date the utility mails the bills is made at the time of the mailing and maintained at the principal office of the utility. Late fees may not be charged on any payment received by 5:00 p.m. on the due date at the utility's office or authorized payment agency. The commission may prohibit a utility from collecting late fees for a specified period if it determines that the utility has charged late fees on payments which were not delinquent.

(d)-(p) (No change.)

(q) Voluntary contributions for certain emergency services.

(1) A utility may implement as part of its billing process a program under which the utility collects from its customers a voluntary contribution including a voluntary membership or subscription fee, on behalf of a volunteer fire department or an emergency medical service. A utility that collects contributions under this section shall provide each customer at the time the customer first becomes a customer, and at least annually thereafter, a written statement:

(A) describing the procedure by which the customer may make a contribution with the customer's bill payment;

(B) designating the volunteer fire department or emergency medical service to which the utility will deliver the contribution;

(C) informing the customer that a contribution is voluntary;

(D) if applicable, informing the customer the utility intends to keep a portion of the contributions to cover related expenses; and

(E) describing the deductibility status of the contribution under federal income tax law.

(2) A billing by the utility that includes a voluntary contribution under this section must clearly state that the contribution is voluntary and that it is not required to be paid .

(3) The utility shall promptly deliver contributions that it collects under this section to the designated volunteer fire department or emergency medical service, except that the utility may keep from the contributions an amount equal to the lesser of:

(A) the utility's expenses in administering the contribution program; or

(B) 5.0% of the amount collected as contributions.

(4) Amounts collected under this section are not rates and are not subject to regulatory assessments, late payment penalties, or other utility related fees, are not required to be shown in tariffs filed with the regulatory authority, and non-payment may not be the basis for termination of service.

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

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Subchapter F. Quality of Service

30 TAC §291.93

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction.

§291.93. Adequacy of Water Utility Service.

Sufficiency of service. Each retail public utility which provides water service shall plan, furnish, operate, and maintain production, treatment, storage, transmission, and distribution facilities of sufficient size and capacity to provide a continuous and adequate supply of water for all reasonable consumer uses.

(1) The water system quantity and quality requirements of the commission shall be the minimum standards for determining the sufficiency of production, treatment, storage, transmission, and distribution facilities of water suppliers and the safety of the water supplied for household usage. Additional capacity shall be provided to meet the reasonable local demand characteristics of the service area, including reasonable quantities of water for outside usage and livestock.

(2) In cases of extreme drought, periods of abnormally high usage, or extended reduction in ability to supply water due to equipment failure, or to comply with a state agency or court order on conservation, temporary restrictions may be instituted to limit water usage. For utilities, these temporary restrictions must be in accordance with an approved water rationing plan. Unless specifically authorized by the executive director, retail public utilities may not use water rationing in lieu of providing facilities which meet the minimum capacity requirements of the commission's rules in Chapter 290 of this title (relating to Rules and Regulations for Public Water Systems), or reasonable local demand characteristics during normal use periods, or when the system is not making all immediate and necessary efforts to repair or replace malfunctioning equipment.

(A) An approved water rationing plan must be on file with the utility's approved tariff prior to implementing water rationing unless authorized by the executive director.

(B) Temporary restrictions must be in accordance with the utility's approved water rationing plan on file or specifically authorized by the executive director. The utility shall file a status report every 30 days that rationing continues or as required by the executive director. The executive director may suspend implementation of the restrictions at any time with written notice to the utility.

(C) The utility must provide written notice to each customer prior to implementing the provisions of the rationing plan. Mailed notice is acceptable and rationing may be enforced by the utility if notice is mailed 72 hours prior to the start of rationing. If notice is hand delivered, the utility cannot enforce the provisions of the plan for 24 hours after notice is provided unless authorized by the executive director. Notice shall be provided to the commission prior to implementing the program and may be by telephone if written notice is provided by mail within ten days. Customer notice must contain:

(i) the date rationing is to begin;

(ii) the expected duration of the rationing program;

(iii) the restrictions or stage of rationing being implemented and the specific restrictions which apply; and

(iv) the penalties for violations of the rationing program.

(3) A retail public utility that possesses a certificate of public convenience and necessity that has reached 85% of its capacity as compared to the most restrictive criteria of the commission's minimum capacity requirements in Chapter 290 of this title shall submit to the executive director a planning report that clearly explains how the retail public utility will provide the expected service demands to the remaining areas within the boundaries of its certificated area. A report is not required if the source of supply available to the utility service provider is reduced to below the 85% level due to a court or agency conservation order unless that order is expected to extend for more than 18 months from the date it is entered in which case a report shall be required.

(A) After any commission field inspection, a retail public utility must analyze the system's capacity to determine if it has reached 85% of its capacity. If the retail public utility has reached 85% of its capacity, it must file this report no later than 90 days after the date of a commission letter detailing the results of the inspection. Capacity is considered to be the overall rated capacity in number of residential connection equivalents based on the most restrictive criteria for production, treatment, storage, or pumping.

(B) The report should be submitted in writing and should contain the following:

(i) a brief description of the overall utility system and service area;

(ii) an analysis of the plant capacity as defined in subparagraph (A) of this paragraph;

(iii) details on how the retail public utility will provide service to the remaining areas within the boundaries of its certificated area. This includes projections of cost and expected design and installation dates for additional facilities.

(C) The executive director may waive or limit the reporting requirements if the retail public utility demonstrates that the projected growth of the area will not require the retail public utility to exceed 100% of its current capacity for the next five years.

(D) Any retail public utility required to file reports under this section of the rules, including those requesting waivers, shall file updated reports within 90 days after the retail public utility receives a copy of each subsequent commission field inspection report until the system demand is below 85% capacity.

(E) Submission of this report shall not relieve the retail public utility from abiding by the requirements of other regulatory agencies as set forth in §291.92 of this title (relating to Requirements by Others).

(4) Each retail public utility which possesses or is required to possess a certificate of convenience and necessity shall furnish safe water which meets the minimum quality criteria for drinking water prescribed by the commission. The supply must meet the requirements of Health and Safety Code, §341.031 and commission rules. A utility or water supply corporation which is authorized to

operate without a certificate of convenience and necessity pursuant to Health and Safety Code, §13.242(c) may be required by the executive director to meet the minimum criteria prescribed by the commission if so instructed in writing.

(5) Each retail public utility must promptly take all reasonable actions necessary to protect the health of its customers at all times.

(6) Every retail public utility shall maintain its facilities to protect them from contamination, ensure efficient operation, and promptly repair leaks.

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

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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-1966

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Subchapter G. Certificate of Convenience and Necessity

30 TAC §§291.101–291.103, 291.106, 291.107, 291.109, 291.111, 291.113, 291.114

The amendments are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction. Section 291.101 implements Texas Water Code, §49.215(d). Section 291.102 implements Texas Water Code, §13.241 and 13.246. Section 291.103 implements Texas Water Code, §49.352. Section 291.109 implements Texas Water Code, §13.301. Section 291.111 implements Texas Water Code, 13.302. Section 291.113 implements Texas Water Code, §13.254. Section 291.114 implements Texas Water Code, §13.253.

§291.102. Criteria for Considering and Granting Certificates or Amendments.

(a) In determining whether to grant a new certificate of public convenience and necessity, the commission shall ensure that the applicant possesses the financial, managerial, and technical capability to provide continuous and adequate service.

(1) For water utility service, the commission shall ensure that the applicant is capable of providing drinking water that meets the requirements of Health and Safety Code, Chapter 341 and commission rules and has access to an adequate supply of water.

(2) For sewer utility service, the commission shall ensure that the applicant is capable of meeting the commission's design criteria for sewer treatment plants, commission rules, and the Texas Water Code.

(3) Where a new certificate of convenience and necessity is being issued for an area which would require construction of a physically separate water or sewer system, the applicant must demonstrate that regionalization or consolidation with another retail public utility is not economically feasible. To demonstrate this, the applicant must at a minimum provide:

(A) a list of all public drinking water supply systems or sewer systems within a two-mile radius of the proposed system;

(B) copies of written requests seeking to obtain service from each of the public drinking water supply systems or sewer systems or demonstrate that it is not economically feasible to obtain service from a neighboring public drinking water supply system or sewer system;

(C) copies of written responses from each of the systems or evidence that they failed to respond;

(D) a description of the type of service that a neighboring public drinking water supply system or sewer system is willing to provide and comparison with service the applicant is proposing;

(E) an analysis of all necessary costs for constructing, operating, and maintaining the new system for at least the first five years, including such items as taxes and insurance;

(F) an analysis of all necessary costs for acquiring and continuing to receive service from the neighboring public drinking water supply system or sewer system for at least the first five years.

(b) The commission may approve applications and grant or amend a certificate only after finding that the certificate is necessary for the service, accommodation, convenience, or safety of the public. The commission may issue or amend the certificate as applied for, or refuse to issue it, or issue it for the construction of a portion only of the contemplated system or facility or extension thereof, or for the partial exercise only of the right or privilege and may impose special conditions necessary to ensure that continuous and adequate service is provided.

(c) In considering whether to grant or amend a certificate, the commission shall also consider:

(1) the adequacy of service currently provided to the requested area;

(2) the need for additional service in the requested area;

(3) the effect of the granting of a certificate on the recipient of the certificate and on any retail public utility of the same kind already serving the proximate area;

(4) the ability of the applicant to provide adequate service;

(5) the feasibility of obtaining service from an adjacent retail public utility;

(6) the financial stability of the applicant, including, if applicable, the adequacy of the applicant's debt- equity ratio;

(7) environmental integrity; and

(8) the probable improvement in service or lowering of cost to consumers in that area.

(d) The commission may require an applicant utility to provide financial assurance to ensure that continuous and adequate utility service is provided. The commission shall set the amount of financial assurance. The form of the financial assurance will be as specified in Chapter 37, Subchapter O of this title (relating to Financial Assurance for Public Drinking Water Systems and Utilities).

(e) Where applicable, in addition to the other factors in this section the commission shall consider the efforts of the applicant to extend service to any economically distressed areas located within the service areas certificated to the applicant. For purposes of this subsection, "economically distressed area" has the meaning assigned in Texas Water Code, §15.001.

§291.106. Notice for Applications for Certificates of Convenience and Necessity.

(a) If an application for issuance or amendment of a certificate of public convenience and necessity is filed, the applicant will prepare a notice or notices, as prescribed in the commission's application form, which will include the following:

(1) All information outlined in the Administrative Procedure Act, Government Code, Chapter 2001;

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

(b) After reviewing and, if necessary, modifying the proposed notice, the commission will send the notice to the applicant for publication and/or mailing.

(1) For applications for issuance of a new certificate of public convenience and necessity, the applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service within five miles of the requested service area, and any city with an extra-territorial jurisdiction which overlaps the proposed service area.

(2) For applications for an amendment of a certificate of public convenience and necessity, the applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service within two miles of the requested service area, and any city with an extra-territorial jurisdiction which overlaps the proposed service area.

(3) Applicants previously exempted for operations or extensions in progress as of September 1, 1975, must provide individual mailed notice to all current customers. The notice must contain the information required in the application.

(4) Utilities that are required to possess a certificate but that are currently providing service without a certificate must provide individual mailed notice to all current customers. The notice must contain the current rates, the effective date those rates were instituted and any other information required in the application.

(5) Within 30 days of the date of the notice, the applicant shall submit to the commission an affidavit specifying the persons to whom notice was provided and the date of that notice.

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

§291.109. Report of Sale, Merger, Etc; Investigation; Disallowance of Transaction.

(a) On or before the 120th day before the effective date of any sale, acquisition, lease, rental, merger, or consolidation of any water or sewer system required by law to possess a certificate of public convenience and necessity, the utility or water supply or sewer service corporation shall file a written application with the commission and give public notice of the action. The notification shall be on the form required by the commission and the comment period will not be less than 30 days. Public notice may be waived by the executive director for good cause shown.

(b) A person purchasing or acquiring the water or sewer system must demonstrate adequate financial, managerial, and technical capability for providing continuous and adequate service to the requested area and any areas currently certificated to the person.

(c) If the person purchasing or acquiring the water or sewer system cannot demonstrate adequate financial capability, the commission may require that the person provide financial assurance to ensure continuous and adequate utility service is provided. The commission shall set the amount of financial assurance. The form of the financial assurance must be as specified in Chapter 37, Subchapter O of this title (relating to Financial Assurance for Public Drinking Water Systems and Utilities).

(d) The commission shall, with or without a public hearing, investigate the sale, acquisition, lease, rental, merger or consolidation to determine whether the transaction will serve the public interest.

(e) Prior to the expiration of the 120-day notification period, the executive director shall notify all known parties to the transaction of the decision to either approve the sale administratively or to request that the commission hold a public hearing to determine if the transaction will serve the public interest. The executive director may request a hearing if:

(1) the application filed with the commission or the public notice was improper;

(2) the person purchasing or acquiring the water or sewer system has not demonstrated adequate financial, managerial, and technical capability for providing continuous and adequate service to the service area being acquired and to any areas currently certificated to that person;

(3) the person or an affiliated interest of the person purchasing or acquiring the water or sewer system has a history of:

(A) noncompliance with the requirements of the commission or the Texas Department of Health; or

(B) continuing mismanagement or misuse of revenues as a utility service provider;

(4) the person purchasing or acquiring the water or sewer system cannot demonstrate the financial ability to provide the necessary capital investment to ensure the provision of continuous and adequate service to the customers of the water or sewer system;

(5) it is in the public interest to investigate the following factors:

(A) whether the seller has failed to comply with a commission order;

(B) the adequacy of service currently provided to the area;

(C) the need for additional service in the requested area;

(D) the effect of approving the transaction on the utility or water supply or sewer service corporation, the person purchasing or acquiring the water or sewer system, and on any retail public utility of the same kind already serving the proximate area;

(E) the ability of the person purchasing or acquiring the water or sewer system to provide adequate service;

(F) the feasibility of obtaining service from an adjacent retail public utility;

(G) the financial stability of the person purchasing or acquiring the water or sewer system, including, if applicable, the adequacy of the debt-equity ratio of the person purchasing or acquiring the water or sewer system if the transaction is approved;

(H) the environmental integrity; and

(I) the probable improvement of service or lowering of cost to consumers in that area resulting from approving the transaction.

(f) Unless the executive director requests that a public hearing be held, the sale, acquisition, lease, or rental or merger or consolidation may be completed as proposed:

(1) at the end of the 120-day period;

(2) or may be completed at any time after the utility or water supply or sewer service corporation receives notice that a hearing will not be requested.

(g) Within 30 days after the actual effective date of the transaction, the utility or water supply or sewer service corporation must file a signed contract, bill of sale, or other appropriate documents as evidence that the transaction has been made final and documentation that customer deposits have been transferred or refunded to the customer with interest as required by these rules.

(h) If a hearing is requested or if the utility or water supply or sewer service corporation fails to make the application as required or to provide public notice, the sale, acquisition, lease, merger, consolidation, or rental may not be completed unless the commission determines that the proposed transaction serves the public interest.

(i) A sale, acquisition, lease, or rental of any water or sewer system, required by law to possess a certificate of public convenience and necessity that is not completed in accordance with the provisions of the Texas Water Code, §13.301 is void.

(j) The requirements of the Texas Water Code, §13.301 do not apply to:

(1) the purchase of replacement property;

(2) a transaction under the Texas Water Code, §13.255; or

(3) foreclosure on the physical assets of a utility.

(k) If a utility facility or system is sold and the facility or system was partially or wholly constructed with customer contributions in aid of construction derived from specific surcharges approved by the regulatory authority over and above revenues required for normal operating expenses and return, the utility may not sell or transfer any of its assets, its certificate of convenience and necessity, or controlling interest in an incorporated utility, unless the utility provides to the purchaser or transferee before the date of the sale or transfer a written disclosure relating to the contributions. The disclosure must contain, at a minimum, the total dollar amount of the contributions and a statement that the contributed property or capital may not be included in invested capital or allowed depreciation expense by the regulatory authority in rate-making proceedings.

(l) A utility or a water supply or sewer service corporation that proposes to sell, assign, lease, or rent its facilities shall notify the other party to the transaction of the requirements of this section before signing an agreement to sell, assign, lease, or rent its facilities.

§291.111. Purchase of Voting Stock in Another Utility.

(a) A utility may not purchase voting stock in and a person may not acquire a controlling interest in a utility doing business in this state unless the utility or person files a written application with the commission not later than the 61st day before the date on which the transaction is to occur. A controlling interest is defined as a person or a combination of a person and other family members possessing at least 50% of the voting stock of the utility; or a person that controls at least 30% of the stock and is the largest stockholder.

(b) A person acquiring a controlling interest in a utility may be required to demonstrate adequate financial, managerial, and technical capability for providing continuous and adequate service to the requested area and any areas currently certificated to the person.

(c) If the person acquiring a controlling interest cannot demonstrate adequate financial capability, the commission may require that the person provide financial assurance to ensure continuous and adequate utility service is provided. The commission shall set the amount of financial assurance. The form of the financial assurance must be as specified in Chapter 37, Subchapter O of this title (relating to Financial Assurance for Public Drinking Water Systems and Utilities).

(d) The executive director may request that the commission hold a public hearing on the transaction if the executive director believes that a criterion prescribed by §291.110 of this title (relating to Foreclosure and Bankruptcy) applies.

(e) Unless the executive director requests that a public hearing be held, the purchase or acquisition may be completed as proposed:

(1) at the end of the 60 day period; or

(2) at any time after the executive director notifies the person or utility that a hearing will not be requested.

(f) The utility or person must notify the commission within 30 days after the date that the transaction is completed.

(g) If a hearing is requested by the executive director or if the person or utility fails to make the application to the commission as required, the purchase or acquisition may not be completed unless the commission determines that the proposed transaction serves the public interest. A purchase or acquisition that is not completed in accordance with the provisions of this section is void.

§291.114. Requirement to Provide Continuous and Adequate Service.

(a) Any retail public utility which possesses or is required by law to possess a certificate of convenience and necessity or a person who possesses facilities used to provide utility service must provide continuous and adequate service to every customer and every qualified applicant for service whose primary point of use is within the certificated area and may not discontinue, reduce or impair utility service except for:

(1) nonpayment of charges for services provided by the certificate holder or a person who possesses facilities used to provide utility service;

(2) nonpayment of charges for sewer service provided by another retail public utility under an agreement between the retail public utility and the certificate holder or a person who possesses facilities used to provide utility service or under a commission order;

(3) nonuse; or

(4) other similar reasons in the usual course of business without conforming to the conditions, restrictions, and limitations prescribed by the commission.

(b) After notice and hearing, the commission may:

(1) order any retail public utility that is required by law to possess a certificate of public convenience and necessity or any retail public utility that possesses a certificate of public convenience and necessity and is located in an affected county as defined in Texas Water Code, §16.341, to:

(A) provide specified improvements in its service in a defined area if:

(i) service in that area is inadequate as set forth in §291.93 and §291.94 of this title (relating to Adequacy of Water Utility Service; and Adequacy of Sewer Service); or

(ii) is substantially inferior to service in a comparable area; and

(iii) it is reasonable to require the retail public utility to provide the improved service; or

(B) develop, implement, and follow financial, managerial, and technical practices that are acceptable to the commission to ensure that continuous and adequate service is provided to any areas currently certificated to the retail public utility if the retail public utility has not provided continuous and adequate service to any of those areas and, for a utility, to provide financial assurance of the retail public utility's ability to operate the system in accordance with applicable laws and rules as specified in Chapter 37, Subchapter O of this title (relating to Financial Assurance for Public Drinking Water Systems and Utilities), or as specified by the commission;

(2) order two or more public utilities or water supply or sewer service corporations to establish specified facilities for interconnecting service;

(3) order a public utility or water supply or sewer service corporation that has not demonstrated that it can provide continuous and adequate service from its drinking water source or sewer treatment facility to obtain service sufficient to meet its obligation to provide continuous and adequate service on at least a wholesale basis from another consenting utility service provider; or

(4) issue an emergency order, with or without a hearing, under §291.14 of this title (relating to Emergency Orders).

(c) If the commission has reason to believe that improvements and repairs to a water or sewer service system are necessary to enable a retail public utility to provide continuous and adequate service in any portion of its service area and the retail public utility has provided financial assurance under Health and Safety Code, §341.0355, or under this chapter, the commission, after providing to the retail public utility notice and an opportunity to be heard by the commissioners at a commission meeting, may:

(1) immediately order specified improvements and repairs to the water or sewer system, the costs of which may be paid by the financial assurance in an amount determined by the commission not to exceed the amount of the financial assurance. The order requiring the improvements may be an emergency order if it is issued after the retail public utility has had an opportunity to be heard by the commissioners at a commission meeting; and

(2) require a retail public utility to obligate additional money to replace the financial assurance used for the improvements.

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

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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239–1966

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Subchapter I. Wholesale Water or Sewer Service

30 TAC §291.138

The amendment is adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction.

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

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Subchapter J. Enforcement, Supervision, and Receivership

30 TAC §291.140, §291.144

The new sections are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction. Section 291.140 implements Texas Water Code, §13.411.

§291.144. Fines and Penalties.

Disposition. Fines and penalties collected under Water Code, Chapter 13, from a retail public utility that is not a public utility in other than criminal proceedings shall be paid to the commission and deposited in the general revenue fund.

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

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Subchapter K. Provisions Regarding Municipalities

30 TAC §§291.150–291.153

The new sections are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction. Section 291.152 implements Texas Water Code, §13.045. Section 291.153 implements Texas Water Code, §13.086.

§291.151. Applicability of Commission Service Rules Within the Corporate Limits of a Municipality.

The commission's rules relating to service and response to requests for service will apply to utilities operating within the corporate limits of a municipality unless the municipality adopts its own rules. These rules include Subchapters E and F of this chapter (relating to Customer Service and Protection and Quality of Service).

§291.152. Notification Regarding Use of Revenue.

At least annually, and before any rate increase, a municipality shall notify in writing each water and sewer retail customer of any service or capital expenditure, not water or sewer related, funded in whole or in part by customer revenue.

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

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part X. Texas Water Development Board

Chapter 353. Introductory Provisions

The Texas Water Development Board (board) adopts the repeal of 31 TAC §§353.1, 353.7, 353.8, 353.11, 353.13, 353.15, 353.21-353.26, 353.41-353.43, 353.59, 353.71, and 353.72, which were found to no longer be necessary, and amendments to §§353.2-353.4, 353.6, 353.9, 353.10, 353.51, 353.52, 353.55-353.58, 353.60, 353.80-353.83 and 353.85, to update and clarify provisions of Chapter 353, Introductory Provisions, without changes to the proposed text as published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12194) and will not be republished. Sections 353.2-353.6, 353.9, 353.10, 353.12 and 353.14 will comprise Subchapter A, General Provisions. Sections 353.51-353.58 and 353.60 will comprise Subchapter B, Rulemaking Public Hearings of the Board. Sections 353.80-353.94 will comprise Subchapter C, Relationship Between the Board and Donors.

Section 353.1 is adopted for repeal as it does not add substantially to the chapter and is unneeded. The adopted amendment to §353.2 corrects references to the administrative offices to reflect that they are offices of the board. The adopted amendments to §353.3 conforms the section to statutory authority to indicate the Board's ability to recess its meetings, and to reference that the chair or the vice-chair presides at board meetings.

The adopted amendments to §353.4 are for grammatical clarification, to correct statutory references, and also to expressly state the board's ability to require persons or entities that are closely aligned to utilize a common representative for presentations at board meetings. Amendments also reflect that the board is not required to allow public comments and oral presentation at all meetings. These amendment are considered necessary in order to allow the board meeting to proceed expeditiously but still assure the public has adequate opportunity to input at appropriate instances in the meetings.

Amendments to §353.6 are adopted to allow the vice-chair of the board to sign minutes of the board. This will allow the timely completion of the minutes in the event that the chair is not available to sign the minutes.

Sections 353.7 and 353.8 are adopted for repeal as unnecessary. Section 353.7 currently provides for the naming of the liaison to the Secretary of State for purposes of Texas Register filing. This is not required to be done in rule. Section 353.8 currently addresses citation of statutes in the board's rules, and is not necessary as the Texas Register rules control citation references, and because the citations are self-explanatory in each section.

Adopted amendments to §353.9 do not change the meaning of the rule, but merely provide more clarity in the reading of the section, and specifically provide for the delegation of authority to conduct hearings to include those hearings relating to feasibility of federal projects under Texas Water Code, §12.051.

Section 353.10 amendments make technical corrections to statutory citations and changes the term "department," which referred to Texas Department of Water Resources, to "board."

Section 353.11 is adopted for repeal because the charges for public records are now established in and governed by rules of General Services Commission, or from exceptions to those charges that are specifically approved by General Services Commission.

Section 353.13 is adopted for repeal. The section adopts by reference the memorandum of understanding between the board and Texas Department of Information Resources. The section is adopted for repeal because the responsibilities discussed in the memorandum are now more formally established by legislation creating the Texas Geographic Information Council passed in 1997.

Section 353.15 is adopted for repeal. The section contains the Memorandum of Understanding between the board and Texas State Soil and Water Conservation Board. The memorandum expired by its own terms on August 31, 1997.

Sections 353.21 through 353.26, which govern the use of environmental impacts statement, and Sections 353.41 through 353.43, which provide guidelines on the preparation of environmental, social and economic impact statements, are adopted for repeal. The sections are not needed in the general introductory provisions relating the board's procedure, as much more

detailed and specific provisions regarding environmental review and consideration are contained in the rules relating to financial assistance programs. Rules on environmental review in the state and regional water planning also are contained in chapters of the board's rules relating to those programs.

Section 353.51 is amended to correct internal references.

Amendments to §353.52 and §353.56 are adopted to clarify that a representative conducting a rulemaking hearing on behalf of the board has the same powers and flexibility as the board in conducting and determining the manner of the hearing. The board often delegates rulemaking hearings to a representative, which then reports back to the board. The amendment merely provides clarification as to discretion of this representative in the conduct of the hearing, including the administration of oaths, establishing order of presentation, and limiting time or repetitious evidence.

Amendments adopted to §353.55 clarify that the public may submit comments and evidence relating to a proposed rule until the deadline for receipt of such comments specified in the publication of the rule in the Texas Register. As written, the section requires all information to be submitted by the time of a rule making hearing.

Adopted amendment to §353.57 clarifies that the board will consider comments to adopted rules in its rulemaking process. This is consistent with state law in the Administrative Procedures Act.

Adopted amendments to §353.58(a) and (b) clarify that a petition for adoption of rules is to be delivered to the board's executive administrator, and that the time for board action regarding the petition begins to run from the executive administrator's receipt of the petition. The rule currently requires written submittal of the petition, but does not specify to whom the petition is delivered. Amendments to (a)(1) are proposed to clarify that a separate petition need only be filed for amendments to each adopted rule chapter. As currently adopted, the section requires a separate petition for "each rule," but does not specify if that means a separate petition for each section of the rules. Separate petitions for each rule section would be an unduly burdensome requirement. The proposed amendment also requires the petition to include a justification for adoption of the proposed rule. This will better allow the board to understand the reasons for adoption, and to make a better determination of whether to grant or deny the petition. It will also aid the board in the meeting the statutory requirements for adoption of the rule.

The board adopts repeal of §353.59 regarding emergency rules. The section is merely a repetition of the requirements found in the Administrative Procedures Act, and therefore is not necessary.

Adopted amendments to §353.60 provides that the executive administrator as well as the board itself may convene an advisory conference or consultation on rules, and that both the board and the executive administrator may use negotiated rulemaking. The section makes it clear that the executive administrator may take actions to convene such panels by his own action. This amendment will assure that the agency continues to consult with experts or interested persons early in the rulemaking process.

Sections 353.71 and 353.72, relating to the board's designation of local sponsors for federal projects, are adopted for repeal. This function has been statutorily transferred to Texas Natural Resource Conservation Commission.

Adopted amendments to §§353.80-353.85 generally reflect changes to state law relating the an agency's acceptance of gifts. The subchapter previously dealt only with donations from entities other than governmental entities. The adopted amendments will expand certain provisions to relate to gifts by any entity, including governmental entities. The amendments to §353.80 and §353.81 clarify the expansion of the chapter by including the term "gifts" into the coverage of the provisions. Amendment to §353.82 adds a definition of "gifts" to be donations or money or property from any source, consistent with the use of the term in the Government Code, Chapter 575. The term "donor" is amended to clarify that it does not include a governmental entity, thus preserving certain of the subchapter's sections as relevant only to donations from individuals or non-governmental entities (the original purpose of the subchapter). The adopted amendment to §353.83 specifies that gifts are deposited in accordance with state law. The section previously stated that donations from private sources are deposited into the treasury. The amendment will provide the greatest flexibility in the deposit of money in accordance with donors' instructions and state law. The amendment to §353.85 substitutes the term "gift" for "donation" to make the section's provisions on acceptance apply to both public and private entities and persons. The amendments reflect that the board must accept all gifts valued at $500 or more, but that the executive administrator may continue to receive gifts if less than $500. The section also incorporates provisions in Government Code Chapter 375 that require the board to accept gifts of $500 or more in open meeting, by majority vote of board members, and record the gifts in the minutes of the board.

No comments were received regarding adoption of the repeals and amendments.

Subchapter A. General Provisions

31 TAC §§353.1, 353.7, 353.8, 353.11, 353.13, 353.15

The repeals are adopted pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

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

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31 TAC §§353.2-353.4, 353.6, 353.9, 353.10

The amendments are adopted pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

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

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Suzanne Schwartz
General Counsel
Texas Water Development Board
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Subchapter B. Environmental Impact Statements

31 TAC §§353.21–353.26

The repeals are adopted pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

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

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Subchapter C. Guidelines on the Preparation of Environmental, Social, and Economic Impact Statements

31 TAC §§353.41–353.43

The repeals are adopted pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

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

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Subchapter D. Rulemaking Public Hearings of the Board

31 TAC §§353.51, 353.52, 353.55-353.58, 353.60

The amendments are adopted pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

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

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31 TAC §353.59

The repeal is adopted pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

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

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Subchapter E. Local Sponsorship

31 TAC §353.71, §373.72

The repeals are adopted pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

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

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Subchapter F. Relationship between the Board and Donors

31 TAC §§353.80–353.83, 353.85

The amendments are adopted pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

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

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Chapter 355. Research and Planning Funding

Subchapter A. General Research and Planning

31 TAC §§355.1–355.5, 355.8–355.10

The Texas Water Development Board (board) adopts amendments to 31 TAC §§355.1-355.5, 355.8-355.10 and 355.70-355.73, concerning the Research and Planning Fund without change to the proposed text as filed for publication with the *Texas Register* but with a change to §355.73 as actually published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12199). Section 355.73 is republished in its correct form. Sections 355.1-355.5, 355.8-355.10 and 355.70-355.72 will not be republished. The proposed amendment to §355.73(b)(4), relating to Scope of Facility Plan, as filed with the Texas Register added as an additional optional task the preparation of water and wastewater facility plans and specifications. The December 4, 1998, issue of the *Texas Register* (23 TexReg 12199) incorrectly published the language of §355.73(b)(4) as a deletion rather than new language.

In Subchapter A, General Research and Planning, amendments are adopted to §§355.1-355.5 and §§355.8-355.10 to bring rules into compliance with statutory changes and to provide more detail on criteria for evaluation of applications. In Subchapter B, concerning Economically Distressed Areas Facility Engineering, amendments are adopted to §§355.70-355.73 to clarify procedures for obtaining grants in the Economically Distressed Areas Program.

Amendments to §355.1, which generally describes the subchapter, would delete the aquifer storage and recovery planning program from eligibility for Research and Planning Grant funding. This is done because Senate Bill 1, 75th Legislature, Regular Session (1997), amended Chapter 11 of the Texas Water Code to make aquifer storage and recovery a recognized water management technique that no longer requires grants for study or planning. Senate Bill 1 also clarified that water resource facilities are part of the Research and Planning Programs.

The amendment to §355.2, relating to Definitions, deletes the definition of "aquifer storage and recovery planning" to conform the rules with the change in the law and amends the definition of "regional planning for water resources" to clarify that this applies to water resource facilities and thus distinguishes this planning from regional water planning under Subchapter C of Chapter 355 (Senate Bill 1 regional planning). Amendments are also adopted to number definitions in accordance with new Texas Register requirements.

The amendment to §355.3, relating to Legal and Fiscal Information, clarifies that there are three categories for grants under the Research and Planning Programs. There were previously four programs, but aquifer storage and recovery has been removed from eligibility.

The amendment to §355.4, relating to Eligibility, clarifies that aquifer storage and recovery planning grants are no longer available. The amendment also clarifies that regional planning grants apply to water resource facilities, not to Senate Bill 1 Regional Planning.

The amendment to §355.5, relating to Criteria, removes the language about aquifer storage and recovery planning grant criteria from the rule, to be consistent with state law. The amendment also adds language to clarify the criteria for applications for research projects that are sent in response to solicitation and those applications that are unsolicited.

The amendment to §355.8, relating to Notice Requirements, clarifies that aquifer storage and recovery planning is no longer part of the Research and Planning Program and that regional planning projects apply only to water resource facility planning projects.

The amendment to §355.9, relating to Contracts, clarifies that the executive administrator may designate a deputy to sign contracts, as the board currently has authorized by separate board action.

The amendment to §355.10 (a) clarifies these provisions apply only to water resource facility planning. The proposed amendment to subsections (e) and (f) remove references to expired legislation, and provide a general exception to allow funding in excess of 75% if specifically authorized by the Legislature. Deletion of subsection (g), removes the language about aquifer storage and recovery planning program.

In §355.70, Definitions, the definition of "facility planning" is amended to reflect that preparation of plans and specifications of water or wastewater facilities for an economically distressed area is an optional task that may be required by the board but is not always included in the tasks or studies that are included in a facility plan. The definition of "economically distressed area" is amended to include areas that were added to the statutory definition in the Texas Water Code, §17.921(1). The definition of "minimal water supply needs" is amended to specify state water treatment, conveyance and storage regulatory requirements as established by the Texas Natural Resource Conservation Commission. The definition of "minimal wastewater needs" is amended to reflect compliance with the state regulatory requirements for minimum wastewater service. Amendments are also adopted to number definitions in accordance with new Texas Register requirements.

The amendment to §355.71, relating to Purposes and Policy, deletes the word "applicable" because the term is surplus

language that can only create confusion to the requirement of signing and sealing plans by a professional engineer.

The amendment to §355.72, relating to Criteria for Eligibility, is to clarify that the model subdivision rules were in fact adopted as part of separate action of the board and not a part of these rules and to reflect the current agency position responsible for responding to requests for copies of the model subdivision rules. The section is also amended to more accurately reflect the requirement imposed by Health and Safety Code §366.035 that any local governmental entity that applies for facility engineering grant funds must receive and maintain a designation of authorized agent as set forth in that code.

The amendment to §355.73, relating to Scope of Facility Plan, adds as an additional optional task the preparation of water and wastewater facility plans and specifications that may be required to be included in the facility plan at the discretion of the board.

No comments were received on the amendments.

The amendments are adopted under the authority of the Texas Water Code, §6.101 and §15.403 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code, including Chapter 15, and other laws of the State.

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

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Suzanne Schwartz
General Counsel
Texas Water Development Board
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Subchapter B. Economically Distressed Areas Facility Engineering

31 TAC §§355.70–355.73

The amendments are adopted under the authority of the Texas Water Code, §6.101 and §15.403 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code, including Chapter 15, and other laws of the State.

§355.73. Scope of Facility Plan.

(a) (No change.)

(b) The facility plan assistance shall include the items of work described in this subsection if approved or required by the board:

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

(3) the preparation of applications for necessary state and federal wastewater permits. Facility planning may not include activities associated with administrative or legal proceedings by regulatory agencies;

(4) the preparation of plans and specifications for constructing the water or wastewater facilities; and

(5) other engineering tasks approved by the executive administrator.

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

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Suzanne Schwartz
General Counsel
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Chapter 363. Financial Assistance Programs

The Texas Water Development Board (the board) adopts amendments to 31 TAC §§363.2, 363.17, 363.704, 363.712, 363.713, 363.721, and 363.731 and new §§363.81-363.84, 363.86, 363.87, and §363.715, concerning Grants for Emergency and the Small Community Emergency Loan Program without changes to the proposed text as published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12203) and will not be republished. Section 363.85, Findings of the Board, was withdrawn from consideration for permanent adoption, as it was found to be unnecessary. The amendments and new sections are adopted to provide grants and short-term loans to community water and wastewater systems in need of emergency assistance due to emergency conditions.

Section 363.2, Definitions of Terms, is adopted for amendment to add definitions for "bonds, "delivery," "emergency," "grants for emergency" and "economically distressed areas" because these are terms used in the rules that govern the program. Adopted amendments also number definitions in compliance with Texas Register requirements. Section 363.17 addresses grants from the Water Loan Assistance Fund and is adopted for amendment to add to the list of projects which may receive grants, those water and/or sewer services which suffer a temporary interruption of service due to emergency conditions.

New sections 363.81-363.84, 363.86 and 363.87 set out the eligibility criteria for political subdivisions that apply for and receive grants in response to emergency conditions. The adopted new sections provide for the use of a grant agreement to detail the requirements for environmental review, design standards, and closing and release of funds.

New §363.81, Grants for Emergency, provides guidelines for potential applicants by addressing eligibility factors in receiving grants. To meet eligibility criteria, a political subdivision must serve an economically distressed area and must suffer an interruption of existing water or wastewater services because of the emergency condition.

New §363.82, Terms of Financial Assistance, provides that the amount of grants shall be limited to the amount necessary to restore service or ensure uninterrupted delivery of service. This limitation is imposed because the grants are intended only to address the problem that arises from the emergency condition. Adopted new §363.83, Application, provides uniformity for application requirements and directs that the grant applicant

must submit an application for grant assistance in the form and numbers required by the executive administrator in order to be considered for grant assistance.

New §363.84, Applicability, provides that applications for grant assistance must submit the same general, legal, fiscal and engineering information that is required for loan applications. The information will enable the agency to determine the eligibility of the application for an emergency grant.

New §363.86, Grant Agreement, provides for additional information to customers by giving notice to a grant recipient of the terms of the grant through the means of a grant agreement. The provisions of the grant agreement will include the term of the grant commitment, conditions for closing, environmental approvals and engineering design standards that must be met to receive grant assistance.

New §363.87, Environmental Review Before Board Approval, requires that staff will make a written report to the executive administrator on known or potentially significant social or environmental concerns prior to approval of the grant by the Board. As a means of ensuring that project design and implementation is environmentally responsible and complies with current law, the adopted new section further provides that the terms and conditions for completion of the environmental review process and identified mitigation measures will be included in the grant agreement.

Section 363.704, Eligibility Requirements, states the requirements for eligibility for small community emergency loan consideration. The adopted amendment adds as an emergency the condition of drought that poses a threat to public health and safety.

Adopted amendment to §363.712, Environmental Review before Board Approval, adds the requirement that the loan agreement provide for terms of completing the environmental review process and with identified mitigation measures so as to ensure that project design and implementation are environmentally responsible and comply with current law. Section 363.713 is proposed for amendment to delete the requirement that a recommendation on a loan application will be prepared within three days of submittal of a completed application. This requirement has been found to be unnecessarily burdensome for staff and achieves no purpose for the applicant as all loan recommendations must wait for the monthly board meetings to be considered by the board for approval.

New section 363.715, Notes and Loan Agreements, is adopted to provide an option to borrowers to receive financial assistance either by issuing bonds or by entering into a loan agreement. The new section provides applicants with the option of entering into a note and loan agreement as a method of receiving funds. Prior to this amendment, applicants could only issue bonds which the agency purchased. The bond issuance method can result in delays of time. The new option offers a quicker means of completing the loan transaction. However, the option limits the term of the loan to one year.

Adopted amendments to §363.721 address closing requirements for borrowers which select the new loan option offered pursuant to §363.715.

Section 363.731 is adopted for amendment to ensure environmental compliance by adding the requirement that the project engineer must include in his assurances that the construction work is being performed in a satisfactory manner and that provision has been made for environmental mitigative measures.

No comments were received regarding adoption of the proposed amendments and new sections.

Subchapter A. General Provisions

Division 1. Introductory Provisions

31 TAC §363.2

The amendment is adopted under the Texas Water Code, Chapter 6, §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

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

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Suzanne Schwartz
General Counsel
Texas Water Development Board
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Division 2. General Application Procedures

31 TAC §363.17

The amendment is adopted under the Texas Water Code, Chapter 6, §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

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

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Division 7. Grants for Emergency

31 TAC §§363.81-363.84, 363.86, 363.87

The new sections are adopted under the Texas Water Code, Chapter 6, §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

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

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Suzanne Schwartz
General Counsel
Texas Water Development Board
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Subchapter G. Small Community Emergency Loan Program

Division 1. Introductory Provisions

31 TAC §363.704

The amendment is adopted under the Texas Water Code, Chapter 6, §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

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

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Suzanne Schwartz
General Counsel
Texas Water Development Board
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Division 2. Application Procedures

31 TAC §§363.712, 363.713, 363.715

The amendments and new section are adopted under the Texas Water Code, Chapter 6, §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

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

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Division 3. Closing and Release of Funds

31 TAC §363.721

The amendment is adopted under the Texas Water Code, Chapter 6, §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

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Division 4. Construction and Post-Construction Phase

31 TAC §363.731

The amendment is adopted under the Texas Water Code, Chapter 6, §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

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Chapter 365. Investment Rules

The Texas Water Development Board (the Board) adopts amendments to 31 TAC §§365.2, 365.8, 365.11, 365.12, 365.18, 365.20 and 365.21, concerning Investment Rules without changes to the proposed text as published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12207) and will not be republished. The amendments are adopted to comply with the Public Funds Investment Act (PFIA) - Chapter 2256 of the Texas Government Code and to address changes resulting from the Board's annual review of its investment policies and strategies.

Section 365.2 is adopted for amendment to reflect the change in the investment officer's title as a result of agency restructuring and to number definitions in accordance with Texas Register requirements. Section 365.8 is adopted for amendment to clarify the internal auditor and finance committee's annual review of investment controls. Section 365.11 is adopted for amendment to require the submission of dealers' qualification information to the investment officer. Section 365.12 is adopted for amendment to delete an inapplicable term, and to remove

the internal auditor as a participant in the annual review of dealers. Section 365.18 is adopted for amendment to remove the internal auditor as a participant in the placement of investment controls. It is inappropriate to the internal auditor's position of independents to be involved in dealer reviews and investment controls. Section 365.20 is adopted for amendment to reflect changes to federal arbitrage regulations which now permit investment yields in excess of arbitrage yield restrictions. Section 365.21 is adopted for amendment to state the method used to determine market values as required by the PFIA.

No comments were received on the proposed amendments.

Subchapter A. General Provisions

31 TAC §365.2, §365.8

The amendments are adopted under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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

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Suzanne Schwartz
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Subchapter B. Selection of Authorized Dealers

31 TAC §§365.11, 365.12, 365.18, 365.20

The amendments are adopted under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Suzanne Schwartz
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Subchapter C. Investment Procedures

31 TAC §365.21

The amendment is adopted under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Chapter 375. State Water Pollution Control Revolving Fund

The Texas Water Development Board (board) adopts the repeal of 31 TAC Chapter 375, State Water Pollution Control Revolving Fund, §§375.1-375.4, 375.14-375.22, 375.31-375.38, 375.40, 375.51, 375.52, 375.61-375.63, 375.72, 375.74, 375.75, 375.81-375.86, 375.88, 375.101-375.103, and new §§375.1-375.4, 375.11-375.18, 375.31-375.42, 375.51, 375.52, 375.61, 375.62, 375.71-375.73, 375.81-375.87 and 375.101-375.105 for Subchapter A, and §§375.201, 375.211-375.214 and 375.221, 375.222 for Subchapter B, comprising Chapter 375, Clean Water State Revolving Fund. Sections 375.2, 375.12, 375.13, 375.34, 375.36, 375.42, 375.71, 375.72 and 375.212 are adopted with changes to the proposed text as published in the December 4, 1998 issue of the Texas Register (23 TexReg 12209). The repeal of §§375.1-375.4, 375.14-375.22, 375.31-375.38, 375.40, 375.51, 375.52, 375.61-375.63, 375.72, 375.74, 375.75, 375.81-375.86, 375.88, 375.101-375.103, and new §§375.1, 375.3, 375.4, 375.11, 375.14-375.18, 375.31-375.33, 375.35, 375.37-375.41, 375.51, 375.52, 375.61, 375.62, 375.73, 375.81-375.87, 375.101-375.105, 375.201, 375.211, 375.213, 375.214, 375.221, and 375.222 are adopted without change and will not be republished.

New Chapter 375 addresses the creation, capitalization by federal grant and state match, purposes and administration of the Clean Water State Revolving Fund (CWSRF). The CWSRF provides low interest loans to eligible applicants of the state pursuant to the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq. (Act) and the Texas Water Code, Chapter 15, §§15.601-15.609 and Chapter 17, Subchapters C, E, and F.

The board repeals former Chapter 375 and adopts new Chapter 375 in order to consolidate all rules governing the CWSRF program under one chapter. Prior to this time, the rules that governed the CWSRF program were divided into two chapters: the rules that applied to loans primarily financed through state funds were contained in Chapter 363; the rules that applied to loans primarily financed through federal funds were contained in Chapter 375. The scattered nature of the CWSRF rule provisions proved confusing and unwieldy for customers and for agency administration. The state and federally funded portions

of the CWSRF program have now been combined into one chapter and divided into two subchapters.

The changes to the structure of former Chapter 375 was so extensive as to justify repeal of the chapter and proposal of a new chapter. Subchapter A of the new chapter sets out the general criteria and methods for funding all CWSRF loans; subchapter B describes the federal requirements that are specific to the use of federal capitalization grant funds. Some of the provisions of the CWSRF program remain unaltered. Sections that have been amended are highlighted below.

Sections 375.1-375.4 address introductory provisions of the CWSRF program. Section 375.1 is new and describes the scope of the rules of subchapter A. Section 375.2 relates to definitions and adds, to clarify the meaning of terms used in the rules, a definition of "commitment", "cost-effectiveness determination", "CWSRF" and "CWSRF program account". Additionally, the definition of "eligible applicant" is expanded as the result of comments from the U.S. Environmental Protection Agency to clarify that this category includes applicants for assistance for projects pursuant to §319 of the Act (nonpoint source pollution control) and §320 of the Act (estuary management). "Hardship Grants Program for Rural Communities" has also been added to the definitions to cite the source of the federal act (Public Law 104-403) which established this program. Section 375.3 states the agency's policies with respect to the intent of the CWSRF program; the encouragement of regionalization and water conservation; protection of the environment; maximizing financial assistance through the provision of match funds; expediting of projects; and limitation of the use of force accounts. These policies are unchanged from those previous stated in former Chapter 375. Section 375.4 states that the date of applicability of the new chapter rules is to projects listed in the intended use plan for federal fiscal year 2000 and beyond. This provision is included because Chapter 363, Subchapter B of the Board rules will govern the administration of certain CWSRF loans prior to federal fiscal year 2000.

Sections 375.11-375.18 address program requirements for the CWSRF program. Sections 375.11 and 375.12 describe the public participation process for the adoption of the CWSRF priority list and the purposes for which CWSRF loans may be used. Both sections repeat the program requirements of the federal Act. Sections 375.13 and 375.14 state the construction activities that may be funded from CWSRF funds and provide that the project priority list will be the same as the list of projects in the annual intended use plan. Both sections reflect the program requirements of the federal Act.

Section 375.15 , Criteria and Methods for Distribution of Fund, has some changes from the requirements of former §363.206. The section provides notice to potential applicants of the population categories and the criteria and methods that will be employed by the agency in determining distribution of funds among projects. It includes categorizing and ranking within categories, the projects for which financial assistance is sought. The section further allows for the designation of a funding line, based on the amount of total loan funds available, so that applicants may determine if they are likely to receive funding during each funding cycle. The section additionally sets out the method the board will employ in notifying applicants when unused funds become available. The section further addresses requirements for applicants to timely submit applications and enter into commitments for assistance.

Section 375.16 addresses the rating process that is used to rank principal projects and provides the criteria for determining a principal project as distinguished from additional projects. In compliance with the requirements of the Clean Water Act, §375.17 addresses the intended use plan, whereby the agency prepares a plan identifying the intended uses of the amounts of funds available to the CWSRF for a funding year. The section sets out a procedure of written notice to potential borrowers and the information that must be included in a submission in order for a project to receive a rating by agency staff. Section 375.18 provides for loan origination fees to provide funds for the agency to administer the CWSRF program. CWSRF program funds may also be used to pay administrative expenses, but the program funds have a ceiling of 4% of the amount of the federal funds. Because the agency provides a state match to these funds, the loan program is extensive and the 4% limitation is insufficient to administer the total program. Fees charged to borrowers are currently excluded from the ceiling on administrative expenses.

Sections 375.31-375.42 address the procedures and the application information that must be provided when seeking CWSRF funding assistance. Section 375.31 requires applicants to meet with agency staff at a preapplication conferences, at which time the applicants can learn of the application progress and have their questions answers. The conference is required to assist applicants in preparing complete applications within the necessary time frames, thus improving the efficiency of the application process.

Section 375.32 states the required general information that must be submitted by an applicant, including names and addresses of representatives and consultants which will be providing information on the loan. The general information is necessary in assisting agency staff to determine whether the applicant and the proposed project are eligible to receive CWSRF funding. Section 375.33 lists required legal information and establishes the legal documents that must be submitted to evidence that the applicant is authorized to incur debt and to proceed with construction. The documents include a resolution that the governing body has approved the loan application and has entered into necessary consultant contracts for the design of the project and the issuance of bonds. The section further requires proof of ownership or other rights to land on which the project will be located, and copies of water or wastewater treatment service contracts. Section 375.34 addresses required fiscal information that must be provided to establish the reasonableness of the project costs and the ability of the applicant to repay the loan from the taxes or revenues being pledged to repayment. The information includes details about bonds that will be issued, specifics as to tax rates and current service charges, operating statements and audited financial statements. The information is required for a determination that the applicant has the authority to incur and the ability to repay the debt obligations that are contemplated.

In compliance with the federal regulations pursuant to the Act, §375.35 describes the procedures that must be followed for projects in completing an environmental assessment and impact statement. The section details public participation requirements, guidelines for environmental assessments, and the process for making environmental findings.

Section 375.36 addresses engineering feasibility data and contains the requirements from 363.13. In response to EPA comments, sections have been added to include that nonpoint

source and estuary management applications must comply with §319 and §320 of the federal Act. Additionally, provision is made that the data will be approved by the executive administrator after there is confirmation that all requirements of the section have been met, all environmental determinations are complete, and the applicant has agreed to comply with any mitigating measures. The section further provides that changes in the project may require further review. These measures are added to ensure the soundness of a proposed project. Section 375.37 requires the preparation and adoption of water conservation measures pursuant to state law and is unchanged from former §375.37 except that for uniformity and validity of terms "political subdivision" has been replaced with "applicant".

Section 375.38 addresses review criteria for approving loans and refinancings and is unchanged from former §375.38 except that cites in the chapter are corrected to fit the new chapter and the requirement for the borrower to submit an operation and maintenance manual is deleted. Submitting the manual has proved to be unnecessarily burdensome to the loan recipient and of little value to the agency staff.

Section 375.39 addresses the pre-design funding option and provides an alternative method to receive loan commitments and close loans which complies with federal requirements and provides flexibility in delivering funds to loan applicants. The section is unchanged from former §375.40 except that chapter cites have been corrected. Section 375.40 relates to the applicants resolution and financing agreements and is unchanged from §363.225.

Section 375.41 establishes a combination CWSRF loan and hardship grants program for rural communities to implement provisions of the Omnibus Consolidated Recessions and Appropriations Act of 1996. The section is substantially similar to §363.226 except that a provision has been added to clarify that grants are not subject to administrative cost recovery provisions or to book entry closing or DTC requirements. Such provisions apply only to loans. Section 375.42 describes the requirements for the capital improvement plan option and is the same as §363.224 except that chapter cites have been corrected. This option offers applicants This option offers applicants additional flexibility in planning, designing and constructing projects.

Sections 375.51 and 375.52 address the process by which the board reviews and approves loans and sets lending rates. Section 375.51 provides that the executive administrator will present applications to the board for action. The section further details actions available to the board and provides for establishment of an effective loan commitment period. The section is substantially similar to former §375.51 except that a commitment period is no longer specified. This change allows greater flexibility in setting a reasonable time for the commitment to remain open. Section 375.52 describes the process for establishing lending rates and details the criteria for fixed and variable rate loans based upon the applicant's cost of funds in the public market. The section is unchanged from former §375.52 except that cites have been corrected and, for purposes of uniformity, a short title has been added to the text addressing adjustment of interest rate.

Sections 375.61 and 375.62 relate to the engineering requirements for projects receiving CWSRF funding. Section 375.61 relates to contract documents and is substantially similar to former §375.62 except that the requirements for value engineering and the wage provisions of the Davis-Bacon Act have been deleted because they are no longer required by the federal Act for CWSRF funding. Section 375.62 is the same as former 375.63 except that the cites have been corrected.

Sections 375.71-375.73 set out the requirements for release of loan funds. Section 375.71 is unchanged from former §375.72 except that "political subdivision" has been replaced with the more specific term of "applicant". Also, in response to EPA comments, loan recipients must demonstrate compliance with generally accepted accounting standards in maintaining records and accounts. Section 375.72 is substantially similar to former §375.74 but in response to EPA comments the section adds "all applicable sections of the Clean Air Act" to the list of federal provisions with which projects must be consistent. The new section additionally corrects cites and adds a requirement for submittal of a monthly reimbursement schedule which is necessary to the agency's submittal of federally-required reports. The requirements of both sections provide evidence that the borrower has completed the fiscal, legal and engineering requirements necessary to receipt of public funds. Section 375.73 is unchanged from former §375.75 except that cites have been corrected.

Sections 375.81-375.87 address requirements applicants must meet during the construction phase of funded projects. Section 375.81 is unchanged from former §375.81 except that cites have been corrected. Section 375.82 is changed from former §375.82 to provide applicants with flexibility by deleting the requirement that construction inspection of a project may only be made by the project engineer. The section now allows inspection by any registered professional engineer. The section also substitutes the more universally understood term "construction" for the term "building". Further, "in order to assure that contract documents are being followed and that the works are being built in accordance with sound engineering principles and building practices" is deleted as redundant from the provision authorizing inspection by the executive administrator. Section 375.83 is changed from former §375.84 by changing the outdated requirement for confirmation of emergency notification of changes from "by letter or telegraph" to "confirmation in writing". Section 375.84 is unchanged from former §375.85. Section 375.85 deletes four of the five requirements of former 375.86, relating to building phase submittals. The requirement for adopting and implementing a user charge system is deleted because it is no longer required by the federal Act. The requirement for submittal of an operation and maintenance manual is deleted because the submittal has proved to be unnecessarily burdensome to the loan recipient and of little value to the agency staff. Notice of completion of construction is no longer required in this provision as the requirement is redundant. There are other means utilized to determine that a project is complete. The requirement of "and any other requirements" is deleted as being without meaning; there are no other requirements. Section 375.86, relating to retainage, is substantially similar to former §375.88 except that the title of subsection (c) has been clarified. Section 375.87 relating to disbursements and outlay reports is substantially similar to §363.242(a) except that applicants whose projects are not required to comply with this section must still submit outlay reports and appropriate documentation to enable the agency to seek reimbursement of state funds from the federal treasury.

In compliance with the requirements of Subchapter E of the Texas Water Code, §§375.101-375.105 address engineering and financial accountability by the applicant during the post building phase of the funded project. Section 375.101 is

changed from former §375.101 to substitute the new, federally endorsed acronym CWSRF (Clean Water State Revolving Fund) for SRF (State Revolving Fund). To emphasize the present requirement that an applicant must comply with all representations and assurances made to the agency, a provision has been added that in the event of noncompliance by the applicant, the executive administrator shall require corrective action, including referral to the Attorney General if corrective action is not pursued.

Section 375.102 is changed from former §375.103 to delete the reference to project performance, which is no longer required by the Act. An unnecessary cite is also deleted and reference to "SRF" is corrected to "CWSRF". Section 375.103 is unchanged from former 363.54. Section 375.104, requiring a certificate of approval, is substantially similar to former §363.55 except that the development fund manager of the agency, in place of the executive administrator, may now issue the certificate. Also, language has been added inform customers that the certificate approves the work as being completed in accordance with engineering principles and practices. Section 375.105 is unchanged from former §363.56.

Section 375.201 states the scope of Chapter 375, Subchapter B, which addresses the information and actions of potential applicants for CWSRF funds which are needed in order for the State to satisfy the requirements associated with the State's receipt of federal capitalization grant funds.

Sections 375.211-375.214 provide for special requirements for program funds awarded through a federal capitalization grant agreement. Section 375.211 is unchanged from former 375.16. Section 375.212 is changed to delete the requirement for compliance with provisions of the Act, Title II, because they are no longer federal requirements for CWSRF funding. Additionally, compliance with The Wilderness Act, 16 USC 1131 et seq., and Executive Order 12898, Environmental Justice, have been added to the list of federal requirements. Also included in the list is compliance with Minority and Women Owned Business Enterprises, Small Business Enterprises and Small Business Enterprises in Rural Areas. All of the new requirements are added as a result of EPA guidelines and federal law.

Section 375.213 provides potential applicants with notice of the process of inviting and processing applications for funding. The section further provides for priority consideration in the event of a funds shortage and establishes the alternatives available to applicants whose projects cannot be funded with the lower interest rates offered under this subchapter. The new section is required to provide accurate guidance to applicants and to establish for the agency an orderly mechanism for managing the process of inviting applications and funding projects.

Section 375.214 details the process for environmental review and approvals necessary to comply with the Federal Water Pollution Control Act. The section is unchanged from former §375.35 except to correct cites.

Sections 375.221-375.222 provide for special requirements for release of federal funds. Section 375.221 is substantially similar to former §375.40 except that it adds a provision limiting the duration of a loan commitment to six months unless extended by the Board. This limitation is added to prevent applicants from reserving Board funds for extended periods of time and thus denying use of the funds to other potential applicants which are ready to proceed with projects. Section 375.222 describes the procedure for setting the lower fixed and variable interest rates that are associated with the special federal requirements for use of federal funds. The section is unchanged from former §375.52 except that cites to board rules have been corrected.

Comments on the proposed rules were received from the U.S. Environmental Protection Agency (EPA). The EPA pointed out that the proposed definition of "eligible applicant" did not include a reference to projects eligible for assistance pursuant to sections 319 and 320 of the Clean Water Act.

Response: The Board agrees that projects pursuant to §319-§320 should be referenced to provide more complete information to customers. At §375.2 (27) , the definition of "eligible applicant" has been changed to reference applicants for non-point source pollution control projects and estuary management projects in accordance with sections 319 and 320 of the federal Act.

The EPA notes that at §375.12, Types of Assistance, there was no provision of assistance for the guarantee or purchase of insurance for local debt obligations as is allowed pursuant to §35.3120(c).

Response: The Board agrees that the guarantee or purchase of insurance for debt obligations is an authorized type of assistance pursuant to §35.3120(c) of the federal regulations. Section 375.12, Types of Assistance, is amended to add the guarantee or purchase of insurance for local debt obligations. This addition will provide more complete guidance for potential applicants.

The EPA suggests that §375.13, relating to Activities Funded, include additional clarification by referencing §375.2.

Response: The Board agrees that the elements of "construction" can be clarified by referencing the definition of "construction" in §375.2, Definitions of Terms. Section 375.13 has been so amended.

The EPA notes that the financing of an administrative fee in a loan is a practice that will be allowed through federal Fiscal Year 99. EPA suggests that §375.18, relating to Administrative Cost Recovery, contain language that limits this activity through FY 99.

Response: The agency anticipates that there will be further congressional action to resolve the question of how the loan origination fee may be financed. One of the options open to Congress is to allow the financing of the fee within the loan to continue past federal Fiscal Year 99.

In the interest of changing the CWSRF rules as little as possible, the agency will maintain the proposed language until a decision is made by Congress, at which time the rules may or may not have to be changed.

The EPA suggests changes to §375.34(12) relating to Required Fiscal Information, that will clarify that an applicant must provide audited financial statements prepared by an independent auditor. EPA further suggests that financial statements from at least the most recent two years (and preferably, three years) be required to allow for the assessment of financial trends.

Response: The Board agrees that prudent lending requires the ability to assess financial trends. Section 375.34 (12) is amended to provide for audited financial statements from the most recent two years.

The EPA notes that at §375.36, relating to Engineering Feasibility Data, applications for estuary management activities were not addressed.

Response: The Board agrees that estuary management projects must be consistent with §320 of the federal Act. Section §375.36 has been amended to reflect this requirement.

The EPA comments that at §375.42, relating to the Capital Improvement Plan Option, safeguards are needed to stress that only CWSRF eligible activities are included under the CIP Option.

Response: In order to provide needed information to customers, §375.42 has been amended to add a clarifying provision that CIP projects must meet the criteria of §375.13, relating to Activities Funded.

The EPA suggests that in §375.71, relating to Loan Closing, it should be stated that loan recipients are required to use generally accepted government accounting standards (GAGAS).

Response: The Board agrees that this standard should be stated for clarification purposes. Section 375.71 is amended to add that in its records and accounts, loan recipients must demonstrate compliance with generally accepted government accounting standards.

EPA suggests that in §375.72, relating to Release of Funds, the word "and" replace "or" in the list of applicable sections of the federal Act, and that applicable sections of the Clean Air Act also be added to the requirements.

Response: The Board agrees that these changes correct and clarify the section. Section 375.72 has been amended to substitute "and" for "or" and to include "applicable sections of the Clean Air Act".

EPA notes that §375.212, relating to Capitalization Grant Requirements, should include in the list of laws the Clean Water Act, PL 92-500, as amended, and Section 129, Small Business Administration Reauthorization and Amendment Act of 1988, PL 100-590.

Response: §375.212 has been amended to add the two laws, as EPA suggests. These additions will provide additional, needed information to potential applicants.

Subchapter A. Introductory Provisions

31 TAC §§375.1-375.4

The repeals are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

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

Filed with the Office of the Secretary of State on January 22, 1999.

TRD-9900431
Suzanne Schwartz
General Counsel
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For further information, please call: (512) 463-7981

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Subchapter B. Program Requirements

31 TAC §§375.14-375.22

The repeals are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

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

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Subchapter C. Application for Assistance

31 TAC §§375.31-375.38, 375.40

The repeals are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

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

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Subchapter D. Board Action on Application

31 TAC §375.51, §375.52

The repeals are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

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Subchapter E. Engineering Design

31 TAC §§375.61-375.63

The repeals are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

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

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Subchapter F. Prerequisites to Release of Funds

31 TAC §§375.72, 375.74, 375.75

The repeals are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

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

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Subchapter G. Building Phase

31 TAC §§375.81–375.86, 375.88

The repeals are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

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Subchapter H. Post Building Phase

31 TAC §§375.101–375.103

The repeals are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

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

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Chapter 375. Clean Water State Revolving Fund

Subchapter A. General Provisions

Division 1. Introductory Provisions

31 TAC §§375.1–375.4

The new sections are adopted under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

§375.2. Definitions of Terms.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in the Texas Water Code, Chapter 15 and

not defined here shall have the meanings provided by the chapter or subchapter as appropriate.

(1) Act - The Federal Water Pollution Control Act, as amended, 33 USC 1251 et. seq.

(2) Administrative cost recovery fund - An operating fund to finance the administration of the CWSRF program, to be held outside the state treasury and separate from the CWSRF program account.

(3) Administrative costs - All reasonable and necessary costs of administering any aspect of the CWSRF program, including the cost of servicing debt obligations of recipients of CWSRF financial assistance.

(4) Alternative technology - Proven wastewater treatment processes and techniques which provide for the reclaiming and reuse of water, productively recycle wastewater constituents or otherwise eliminate the discharge of pollutants, or recover energy. Specifically, alternative technology includes land application of effluent and sludge; aquifer recharge; aquaculture; direct reuse (nonpotable); horticulture; revegetation of disturbed land; containment ponds; sludge composting and drying prior to land application; self-sustaining incineration; methane recovery; individual and onsite systems; and small diameter pressure and vacuum sewers and small diameter gravity sewers carrying partially or fully treated wastewater.

(5) Applicant - A political subdivision or subdivisions which file an application with the board for financial assistance or associated actions.

(6) Application for assistance - All the information required for submittal in the following sections: §375.32 of this title (relating to Required General Information), §375.33 of this title (relating to Required Legal Information), §375.34 of this title (relating to Required Fiscal Information), §375.35 of this title (relating to Required Environmental Review and Determination), and §375.36 of this title (relating to Engineering Feasibility Data).

(7) Authorized representative - The signatory agent of the applicant authorized and directed by the applicant's governing body to make application for assistance and to sign documents required to undertake and complete the project, on behalf of the applicant.

(8) Board - The Texas Water Development Board.

(9) Bonds - All bonds, notes, certificates, book-entry obligations, and other obligations authorized to be issued by any political subdivision.

(10) Building - The erection, acquisition, alteration, remodeling, improvement or extension of treatment works.

(11) Capitalization grant - Federal grant assistance awarded to the state for capitalization of the Clean Water State Revolving Fund.

(12) Change order - The documents issued by the loan recipient, authorizing a change, alteration, or variance in previously approved engineering contract documents, including, but not limited to, additions or deletions of work to be performed pursuant to the contract or a change in costs for work performed pursuant to the contract.

(13) Closing - The time at which the requirements for loan closing have been completed under §375.71 of this title (relating to Loan Closing) and an exchange of debt for funds to either the applicant, an escrow agent bank, or a trust agent has occurred.

(14) Collector sewer - The common lateral sewers, within a publicly owned treatment system, which are primarily installed to receive wastewater directly from facilities which convey wastewater from individual systems, or from private property.

(15) Commission - The Texas Natural Resource Conservation Commission.

(16) Commitment - A legal obligation approved by the board, specifying the terms and conditions under which assistance may be provided.

(17) Construction - Any one or more of the following:

(A) preliminary planning to determine the feasibility of treatment works;

(B) engineering, architectural, environmental, legal, title, fiscal, or economic studies;

(C) the expense of any condemnation or other legal proceeding;

(D) surveys, designs, plans, working drawings, specifications, procedures; and

(E) erection, building, acquisition, alteration, remodeling, improvement or extension of treatment works or the inspection or supervision of any of the foregoing items.

(18) Construction fund - A dedicated source of funds, created and maintained by the applicant at an official depository, or a designated depository approved by the executive administrator, used solely for the purposes of construction of a project as approved by the board.

(19) Contract documents - The engineering description of the project including engineering drawings, maps, technical specifications, design reports, instructions and other contract conditions and forms that are in sufficient detail to allow contractors to bid on the work.

(20) Cost-effectiveness determination - A determination based on engineering, environmental, and financial analyses that a proposed project or component part will result in the minimum total monetary costs over time, but without overriding adverse social, economic, and environmental considerations and legal requirements.

(21) CWSRF - The state water pollution control revolving fund created pursuant to the Texas Water Code, Subchapter J, Chapter 15, herein referred to as the Clean Water State Revolving Fund.

(22) CWSRF program account - The program account is an account in the CWSRF created pursuant to a resolution of the board in issuing CWSRF bonds and is used, pursuant to such bond resolution(s), for the purpose of providing financial assistance to political subdivisions for construction of treatment works and, if needed, to pay rebate amounts to the federal government.

(23) Debt - All bonds, notes, certificates, book-entry obligations, and other obligations authorized to be issued by any political subdivision.

(24) Delivery - The time at which payment is made by the board to the loan recipient against the purchase price of the loan recipient's debt, and the board takes possession of the debt instruments evidencing the loan recipient's debt. Delivery may occur simultaneously with a release of funds, or without release of funds pursuant to an escrow agreement.

(25) Designated management agency, waste treatment management agency - A political subdivision of the state which is

designated by the governor and approved by EPA to receive federal assistance pursuant to the Act, §208 and §303(e).

(26) Effluent limitation - Any restriction established by the state or the EPA administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discarded from a point source into waters of the state.

(27) Eligible applicant - A waste treatment management agency including any interstate agencies, or any city, commission, county, district, river authority, or other public body created by or pursuant to state law which has authority to dispose of sewage, industrial wastes, or other waste; or an authorized Indian tribal organization; or any political subdivision applying for financial assistance to build a nonpoint source pollution control project pursuant to the Act, §319; or any political subdivision applying for financial assistance for an estuary management project pursuant to the Act, §320.

(28) Enforceable requirements of the Act - Those conditions and limitations of permits issued pursuant to the Act, §402 and §404, which, if violated, could result in issuance of a compliance order or initiation of a civil or criminal action under the Act, §309. Where a permit has not been issued, but issuance is anticipated, the term means any requirement which will be in the permit when issued. Where no permit is applicable, the term means any requirement which is necessary to meet applicable criteria for best practicable waste treatment technology.

(29) Engineering feasibility data - Those necessary plans and studies which directly relate to treatment works needed to comply with enforceable requirements of the Act and state statutes, and which consist of a systematic evaluation of alternatives that are feasible in light of the unique demographic, topographic, hydrologic, and institutional characteristics of the area and will demonstrate the selected alternative is cost-effective.

(30) Environmental assessment - A written analysis prepared by the applicant describing the potential environmental impacts of a proposed project, sufficient in scope to enable the executive administrator to make an environmental determination.

(31) Environmental determination - A finding by the executive administrator regarding the potential environmental impacts of a proposed project and describing what mitigative measures, if any, the applicant will be required to implement as a condition of financial assistance.

(32) Environmental information document - A written analysis prepared by the applicant describing the potential environmental impacts of a proposed project, sufficient in scope to enable the executive administrator to prepare an environmental assessment to allow an environmental determination to be made by the executive administrator.

(33) Environmental review - The process whereby an evaluation is undertaken by the board, consistent with the National Environmental Policy Act and other federal, state, and local laws and requirements, to determine whether a proposed project may have significant impacts on the environment and therefore require the preparation of an environmental impact statement, as detailed in §375.35 of this title (relating to Required Environmental Review and Determination).

(34) EPA - The United States Environmental Protection Agency.

(35) Escrow - The transfer of funds to a custodian of the funds which will act as the escrow agent or trust agent.

(36) Escrow agent - The third party appointed to hold the funds which are not eligible for release to the loan recipient.

(37) Escrow agent bank - The financial institution which has been appointed to hold the funds which are not eligible for release to the loan recipient.

(38) Estuary management plan - A plan for the conservation and management of an estuary of national significance as described in the Act, §320.

(39) Estuary management project - A project pursuant to an estuary management plan.

(40) Executive administrator - The executive administrator of the board or a designated representative.

(41) Financial assistance - Loans by the board from the CWSRF, which may be made in conjunction with grants from the Hardship Grants Program for Rural Communities.

(42) Fund - The state water pollution control revolving fund, created pursuant to the Texas Water Code, Subchapter J, Chapter 15, herein referred to as the CWSRF.

(43) Funding year - The particular federal fiscal year (October 1 - September 30) for which funds are made available to the CWSRF.

(44) Hardship Grants Program for Rural Communities - The program established by the federal Omnibus Consolidated Recessions and Appropriations Act of 1996 (Public Law 104-403).

(45) Infiltration - Water other than wastewater that enters a sewer system (including sewer service connections and foundation drains) from the ground through such means as defective pipes, pipe joints, connections, or manholes. Infiltration does not include, and is distinguished from, inflow.

(46) Inflow - Water other than wastewater that enters a sewer system (including sewer service connections) from sources such as, but not limited to, roof leaders, cellar drains, yard drains, area drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash waters, or drainage. Inflow does not include, and is distinguished from, infiltration.

(47) Innovative technology - Nonconventional methods of treatment such as rock reed, root zone, ponding, irrigation or other technologies which represent a significant advance in the state of the art.

(48) Intended use plan - A plan identifying the intended uses of the amount of funds available for loans in the CWSRF for each fiscal year as described in the Act, §606(c).

(49) Interceptor sewer - A sewer which is designed for one or more of the following purposes:

(A) to intercept wastewater from a final point in a collector sewer and convey such wastes directly to a treatment facility or another interceptor;

(B) to replace an existing wastewater treatment facility and transport the wastes to an adjoining collector sewer or interceptor sewer for conveyance to a treatment plant;

(C) to transport wastewater from one or more municipal collector sewers to another municipality or to a regional facility for treatment; and

(D) to intercept an existing major discharge of raw or inadequately treated wastewater for transport directly to another interceptor or to a treatment plant.

(50) Lending rate - Interest rate assessed to loan applicants for loans through the CWSRF.

(51) Market interest rate - The average interest rate given in current market dealings for this section of the country/state as determined by the board.

(52) Nonpoint source pollution plan - A plan for managing nonpoint source pollution as described in the Act, §319.

(53) Nonpoint source pollution project - A project pursuant to a nonpoint source pollution plan.

(54) Permit or waste discharge permit - The authority granted by the commission to establish the conditions under which waste may be discharged into or adjacent to waters in the state.

(55) Planning area - The existing and proposed wastewater service area consistent with the appropriate water quality management plan.

(56) Point source - Any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(57) Population - For purposes of §375.15 of this title (relating to Criteria and Methods for Distribution of Funds) and §375.16 of this title (relating to Rating Process), population will be based upon data that is acceptable to the executive administrator and is determined as follows:

(A) where the applicant is an incorporated city or town, the best available estimate of the current number of people which reside within the territorial boundaries of the applicant, or where greater, the number of people which receive wholesale or retail wastewater service from the applicant; or

(B) where the applicant is not an incorporated city or town, the best available estimate of the current number of people in the wastewater treatment service area to which the proposed project provides service.

(58) Principal project - A project or group of projects included in a proposal which are intended to address a specific system condition within a single wastewater treatment service area that can be rated according to §375.16 of this title (relating to Rating Process), the cost of correction of which represents greater than 50% of the cost of all projects included in the proposal.

(59) Priority list - A list of projects for which CWSRF assistance may be requested.

(60) Project - The scope of work describing a construction endeavor normally within a single wastewater treatment or collection service area which can be separately rated in accordance with §375.16 of this title (relating to Rating Process).

(61) Project completion - The date that operations of the treatment works are initiated or are capable of being initiated, as determined by the executive administrator.

(62) Project engineer - The engineer or engineering firm retained by the applicant to provide professional engineering services during the planning, design, and/or construction of a project.

(63) Regional facility - Wastewater collection and treatment, which incorporates multiple service areas into an area wide service facility, thereby reducing the number of required facilities, or any system which serves an area that is other than a single county, city, special district, or other political subdivision of the state, the specified size of which is determined by any one or combination of population, number of governmental entities served, and/or service capacity. Regional wastewater treatment facilities may also include those identified in the approved state water quality management plan and the annual updates to that plan.

(64) Release - The time at which funds are made available to the loan recipient.

(65) State of Texas 303(d) List - The list prepared biennially by the commission as required by the Act, §303(d).

(66) Treatment works - Any devices and systems which are used in the storage, treatment, recycling, and reclamation of waste or which are necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of, or used in connection with, the treatment process (including land used for the storage of treated water in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from such treatment; or facilities to provide for the collection, control, and disposal of waste.

(67) Trust agent - The party appointed by the applicant and approved by the executive administrator of the board to hold the funds which are not eligible for release to the loan recipient.

(68) Unserved areas - For purposes of the rating process, refers to populated areas of an existing developed community that are not served by a centralized collection system.

(69) Water conservation plan - A report outlining the methods and means by which water conservation may be achieved within a particular facilities planning area, as further defined in §375.37 of this title (relating to Required Water Conservation Plan).

(70) Water conservation program - A comprehensive description and schedule of the methods and means to implement and enforce a water conservation plan.

(71) Water quality management plan - A plan prepared and updated annually by the state and approved by the Environmental Protection Agency which determines the nature, extent, and causes of water quality problems in various areas of the state and identifies cost-effective and locally acceptable facility and nonpoint measures to meet and maintain water quality standards.

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

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Division 2. Program Requirements

31 TAC §§375.11–375.18

The new sections are adopted under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

§375.12. Types of Assistance.

The fund may be used for the following purposes:

(1) to make loans on the condition that:

(A) such loans are made at or below market interest rates, including interest free loans at terms not to exceed 20 years;

(B) annual principal and interest payments will commence not later than one year after completion on any project and all loans will be fully amortized not later than 20 years after project completion; and

(C) the recipient of a loan will establish a dedicated source of revenue for repayment of loans;

(2) to buy or refinance the bonds of eligible applicants within the state at or below market rates, when such bonds were incurred after March 7, 1985;

(3) for the reasonable costs of administering the fund and conducting activities under the Act, Title VI;

(4) as a source of revenue or security for the payment of principal and interest on revenue or general obligation bonds issued by the state if the proceeds of sale of such bonds will be deposited in the fund;

(5) to earn interest on fund accounts; and

(6) to guarantee or purchase insurance for local debt obligations.

§375.13. Activities Funded.

The board may provide financial assistance under this chapter for one or more elements of construction, as defined pursuant to §375.2 of this title (relating to Definitions of Terms).

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Division 3. Applications for Assistance

31 TAC §§375.31–375.42

The new sections are adopted under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

§375.34. Required Fiscal Information.

The applicant shall submit a statement of the total project costs including the engineer's most current estimate of construction costs itemized as to major facilities, land and right-of-way costs, and engineering fees, as well as estimates of all legal fees, fees of financial advisors and/or consultants, contingencies, and interest during construction.

(1) The following information is to be furnished when the applicant proposes to enter into a contractual loan agreement or to sell bonds to finance the project, whether the purchasers are to be the board or others than the board:

(A) citation of statutory authority for issuance;

(B) type of bonds (i.e., general obligation, revenue, or combination). If revenues are to be pledged, state the source and nature of such revenue;

(C) amount of the issue;

(D) full name of issue(s);

(E) approximate date of issue(s);

(F) proposed maturities; and

(G) details of option for prior payments.

(2) The applicant shall submit the amount and source of any funds to be expended on the project.

(3) If the applicant is authorized by law to levy and collect ad valorem taxes, give the following information:

(A) If such right and power have been exercised, give the following information for each of the five preceding years:

(i) the assessed valuation of taxable property;

(ii) the ratio of assessed valuation to actual market value in a specified year;

(iii) the maximum tax rate permitted by law per $100 of assessed valuation;

(iv) the aggregate rate of all taxes levied and aggregate amount in dollars of taxes collected;

(v) the total amount in dollars of taxes collected; and

(vi) the distribution of tax rate as between interest and sinking fund and other purposes.

(B) If applicant is newly created, or if it has never exercised its taxing power, give the following information:

(i) the assessed valuation of taxable property if valuations have been established, and if not, the estimated total amount of the assessed valuation taxable property. Indicate whether the figure represents actual valuation or an estimate; and

(ii) the maximum tax rate permitted by law per $100 of assessed valuation.

(4) The applicant shall give details of any limitation governing amount of bonded or general obligation debt which applicant may incur.

(5) If applicant has bonds outstanding which are payable wholly or in part from ad valorem taxes, the following information shall be submitted:

(A) a complete description of each such issue of bonds, including title, date, interest rate, maturities, amount outstanding, and prepayment options;

(B) a consolidated schedule of future requirements of principal and interest extended so as to reflect total annual requirements; and

(C) a direct and overlapping debt statement.

(6) If the financing of the project will involve entering into a contractual loan agreement or sale of bonds or other securities payable wholly or in part from ad valorem taxes, the following information shall be submitted:

(A) a schedule of proposed future maturities of principal and interest of proposed bonds plus total maturities of any outstanding bonds from paragraph (5)(B) of this subsection; and

(B) the rate of interest assumed in computing future interest maturities on proposed bonds.

(7) If the project for which the CWSRF loan is desired is for the purpose of extending, enlarging or improving an existing system or facility, the following shall be submitted for each of the five preceding years to the extent available:

(A) a comparative operating statement;

(B) a schedule of water and sewer rates or service charges; and

(C) the number of customers or patrons of the system.

(8) The applicant shall provide a schedule of proposed rates required for financing the project under consideration.

(9) If applicant has bonds outstanding which are payable either wholly or in part from net revenues of a system or facility in connection with which the current project is planned, the following information shall be submitted:

(A) a complete description of each such issues of bonds, including title, date, interest rate, maturities, amount outstanding, and prepayment options; and

(B) a consolidated schedule of future requirements of principal and interest extended so as to reflect total annual requirements.

(10) If financing of the project will require entering into a loan agreement or require the sale of bonds or other securities payable either wholly or in part from net revenues of one or more facilities or systems, the following information shall be submitted:

(A) a schedule of proposed future bonds plus total maturities of any outstanding bonds referred to in subsection (9)(B) of this section; and

(B) the rate of interest assumed in computing future interest requirements on proposed bonds.

(11) The applicant shall provide a statement as to whether or not there has been a default in the payment of items of matured principal or interest and if so, give details.

(12) The applicant shall provide audited financial statements prepared by an independent auditor from the most recent two years; however, no audit is required if the applicant has no operation history.

(13) Where the project envisions either contractual loan agreement or the sale of revenue bonds, a schedule of the project engineer's estimate of future income and expense, showing the estimated amount of net revenue to accrue in each year during the life of any bonds to be issued.

§375.36. Engineering Feasibility Data.

(a) Submittal of engineering feasibility data. The applicant shall submit engineering feasibility data signed and sealed by a professional engineer registered in the State of Texas. The data, based on guidelines provided by the executive administrator, shall provide:

(1) description and purpose of the project;

(2) entities to be served and current and future population;

(3) the cost of the project;

(4) a description of innovative and conventional alternatives considered and reasons for the selection of the project proposed;

(5) sufficient information to evaluate the engineering feasibility; and

(6) maps and drawings as necessary to locate and describe the project area. The executive administrator may request additional information or data as necessary to evaluate the project.

(b) Nonpoint source applications. Applications for assistance for nonpoint source pollution control projects must be consistent with an approved nonpoint source management plan pursuant to the Act, §319.

(c) Estuary management applications. Applications for assistance for estuary management projects must be consistent with an approved estuary management plan pursuant to the Act, §320.

(d) Approval of engineering feasibility data. The executive administrator will approve the engineering feasibility data after confirming that the items listed in subsection (a) of this section have been completed, the appropriate environmental determinations have been completed in accordance with §375.35 of this title (relating to Required Environmental Review and Determination) or §375.214 of this title (relating to Required Environmental Review and Determination), whichever is appropriate, and the loan recipient has agreed to incorporate all mitigating measures directed by the executive administrator.

(e) Changes to engineering feasibility data. If changes occur in the project after approval of the engineering feasibility data, the executive administrator may request additional engineering and/or environmental information in order to ascertain that the loan commitment and environmental determination continues to be appropriate.

§375.42. Capital Improvements Plan Option.

(a) The capital improvements plan CWSRF loan processing option will provide applicants an alternative to secure loan proceeds for eligible projects that meet the criteria of §375.13 of this title (relating to Activities Funded) under the applicant's capital improvements plan. This option is a two-step loan processing method. First,

an applicant will provide applicable information to the board for preliminary eligibility determination under subsection (b) of this section. Second, an applicant will submit a financial application in order to apply for financing under subsection (d) of this section. Under the capital improvements plan option, a loan may be closed: after bids are approved and prior to construction commencing as specified in §375.71 of this title (relating to Loan Closing) and §375.72 of this title (relating to Release of Funds); or utilizing the pre-design funding option as specified in §375.39 of this title (relating to Pre-Design Funding Option). This capital improvements plan option may be used for the purpose of reimbursement of system revenues and/or refinancing of interim financing, including commercial paper expended for approved project(s). General procedures and requirements for processing a loan application under the capital improvements plan option are described in subsections (b), (c) and (d) of this section.

(b) An applicant will request a preliminary eligibility determination from the board on the project(s) described in the applicant's capital improvements plan or similar document addressing capital improvement planning.

(1) The board's action of preliminary eligibility determination will:

(A) authorize board staff to expend agency resources to review and approve project documents as described in subsection (c) of this section for the proposed capital improvements plan;

(B) establish that those portions of project(s) and costs approved in the preliminary eligibility determination are eligible for CWSRF financing provided that the requirements in subsection (c) of this section are met; and

(C) acknowledge the applicant's intention to construct the project(s) in the capital improvements plan and to seek financial assistance to finance, including refinancing all or part of, those project(s).

(2) The board's action of preliminary eligibility determination will provide no financial commitment by the board to the project(s) in the capital improvements plan.

(3) Requests for preliminary eligibility determination must include:

(A) a capital improvements plan or similar information which includes a description and purpose of the project(s), area maps or drawings which adequately locate the project area(s), a proposed project schedule, estimated project costs and sources of funds;

(B) a forecast of system cash flow, timing and approximate amount of financial assistance to be requested from the CWSRF, and a description of any intention to use the CWSRF loan proceeds to refinance existing interim debt obligations, including a description of the debt obligations, interfund transfers or internal methods of finance;

(C) a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project and any environmental information which may already be prepared pertaining to the proposed project(s) included in the capital improvement plan or documentation of environmental review of the proposed project(s) which may have been required by another state or federal agency;

(D) a resolution of the applicant's governing body requesting CWSRF preliminary eligibility determination from the board and stating that the applicant will comply with all board rules and requirements; and

(E) any additional information the executive administrator may request to complete eligibility evaluation of the capital improvements plan.

(c) Procedures between board preliminary eligibility determination and before financial commitment are as follows:

(1) Prior to the initiation of construction of each project included in the capital improvements plan which will be funded by the board, the applicant will obtain from the executive administrator approval of the engineering feasibility data as addressed in §375.36 of this title (relating to Engineering Feasibility Data), a favorable environmental determination as addressed in §375.35 of this title (relating to Required Environmental Review and Determination) or §375.214 of this title (relating to Required Environmental Review and Determination), whichever is applicable; approval of design plans and specifications as addressed in §375.62 of this title (relating to Approval of Contract Documents). Prior to the initiation of construction, applicant will additionally submit to the executive administrator bidding documents, including executed contracts for the project.

(2) The executive administrator will make periodic inspections of projects under §375.82 of this title (relating to Inspection During Construction).

(3) The executive administrator will advise the board concerning projects that involve major economic or administrative impacts to the applicant resulting from environmentally-related special mitigative or precautionary measures from an environmental assessment under §375.35 of this title or as conditions in the environmental determination required by §375.214 of this title as applicable.

(d) After the board's preliminary eligibility determination under subsection (b) of this section and after all requirements under subsection (c) of this section have been met, any of the project(s) included in the applicant's capital improvements plan may be considered for a commitment for financial assistance. An applicant must submit an application which includes the following:

(1) all applicable information required in §375.32 of this title (relating to Required General Information), §375.33 of this title (relating to Required Legal Information), and §375.34 of this title (relating to Required Fiscal Information);

(2) a water conservation plan required by §375.37 of this title (relating to Required Water Conservation Plan); and

(3) any additional information the executive administrator may request to complete evaluation of the financial application.

(e) After board commitment and after completion of all closing and release prerequisites specified in §375.39, §375.71, or §375.72 of this title, funds will be released.

(f) The executive administrator may recommend to the board the use of this section if, based on available information submitted under subsection (b), (c) or (d) of this section, there appear to be no significant permitting, social, environmental, engineering, or financial issues associated with the project. Any request for preliminary eligibility determination or financing under this option may be considered by the board despite a negative recommendation from the executive administrator.

(g) An applicant with outstanding commitments for financial assistance for projects previously approved by the board or with funds available from closed loans may utilize identified funds from the outstanding commitments or closed loans for costs approved in the preliminary eligibility determination when the requirements in

subsection (c) of this section have been met. If the applicant uses this subsection, the board cannot guarantee that additional funds for projects or work previously approved by the board will be available. The applicant must submit a new request for additional financial assistance in the event funds from outstanding commitments or closed loans are utilized for projects in the preliminary eligibility determination and additional funding is required to complete the projects. The provisions of this subsection may not be used if the previously committed or closed loans are backed by project-specific revenues as opposed to system revenues or tax pledges of the applicant.

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

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Division 4. Board Action on Applications

31 TAC §§375.51–375.52

The new sections are adopted under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

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Division 5. Engineering Requirements

31 TAC §§375.61–375.62

The new sections are adopted under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

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Division 6. Prerequisites to Release of Funds

31 TAC §§375.71–375.73

The new sections are adopted under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

§375.71. Loan Closing.

(a) Instruments needed for closing. The documents which shall be required at the time of closing shall include the following:

(1) evidence that requirements and regulations of all local, state and federal agencies having jurisdiction have been met prior to release of building funds, including but not limited to permits and authorizations;

(2) certified copy of the ordinances or resolutions adopted by the governing body authorizing issuance of debt sold to the board which has received prior approval by the executive administrator and which shall have sections providing:

(A) that an escrow account, if applicable, shall be created which shall be separate from all other funds and that:

(i) the account shall be maintained at an escrow agent bank or maintained with the trust agent;

(ii) funds shall not be released from the escrow account without written approval by the executive administrator;

(iii) the escrow account bank statements or trust account statement will be provided on a monthly basis to the development fund manager's office; and

(iv) the escrow account will be adequately collateralized as determined by the executive administrator sufficient to protect the board's interest;

(B) that a construction fund shall be created which shall be separate from all other funds of the applicant;

(C) that a final accounting be made to the board of the total sources and authorized use of project funds and that any surplus loan funds be used in a manner as approved by the executive administrator;

(D) that an annual audit of the applicant, prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant be provided annually to the executive administrator;

(E) that the applicant shall fix and maintain rates and collect charges to provide adequate operation, maintenance and insurance coverage on the project in an amount sufficient to protect the board's interest;

(F) that the applicant will implement any water conservation program required by the board until all financial obligations to the state have been discharged;

(G) that the applicant shall maintain current, accurate and complete records and accounts necessary to demonstrate compliance with generally accepted government accounting standards and other financial assistance related legal and contractual provisions;

(H) that the applicant covenants to abide by the board's rules and relevant statutes, including the Texas Water Code, Chapter 15, subchapter J; and

(I) that the applicant, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the applicant's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the board were a participating underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the board and the beneficial owner of the applicant's obligations, if the board sells or otherwise transfers such obligations, and the beneficial owners of the board's bonds if the applicant is an obligated person with respect to such bonds under rule 15c2-12;

(3) two copies of the applicant's water conservation program, including documentation of local adoption;

(4) unqualified approving opinions of the attorney general of Texas and a certification from the comptroller of public accounts that such debt has been registered in that office;

(5) unqualified approving opinion by a recognized bond attorney acceptable to the executive administrator;

(6) executed escrow agreement entered into by the applicant and an escrow agent bank or an executed trust agreement entered into by the applicant and the trust agent satisfactory to the executive administrator, in the event that construction funds are escrowed;

(7) evidence that the applicant shall maintain adequate insurance coverage on the project in an amount adequate to protect the board's interest;

(8) assurances that the applicant will comply with any special conditions specified by the board's environmental determination until all financial obligations to the state have been discharged; and

(9) other or additional data and information, if deemed necessary by the executive administrator.

(b) Certified transcript. At such time as available following the final release of funds the applicant shall submit a transcript of proceedings relating to the debt purchased by the board which shall contain those instruments normally furnished a purchaser of debt.

(c) Refinancing construction loans. If the project includes the refinancing of a loan, the applicant shall submit all of the items specified in subsection (a) of this section and any records, assurances, or appraisals concerning the construction of the project. Additionally, the project must pass the executive administrator's inspection of the project.

(d) Loan closing prior to completion of design. In the event financial assistance is needed by the applicant to complete design of a project without escrow of funds for building under §375.39 of this title (relating to Pre-Design Funding Option), the executive administrator will so advise the board. The board at its option may authorize the executive administrator to close the loan for planning and design without requiring the submittals in subsection (a)(1) and (6) of this section. However, the submittals in subsection (a)(1) of this section will be required prior to delivery of funds for building purposes. Applicants wishing to close prior to obtaining required commission permits will be required to present documentation that the required permits are expected to be issued.

(e) Loan closing for phased construction. The executive administrator may determine it appropriate to close only a portion of a loan for a phased construction project unless the applicant can demonstrate the need for phased construction and that closing the portion of the loan desired by the applicant is necessary to expedite construction.

(f) Closing requirements. The applicant shall be required to comply with the following closing requirements:

(1) all loans shall be closed in book-entry-only form;

(2) the applicant shall use a paying agent/registrar that is a Depository Trust Company (DTC) participant;

(3) the applicant shall be responsible for paying all DTC closing fees assessed to the applicant by the board's custodian bank directly to the board's custodian bank; and

(4) the applicant shall provide evidence to the board that one fully registered bond has been sent to the DTC or to the applicant's paying agent/registrar prior to closing.

§375.72. Release of Funds.

(a) Release of funds for planning, design and permits. Prior to the release of funds for planning, design, and permits, the political subdivision shall submit for approval to the executive administrator the following documents:

(1) a statement as to sufficiency of funds to complete the activity;

(2) certified copies of each contract under which revenues for repayment of the political subdivision's debt will accrue;

(3) executed consultant contracts relating to services provided for planning, design, and/or permits; and

(4) other such instruments or documents as the board or executive administrator may require.

(b) Pre-design funding. The funds needed for the total estimated cost of the engineering planning, and design cost if the engineering feasibility data required under §375.36 of this title (relating to Engineering Feasibility Data) has been approved, the cost of issuance associated with the loan, and any associated capitalized interest will be released to the loan recipient and the remaining funds will be escrowed to the escrow agent bank or to the trust agent until all applicable requirements in subsections (a) and (c) of this section and §375.39 of this title (relating to Pre-Design Funding Option) have been met.

(c) Release of funds for building purposes. Prior to the release of funds for building purposes, the political subdivision shall

submit for approval to the executive administrator the following documents:

(1) a tabulation of all bids received and an explanation for any rejected bids or otherwise disqualified bidders;

(2) two executed original copies of each construction contract the effectiveness and validity of which is contingent upon the receipt of board funds;

(3) evidence that the necessary acquisitions of land, leases, easements and rights-of-way have been completed or that the applicant has the legal authority necessary to complete the acquisitions;

(4) a statement as to sufficiency of funds to complete the project;

(5) certified copies of each contract under which revenues to the project will accrue;

(6) evidence that the project is consistent with plans, if any, developed under the Act, §§205(j), 208, 303(e), 319 and 320, as well as the applicable sections of the Clean Air Act which apply to the project receiving the financial assistance;

(7) an updated schedule of projected monthly reimbursements for eligible project costs to be requested by the applicant throughout the project funding period. Any eligible project costs which will be paid by the applicant prior to receiving reimbursement must be identified separately in this schedule; and

(8) other such instruments or documents as the board or executive administrator may require.

(d) Release of funds for projects constructed through one or more construction contracts. For projects constructed through one or more construction contracts, the executive administrator may approve the release of funds for all or a portion of the estimated project cost, provided all requirements of subsection (c) of this section have been met for at least one of the construction contracts.

(e) Escrow of funds. The executive administrator may require the escrow of an amount of project funding related to contracts which have not met the requirements of subsection (c) of this section at the time of loan closing.

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Division 7. Building Phase

31 TAC §§375.81–375.87

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Division 8. Post Building Phase

31 TAC §§375.101–375.105

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

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TRD-9900435
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: February 11, 1999
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For further information, please call: (512) 463–7981

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Subchapter B. Provisions Pertaining to Use of Capitalization Grant Funds

Division 1. Introductory Provisions

31 TAC §375.201

The new sections are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

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

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Division 2. Program Requirements

31 TAC §§375.211–375.214

The new sections are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

§375.212. Capitalization Grant Requirements.

(a) All projects which receive assistance from the fund and will be constructed in whole or part with funds directly made available by capitalization grants shall satisfy the following federal requirements:

(1) National Environmental Policy Act of 1969, PL 91-190;

(2) Archeological and Historic Preservation Act of 1974, PL 93-291;

(3) Clean Air Act, 42 USC 7506(c);

(4) Coastal Barrier Resources Act, 16 USC 3501 et seq;

(5) Coastal Zone Management Act of 1972, PL 92-583, as amended;

(6) Endangered Species Act, 16 USC 1531, et seq;

(7) Executive Order 11593, Protection and Enhancement of the Cultural Environment;

(8) Executive Order 11988, Floodplain Management;

(9) Executive Order 11990, Protection of Wetlands;

(10) Farmland Protection Policy Act, 7 USC 4201 et seq;

(11) Fish and Wildlife Coordination Act, PL 85-624, as amended;

(12) National Historic Preservation Act of 1966, PL 89-665, as amended;

(13) Safe Drinking Water Act, §1424(e), PL 92-523, as amended;

(14) Wild and Scenic Rivers Act, PL 90-542, as amended;

(15) Demonstration Cities and Metropolitan Development Act of 1966, PL 89-754, as amended;

(16) Clean Air Act, §306 and Clean Water Act, §508, including Executive Order 11738, Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans;

(17) Age Discrimination Act, PL 94-135;

(18) Civil Rights Act of 1964, PL 88-352;

(19) PL 92-500, §13; Prohibition against sex discrimination under the Federal Water Pollution Control Act;

(20) Executive Order 11246, Equal Employment Opportunity;

(21) Executive Orders 11625 and 12138, Women's and Minority Business Enterprise;

(22) Rehabilitation Act of 1973, PL 93-112 (including Executive Orders 11914 and 11250);

(23) Uniform Relocation and Real Property Acquisition Policies Act of 1970, PL 91-646;

(24) Executive Order 12549, Debarment and Suspension;

(25) The Wilderness Act, 16 USC 1131 et seq.; and

(26) Environmental Justice, Executive Order 12898.

(27) Clean Water Act, PL 92-500, as amended

(28) Section 129, Small Business Administration Reauthorization and Amendment Act of 1988, PL 100-590.

(b) Requirements for minority business enterprise/women's business enterprise/small business enterprise/small business enterprise in a rural area.

(1) Definitions. For the purposes of this subsection the following definitions shall apply.

(A) Construction–Notwithstanding the provisions of §375.2 of this title (relating to Definition of Terms), any contract or agreement to provide the building, erection, alteration, remodeling, improvement or extension of a CWSRF funded project.

(B) Contract–A written agreement between a CWSRF recipient and another party and any lower tier agreement for equipment, supplies, or construction necessary to complete the project. Includes personal and professional services , agreements with consultants, and purchase orders.

(C) Equipment–Tangible, nonexpendable personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

(D) MBE–A minority business enterprise, a business concern that is:

(i) at least 51% owned by one or more minority individuals who are U. S. Citizens, or in the case of a publicly owned business, at least 51% of the stock is owned by one or more minority individuals who are U. S. Citizens; and

(ii) whose daily business operations are managed and directed by one or more of the minority owners. Minority individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans or other groups whose members have been found to be disadvantaged by the Small Business Act or by the Secretary of Commerce under Executive Order 11625, §5.

(E) Prime contract–Any contract, agreement or other action entered into by a CWSRF applicant to procure construction, services, equipment or supplies.

(F) SBE–A small business enterprise, a business concern, including its affiliate, that is independently owned and operated, not dominant in the field of operation in which it operates, and that is qualified as a small business by the Small Business Administration.

(G) SBRA–A small business enterprise in a rural area, a small business concern that is located and conducts its principal operations in a non-metropolitan county as delineated by the Small Business Administration.

(H) Services–A contractor's time and efforts which do not involve delivery of a specific end item other than documents (e.g. reports, design drawings, specifications, etc.).

(I) Subcontract–Any contract, agreement or other action to procure construction, services, equipment or supplies between a prime contractor and any other business to supply such goods or services for a CWSRF financial assistance action.

(J) Supplies–All tangible personal property other than equipment.

(K) WBE–A women's business enterprise, a business concern that is:

(i) at least 51% owned by one or more women, or in the case of a publicly owned business, at least 51% of the stock is owned by one or more women; and

(ii) whose daily business operations are managed and directed by one or more of the women owners.

(2) Affirmative action steps. Those steps necessary by the applicant and the prime contractor to ensure that MBEs , WBEs, SBEs and SBRAs are utilized when possible including:

(A) placing qualified MBEs, WBEs, SBEs and SBRAs on solicitation lists;

(B) assuring that MBEs, WBEs, SBEs and SBRAs are solicited whenever they are potential sources;

(C) dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by MBEs, WBEs, SBEs and SBRAs;

(D) establishing delivery schedules, where the requirement permits, which encourage participation by MBEs, WBEs, SBEs and SBRAs;

(E) using the services and assistance of the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(F) requiring the prime contractor, if subcontracts are to be let, to take the affirmative action steps listed in subparagraphs (A)-(E) of this paragraph.

(3) Requirements for applicants.

(A) Pursuant to EPA policy and legal requirements, a goal oriented system has been established to promote MBE and WBE participation on all projects receiving funds from the CWSRF. In addition, it is the intent that SBEs and SBRAs be afforded the maximum practicable opportunity to participate in the CWSRF financial assistance program.

(B) Prior to receiving a loan commitment the applicant will submit an affirmative action plan on forms provided by the board. The plan shall be signed by the authorized representative of the applicant and shall contain estimates and/or actual amounts of MBE and WBE participation in the categories of construction, services, equipment, or supplies. Copies of any existing or proposed MBE and WBE contracts should be attached.

(C) In all procurements, the applicant will undertake a good faith effort to attract and utilize MBE, WBE, SBE and SBRA participation. This must include, but not be limited to taking the six affirmative action steps.

(D) In all procurements, the applicant will include provisions in prime contracts requiring the prime contractors to submit an affirmative action plan, and to undertake a good faith effort to attract and utilize MBEs, WBEs, SBEs and SBRAs, through subcontracts. This must include but not be limited to taking the affirmative action steps described in paragraphs (2)(A)-(E) of this subsection.

(E) As a condition to the release of funds or at any other time contracts or subcontracts are entered into, the applicant will report MBE and WBE participation and will provide documentation of good faith efforts on forms provided by board staff.

(F) The applicant and the prime contractor(s) will maintain all records documenting required good faith efforts.

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 January 22, 1999.

TRD-9900437
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: February 11, 1999
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For further information, please call: (512) 463–7981

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Division 3. Prerequisites to Release of Funds

31 TAC §375.221, §375.222

The new sections are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

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

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TRD-9900438
Suzanne Schwartz
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463–7981

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part I. Texas Department of Public Safety

Chapter 23. Vehicle Inspection

Subchapter G. Vehicle Emissions Inspection and Maintenance Program

37 TAC §23.91, §23.92

The Texas Department of Public Safety adopts the repeal of §23.91 and §23.92, concerning vehicle inspection, without changes to the proposed text as published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12246).

The justification for this repeal will be improved air quality by the reduction of emissions of hydrocarbons, carbon monoxide and other pollutants from mobile sources.

No comments were received regarding the repeal of these sections.

The repeals are adopted pursuant to Health and Safety Code, Chapter 383, §382.037, §382.038, and Texas Transportation Code, Chapter 502, and Chapter 548, which provide the Public Safety Commission with the authority to establish a Motor Vehicle Inspection and Maintenance Program for vehicles in counties that do not meet the National Ambient Air Quality Standards.

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

Filed with the Office of the Secretary of State on January 15, 1999.

TRD-9900312
Dudley M. Thomas
Director
Texas Department of Public Safety
Effective date: February 4, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 424–2135

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Part V. Texas Board of Pardons and Paroles

Chapter 141. General Provisions

Subchapter F. Subpoenas

37 TAC §141.101

The Policy Board of the Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §141.101, governing the issuance of subpoenas, with one minor change to the proposed text as published in the October 16, 1998, issue of the *Texas Register* (23 TexReg 10622).

The amendment is adopted in order to update the procedures on issuance of subpoenas by the Board or parole panel.

No comments were received regarding adoption of the amendment. However, one minor change was made to the rule title.

The amendment is adopted under the Code of Criminal Procedure, Article 42.18, §8(g), which provides that the Policy Board may adopt such other reasonable rules not inconsistent with law as it may deem proper or necessary with respect to the conduct of parole and mandatory supervision hearings, and §508.048, which provides for the issuance of subpoenas by the parole panels requiring the attendance of a witness or the production of materials deemed necessary for the investigation of a case.

§141.101. Issuance of Subpoenas.

(a) The Board or parole panel may issue subpoenas requiring the attendance of witnesses and the production of records, books, papers, and documents as deemed necessary for the investigation of the case of any person before a parole panel or designee of the board.

(b) Subpoenas may be issued following the completion of an application prescribed by the Policy Board.

(c) Subpoenas may be signed and oath administered by any member of the board.

(d) A designee of the Board may cause the issuance of subpoenas signed by a Board member when necessary to obtain the attendance of witnesses or the production of any of the items referred to in subsection (a) of this section in accordance with Government Code, §508.048.

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 January 19, 1999.

TRD-9900341
Laura McElroy
General Counsel
Texas Board of Pardons and Paroles
Effective date: February 8, 1999
Proposal publication date: October 16, 1998
For further information, please call: (512) 463–1883

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Subchapter G. Definitions of Terms

37 TAC §141.111

The Policy Board of the Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §141.111, concerning definition of terms, without changes to the proposed text as published in the October 16, 1998, issue of the *Texas Register* (23 TexReg 10622).

The amendment is adopted for the purpose of defining new terms cited in the conflict of interest policy proposed and adopted by the Policy Board in amended §150.55. The new definitions are adopted in order to comply with House Bill 1386, Chapter 161, §7, Acts of the 75th Legislature, Regular Session, 1997 (effective September 1, 1997), recommended by the Sunset Advisory Commission, which requires the Policy Board to develop and implement a policy that clearly defines circumstances under which Parole Board members should disqualify themselves from voting on a parole decision or a decision to continue, modify, or revoke parole or mandatory supervision.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Code of Criminal Procedure, Article 42.18, §7(c), which charges the Policy Board with the duty to develop and implement a policy that clearly defines circumstances under which Parole Board members should disqualify themselves from voting on a parole decision or a decision to revoke parole or mandatory supervision.

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 January 19, 1999.

TRD-9900336
Laura McElroy
General Counsel
Texas Board of Pardons and Paroles
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Proposal publication date: October 16, 1998
For further information, please call: (512) 463–1883

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Chapter 145. Parole

Subchapter A. Parole Process

37 TAC §145.3

The Policy Board of the Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §145.3, concerning policy statements relating to parole release decisions by the Board, without changes to the proposed text as published in the October 16, 1998, issue of the *Texas Register* (23 TexReg 10624).

The amendment is adopted for the purpose of aiding the Board in implementing policies affecting subsequent release to parole following a revocation or a new sentence; in clarifying the rule review procedure when a felony complaint is filed against an inmate; and in repealing subsections which do not reflect current procedures on parole review and completion of certain special treatment programs.

No comments were received regarding adoption of the amendment .

The amendment is adopted under the Code of Criminal Procedure, Article 42.18, §6(a) and §8(g), and under the Government Code, §508.044 and §508.045, which provide the parole panels of the Board of Pardons and Paroles with the power to make parole release decisions and which provides the Policy Board with the power to adopt rules relating to the decision-making processes used by the parole panels.

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

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Laura McElroy
General Counsel
Texas Boards of Pardons and Paroles
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For further information, please call: (512) 463–1883

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37 TAC §145.12

The Policy Board of the Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §145.12, concerning action upon review with one minor change to the text as published in the October 30, 1998, issue of the *Texas Register* (23 TexReg 11094), in order to clarify the procedures on new voting options for use by parole panels when considering inmates for release on parole.

The Policy Board's purpose in creating and refining these new voting options is to ensure that the inmate completes the rehabilitation program before release to parole by establishing the earliest program start date and determining the minimum number of months the inmate is to participate in the program before release to parole.

There was one comment to the proposed amendment. The commenter suggested, and the Policy Board agrees, that at the end of paragraph (5), the words "required aftercare program" be changed to "required post-release program" to more accurately reflect the Policy Board's intention not to inadvertently impose some limitation on the discretion of TDCJ to assign inmates to the appropriate post-release program, which includes an aftercare component.

The amendment is adopted under the Code of Criminal Procedure, Article 42.18, §8(g) and §508.044(d)(1), Government Code, which provide the Policy Board with the authority to promulgate rules with respect to the release of inmates on parole and §§508.045-508.047 and §508.150, Government Code, which provide the Board with the authority to release inmates eligible for parole.

§145.12 Action Upon Review

A case reviewed by a parole panel for parole consideration may be:

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

(4) determined that the totality of the circumstances favor the inmate's release on parole, further investigation (FI) is ordered in the following manner; and, upon release to parole, all conditions of parole or release to mandatory supervision that the parole panel is required by law to impose as a condition of parole or release to mandatory supervision are imposed:

(A) FI-1–Release when eligible;

(B) FI-2 (Month/Year)–Release on a specified future date within the three year incarceration period following either the prior parole docket date or date of the panel decision if the prior parole docket date has passed;

(C) FI-3 R (Month/Year)–Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and no earlier than three months from specified date. Such TDCJ program may include the Pre-Release Substance Abuse Program (PRSAP). In no event shall the specified date be set more than three years from the current docket date or the date of the panel decision if the current docket date has passed;

(D) FI-4 (Month/Year)–Transfer to Pre-parole Transfer facility prior to presumptive parole date set by board panel and release to parole supervision on presumptive parole date, but in no event shall the specified date be set more than three years from either initial eligibility date, current docket date or date of panel decision, if the aforementioned dates have passed;

(E) FI 5–Transfer to Inpatient Therapeutic Community Program. Release to aftercare component only after completion of IPTC program;

(F) FI 6 R (Month/Year)–Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and no earlier than six months from specified date. Such TDCJ program may include the Pre-Release Therapeutic Community (PRTC). In no event shall the specified date be set more than three years from the

current docket date or the date of the panel decision if the current docket date has passed;

(G) FI-9 R (Month/Year)–Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and no earlier than nine months from specified date. Such TDCJ program may include the In-Prison Therapeutic Community (IPTC). In no event shall the specified date be set more than three years from the current docket date or the date of the panel decision if the current docket date has passed;

(H) FI-18 R (Month/Year)–Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and no earlier than 18 months from specified date. Such TDCJ program may include the Sex Offender Treatment Program (SOTP). In no event shall the specified date be set more than three years from the current docket date or the date of the panel decision if the current docket date has passed;

(5) any person released to parole or mandatory supervision after completing a TDCJ treatment program must participate in and complete any required post-release program.

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

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TRD-9900340
Laura McElroy
General Counsel
Texas Board of Pardons and Paroles
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For further information, please call: (512) 463-1883

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37 TAC §145.16

The Policy Board of the Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §145.16, concerning action upon special review of additional information not previously available following approval for release to parole, with one non-substantive change to the text as published in the October 16, 1998, *Texas Register* (23 TexReg 10626).

The amendment is adopted in order to provide for a review of additional information received by the Board following a release decision but before the inmate's actual release.

One comment was received and the change was adopted in which it was suggested that the words "for any reason" in the proposed new language at the end of subsection (b) be deleted in order to make sure that the rule is structured in accordance with applicable laws regarding rulemaking.

The amendment is adopted under the Code of Criminal Procedure, Article 42.18, §8(g), and Government Code, §508.044(d)(1), which provide the Policy Board with the authority to adopt rules with respect to the release of prisoners for parole and mandatory supervision; and Government Code, §508.045, which provides parole panels with the authority to release inmates eligible for parole.

§145.16. Action upon Special Review of Information Not Previously Available–Release Approved.

(a) Responses received from trial officials or victims after a release to parole or release to mandatory supervision decision shall be considered information not previously available to the parole panel. Provided that release to parole or mandatory supervision has not occurred, the responses shall be referred to the parole panel or to the board office corresponding to the board panel that rendered the release to parole or release to mandatory supervision decision. A case reviewed by a parole panel, pursuant to the receipt of information not previously available to the parole panel, may then:

(1) be continued in a release to parole or release to mandatory supervision status with or without additional conditions of release imposed; or

(2) have the release to parole or release to mandatory supervision decision withdrawn and the next review date set by the parole panel in accordance with applicable provisions of Chapter 145 of this title (relating to Parole Process).

(b) Nothing in this rule is intended to restrict a board member from reconsidering a release to parole or mandatory supervision vote.

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

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TRD-9900335
Laura McElroy
General Counsel
Texas Board of Pardons and Paroles
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Proposal publication date: October 16, 1998
For further information, please call: (512) 463–1883

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37 TAC §145.17

The Policy Board of the Texas Board of Pardons and Paroles adopts new 37 TAC §145.17, concerning action upon special review with one minor language change in the text as published in the October 16, 1998, issue of the *Texas Register* (23 TexReg 10627).

The new rule is adopted for the purpose of providing a forum for receipt and consideration of information not previously available to the parole panel where the decision of the panel was to deny release to parole or mandatory supervision.

The commenter suggested, and the Policy Board agrees that the words "to reconsider the decision prior to the next review date" in subsection (d)(1) should be corrected to read "to have the decision reconsidered prior to the next review date."

The new rule is adopted under the Code of Criminal Procedure, Article 42.18, §8(g), and Government Code, §508.044(d)(1), which provide the Policy Board with the authority to adopt rules with respect to the release of prisoners for parole and mandatory supervision; and Government Code, §508.045, which provides parole panels with the authority to release inmates eligible for parole.

§145.17. Action upon Special Review of Information Not Previously Available-Release Denied

(a) This rule provides a forum for receipt and consideration of information not previously available to the parole panel where the decision of the panel was to deny release to parole or mandatory

supervision. While affording a remedy for consideration of such information, the Board also intends by this rule to reduce frivolous and duplicate requests for special consideration.

(b) Requests for special review shall apply only to cases reviewed for release to parole or mandatory supervision where the decision of the parole panel was to deny release to parole or mandatory supervision.

(c) All requests for special review shall be in writing.

(d) Requests for special review shall be considered in the following circumstances:

(1) a parole panel denied release to parole or mandatory supervision and a board member who voted with the majority on that panel desires to have the decision reconsidered prior to the next review date; or

(2) a petition on behalf of an inmate cites information not previously available to the parole panel.

(e) Information not previously available shall mean only:

(1) responses from trial officials and victims;

(2) a change in an inmate's sentence and judgment; or

(3) an allegation that the parole panel commits an error of law or board rule.

(f) All requests for special review shall be filed with The Texas Board of Pardons and Paroles, Board Administrator, P.O. Box 13401, Austin, Texas 78711.

(g) The board administrator shall refer to the special review parole panel only those requests for special review which meet the criteria set forth herein.

(h) A special review parole panel shall decide and exercise final action on such requests for special review.

(i) Upon considering a case for special review, the special review parole panel may take the following action:

(1) defer for request and receipt of further information;

(2) deny special review; or

(3) grant special review and revote the case in accordance with applicable provisions of Chapter 145 of this title (relating to Parole Process).

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 January 19, 1999.

TRD-9900337
Laura McElroy
General Counsel
Texas Board of Pardons and Paroles
Effective date: February 8, 1999
Proposal publication date: October 16, 1998
For further information, please call: (512) 463–1883

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Part VI. Texas Department of Criminal Justice

Chapter 151. General Provisions

37 TAC §151.55

The Texas Department of Criminal Justice adopts an amendment to §151.55, concerning the disposal of surplus agricultural goods and agricultural personal property without changes to the proposed text as published in the November 27, 1998, issue of the *Texas Register*.

The amendment will increase accountability for the disposal of surplus agricultural goods and agricultural personal property.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Government Code, §497.113, which specifically authorizes this section and §492.013, which grants rulemaking authority to the Board.

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

Filed with the Office of the Secretary of State on January 25, 1999.

TRD-9900512
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Effective date: February 14, 1999
Proposal publication date: November 27, 1998
For further information, please call: (512) 463–9693

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Chapter 155. Reports and Information Gathering

Subchapter C. Procedures for Resolving Contract Claims and Disputes

37 TAC §155.31

The Texas Department of Criminal Justice adopts new §155.31, concerning procedures for resolving contract claims and disputes, with minor changes to the text as proposed in the November 27, 1998, issue of the *Texas Register* (23 TexReg 11913).

The new section establishes procedures for resolving contract claims and disputes between TDCJ and other contract parties with respect to construction and non-construction contracts. Changes were made pursuant to internal review of the board's proposal, and serve to clarify the procedures for parties to a contract claim. A contract claim deadline of 180 days from the date of substantial contract completion has been added.

No comments were received regarding adoption of the new section.

The new section is adopted under the Government Code, §492.013, which grants general rulemaking authority.

§55.31. Establishing Procedures for Resolving Contract Claims and Disputes.

(a) Purpose. The purpose of this section is to establish procedures for resolving contract claims and disputes between TDCJ and other contract parties with respect to construction and non-construction contracts.

(b) Policy. It is the policy of the Texas Board of Criminal Justice (the Board) and TDCJ to resolve contract claims and disputes as efficiently and as expeditiously as possible, consistent with prudent stewardship of State of Texas assets.

(c) Procedures.

(1) Contract Disputes Committee (the Committee).

(A) The executive director will name the members and chairman of a Committee or Committees to serve at his or her pleasure. It will be the responsibility of the Committee to gather information, study, and meet informally with contractors, if requested, to resolve any disputes that may exist between the department office and the contractor, and which result in one or more contract claims or disputes.

(B) TDCJ stresses that, to every extent possible, disputes between a contractor and TDCJ employee, design professional, or other contractor in charge of a project or providing services in connection with a project should be resolved during the course of the contract. If, however, after completion of a contract, or when required for orderly performance prior to completion, resolution of a contract claim or dispute is not reached with the department office, the contractor should file a detailed report and request with the department office director under whose administration the contract was or is being performed that the contract claim or dispute be referred to the committee. In no event may such a contract claim or dispute be filed with the department if more than 180 days have elapsed since the date of substantial contract completion. The filed documents will be transmitted to the Committee.

(C) The Committee will secure detailed reports and recommendations from the responsible department office, and may confer with any other department office it deems appropriate.

(D) The Committee will then afford the contractor an opportunity for a meeting to informally discuss the disputed matters and to provide the contractor an opportunity to present additional relevant information and respond to information the Committee has received from the department office.

(E) The Committee chairman will give written notice of the Committee's proposed disposition of the claim to the contractor. If that disposition is acceptable, the contractor shall advise the Committee chairman in writing within 20 days of the date such notice is received, and the chairman will forward the agreed disposition to the executive director for a final and binding order on the claim. If the contractor is dissatisfied with the proposal of the Committee, the contractor may appeal to the executive director. If the department office is dissatisfied with the proposal of the Committee, the department office may appeal to the executive director.

(2) Appeal to the Executive Director

(A) An aggrieved contractor or department office may file a written appeal of the Committee's decision to the executive director within ten days of the Committee's decision. The executive director or his or her designee may uphold, reverse, or modify the decision of the Committee.

(B) The executive director or his or her designee will give written notice of the proposed disposition of the claim or dispute to the contractor and department office. If that disposition is acceptable to the contractor, the contractor shall advise the executive director, in writing, within 20 days of the date such notice is received.

(3) Mediation. If the executive director's disposition is not acceptable to the contractor, the contractor and TDCJ shall mediate in good faith in an attempt to resolve the claim or dispute. TDCJ and the contractor shall agree to a mediator and shall conduct such mediation pursuant to Chapter 2008 of the Texas Government Code and §§154.051-154.073 of the Texas Civil Practice and Remedies Code. The department office shall have no right to object to the disposition of the claim or dispute made by the executive director or his or her designee.

(4) Unsuccessful Mediation. In the event mediation does not resolve the claim or dispute to the satisfaction of the contractor and TDCJ, the parties may pursue legal remedies that would otherwise be available. TDCJ and the Board do not waive sovereign immunity from suit or liability due to the establishment of this Rule.

(5) Approval. Any settlement reached pursuant to this section may require the approval of the Texas Board of Criminal Justice, the Attorney General of Texas, the Governor of Texas, or the Texas Legislature, as required by Board policy, statutes and rules of the State of Texas, and the General Appropriations Act.

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

Filed with the Office of the Secretary of State on January 25, 1999.

TRD-9900513
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Effective date: February 14, 1999
Proposal publication date: November 27, 1998
For further information, please call: (512) 463–9693

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Part XIII. Texas Commission on Fire Protection

Chapter 423. Fire Suppression

Subchapter B. Minimum Standards for Aircraft Rescue Fire Fighting Personnel

37 TAC §423.203

The Texas Commission on Fire Protection adopts an amendment to §423.203, concerning minimum standards for basic aircraft rescue fire fighting personnel certification, without changes to the text published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12246).

The justification for this section is that the public is assured that persons responding as aircraft rescue fire fighting personnel are properly trained and evaluated in the skills necessary to safely and effectively perform their duties.

The amendments to §423.203 add language that requires skills testing for persons seeking certification as aircraft rescue fire fighting personnel.

There were no comments received on the proposed amendments.

The amendment is adopted under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of

its powers and duties; and Texas Government Code, §419.022, which provides the commission with the authority to establish minimum training standards for fire protection personnel in advanced or specialized fire protection personnel positions.

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 January 25, 1999.

TRD-9900503
T.R. Thompson
General Counsel
Texas Commission on Fire Protection
Effective date: March 1, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 918–7189

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Chapter 437. Fees

37 TAC §437.17

The Texas Commission on Fire Protection adopts new §437.17, concerning fees for records review, without changes to the text published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12247).

The justification for this section is a more efficient use of agency resources in that a records review fee will discourage requests from all but serious applicants for testing.

The new section allows the commission to charge a fee for review of training records for individuals seeking certification for out-of-state or military training. It also allows the commission to charge a fee for review of training records from the State Firemen's and Fire Marshals' Association of Texas or other in-state volunteer records.

There were no comments received on the proposed new section.

The new section is adopted under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to adopt rules for the administration of its powers and duties; and §419.026, which provides the commission with authority to establish fees for certification and examinations.

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

Filed with the Office of the Secretary of State on January 25, 1999.

TRD-9900502
T.R. Thompson
General Counsel
Texas Commission on Fire Protection
Effective date: March 1, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 918–7189

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Chapter 439. Examinations for Certification

37 TAC §439.13

The Texas Commission on Fire Protection adopts an amendment to §439.13, concerning testing for proof of proficiency, without changes to the text published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12248).

The justification for this section is the elimination of the requirement of skills evaluation deemed unnecessary where an individual has maintained skills by documenting continuing education.

The amendment to §439.13 allows an individual who has been out of the fire service and whose certificate has expired for more than one year to be exempted from the performance skills portion of the proficiency examination provided the individual can document twenty hours of continuing education for each year since the expiration of the certificate, up to a maximum of one hundred hours.

There were no comments received on the proposed amendments.

The amendment is adopted under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.032(b), concerning basic certification examinations.

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

Filed with the Office of the Secretary of State on January 25, 1999.

TRD-9900501
T.R. Thompson
General Counsel
Texas Commission on Fire Protection
Effective date: March 1, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 918–7189

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Chapter 443. Certification Curriculum Manual

37 TAC §443.5

The Texas Commission on Fire Protection adopts an amendment to §443.5, concerning the effective date of new curricula or changes to curricula required by law or rule, without changes to the text published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12248).

The justification for this section is that firefighters will be trained and tested in accordance with the most current National Fire Protection Association standards and associated reference materials.

The amendment to §443.5 allows the commission to specify a date for adoption of changes to the curriculum manual, other than January 1.

There were no comments received on the proposed amendments.

The amendment is adopted under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022,

which provides the commission with authority to establish minimum training standards for fire protection personnel.

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

Filed with the Office of the Secretary of State on January 25, 1999.

TRD-9900500
T.R. Thompson
General Counsel
Texas Commission on Fire Protection
Effective date: March 1, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 918–7189

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Chapter 449. Head of a Fire Department

37 TAC §449.1

The Texas Commission on Fire Protection adopts the repeal of §449.1, concerning head of a fire department, without changes as published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12249).

The justification for this repeal is that the repeal is being replaced with new language that assures that persons appointed as a department head for a fire department are properly trained, tested, and possess experience deemed necessary for the position.

The subject matter of the repealed section will be replaced by a proposed new section dealing with the same subject matter.

There were no comments received on the proposed repeal.

The repeal is adopted under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.032(f), which provides that the commission shall adopt rules for the purpose of this subsection relating to the appointment of a person to the position of head of the fire department.

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 January 25, 1999.

TRD-9900499
T.R. Thompson
General Counsel
Texas Commission on Fire Protection
Effective date: March 1, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 918–7189

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The Texas Commission on Fire Protection adopts new §449.1, concerning minimum standards for the head of a fire department, without changes to the text published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12250).

The justification for this section is that the public is assured that persons appointed as a department head for a fire department are properly trained, tested, and possess experience deemed necessary for the positions.

Certification as head of a department requires completion of all requirements for certification as fire protection personnel in any discipline with an approved curriculum including testing and training and five years of experience. Alternatively, an individual with ten years of out-of-state experience in a structural fire protection personnel position or ten years of volunteer fire fighter experience may qualify for a basic certification examination. The new rule does not require current emergency care attendant certification for head of department certification and does not require performance skills evaluation for certification as head of a department. In addition, the new rule requires experience in fire suppression for departments providing fire suppression duties and experience in fire prevention activities for a department providing fire prevention only. Certification as head of the department in any one discipline does not authorize an individual to perform duties in any discipline other than the one in which certification is obtained.

There were no comments received on the proposed new section.

The new section is adopted under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.032(f), which provides that the commission shall adopt rules for the purpose of this subsection relating to the appointment of a person to the position of head of the fire department.

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 January 25, 1999.

TRD-9900498
T.R. Thompson
General Counsel
Texas Commission on Fire Protection
Effective date: March 1, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 918–7189

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Chapter 461. General Administration

37 TAC §461.4

The Texas Commission on Fire Protection adopts an amendment to §461.4, concerning the general administration of the Fire Department Emergency Program, without changes to the text published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12251).

The justification for this section is that commission rules are conformed to legislative changes that transferred administration of the Texas Fire Incident Reporting System from the commission to the Texas Department of Insurance.

The amendment changes the definition of Texas Fire Incident Reporting System to reflect a legislative change that transferred

administration of the program from the commission to the Texas Department of Insurance.

There were no comments received on the proposed amendments.

The amendment is adopted under Texas Government Code, §419.008 which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code §419.051-§419.064, which provides the commission authority to administer the Fire Department Emergency Program.

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

Filed with the Office of the Secretary of State on January 25, 1999.

TRD-9900497
T.R. Thompson
General Counsel
Texas Commission on Fire Protection
Effective date: March 1, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 918–7189

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Chapter 463. Application Criteria

37 TAC §§463.3, 463.4, 463.6

The Texas Commission on Fire Protection adopts amendments to §§463.3, 463.4, 463.6, concerning application criteria for the Fire Department Emergency Program, without changes to the text published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12252).

The justification for this section is that the application process for loans and grants is simplified and criteria deemed unnecessary by the commission are eliminated.

The amendments to §463.3 delete information previously required on applications for financial assistance that was considered unnecessary. The amendments to §463.4 removes income levels and number of certification programs from the competitive needs criteria. The amendment to §463.6 requires participation in a training certification program approved by the Commission on Fire Protection as a condition for financial assistance.

There were no comments received on the proposed amendments.

The amendments are adopted under Texas Government Code, §419.008 which provides the Texas Commission on Fire Protection with authority to establish rules for the administration of its powers and duties; and Texas Government Code §419.051-§419.064, which provides the commission authority to administer the Fire Department Emergency Program.

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

Filed with the Office of the Secretary of State on January 25, 1999.

TRD-9900496
T.R. Thompson
General Counsel
Texas Commission on Fire Protection
Effective date: March 1, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 918–7189

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Chapter 495. Regulation of Nongovernmental Departments

Subchapter A. Voluntary Regulation of Nongovernmental Departments

37 TAC §495.1

The Texas Commission on Fire Protection adopts an amendment to §495.1, concerning regulation of nongovernmental departments, without changes to the text published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12253).

The justification for this section is that commission rules are conformed to changes made by the Texas Department of Insurance that replace key rate classification with the Insurance Services Office public protection classifications.

The amendment to §495.1 adds language to allow for the acceptance of a public protection classification assigned by the Insurance Services Office as an alternative to a key rate assigned by the Texas Department of Insurance, in order to seek voluntary regulation of the department.

There were no comments received on the proposed amendments.

The amendment is adopted under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.085, which provides the commission with authority to provide rules and procedures for mandatory regulation of nongovernmental organizations and personnel.

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

Filed with the Office of the Secretary of State on January 25, 1999.

TRD-9900495
T.R. Thompson
General Counsel
Texas Commission on Fire Protection
Effective date: March 1, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 918–7189

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part XX. Texas Workforce Commission

Chapter 800. General Administration

Subchapter B. Allocations and Funding

40 TAC §800.58

The Texas Workforce Commission (Commission) adopts new §800.58, concerning allocation of child care funds to local workforce development areas (workforce areas) without changes to the proposed text as published in the November 13, 1998 issue of the *Texas Register* (23 TexReg 11567). The adopted text will not be republished here.

The purpose of the rule is to allow local workforce development boards (Boards) to have more flexibility in the use of funds for child care services at the local level and to allocate the funds in the most effective manner based on the child care needs of the workforce areas. It is the Commission's intent to allocate funds to workforce areas for the purpose of meeting and exceeding statewide performance measures to support working families or those participating in employment and training activities.

The new rule shall be applicable to all fund distributions for child care allocations beginning with allocations for fiscal year 2000. The current child care allocation rule at Title 40, Texas Administrative Code §800.56, shall remain applicable to the funds allocated for fiscal year 1999.

The new rule sets forth the provisions for budgeting and expending funds for child care services to the extent permitted by statutory and regulatory provisions related to the funding sources.

The new rule specifies the method the Commission will employ in carrying out the allocation of funds to the workforce areas and the use of those funds for certain child care services. The child care services are provided under Texas Human Resources Code, Chapter 44.

If a Board fails to comply with the provisions contained in the rule, the Board shall be subject to the sanctions as detailed in Title 40, Texas Administrative Code, Chapter 800, Subchapter E, Sanctions.

The Commission held a public hearing on the proposed rule at 1:30 p.m. on November 20, 1998, in Room 644 of the Texas Workforce Commission Building at 101 East 15th Street in Austin, Texas.

The Commission received comments on the rules from local workforce development boards, businesses, and organizations. Some comments supported the rule, and others did not state whether they supported or were opposed to the rule, but had concerns and questions about the rules as proposed and suggested changes.

The names of interested groups or associations offering comments on the rules are as follows:

The Coastal Bend Workforce Development Board;

The East Texas Career Center;

The State Child Care Advisory Committee; and

The El Paso YWCA.

Following each comment or group of related comments is the Commission's response.

Comment: One commenter asserted that the policy of requiring local areas to provide funds to match federal funds penalizes poor communities and recommends taking into account conditions such as unemployment, per capita income levels, and other poverty indicators when determining match requirements. The commenter further recommends incorporating a sliding scale or allowing for in-kind matches rather than strictly cash to allow poor communities to compete on a level playing field.

Response: Regarding in-kind match, the federal regulations require a cash match in order to access the federal matching funds; in-kind match is not permitted. The state matching rate is also federally mandated. As there is insufficient state general revenue appropriations to match all of the available federal funds, some local funds are required to access the additional funds. The Commission believes that the benefit of sending the matched funds to the area that generated the local match is integral to motivating the local communities to soliciting the local match. At present, preliminary reviews have not proven a direct correlation on which to justify an allocation formula change and the Commission believes that a change to a sliding-scale may result in lower overall matching being generated.

Comment: One commenter asserted that the use of regional market surveys to determine the child care allocation rewards areas that charge more and penalizes those that charge less. The commenter recommended: 1) use of regional market surveys only to arrive at a statewide average and substate allocations based on the statewide average; 2) if regional market surveys continue to be used, identify markets in which the state reimbursement rate is a major factor and not decrease the disbursement in those regions so long as the statewide market average is increasing; and 3) automatically include cost of living adjustments and increases in the minimum wage into the allocation formula.

Response: The market rate survey is not a factor in the formula for allocating funds to local workforce development areas for FY 2000, but can be used by Boards to establish reimbursement rates for child care service providers. Cost of living adjustments would be similar to market rate adjustments and also are not included. As minimum wage is uniform throughout the state, it is also not a factor in the formula for allocations, but could be a factor in boards' determinations of reimbursement rates paid.

Comment: One commenter asserted that the potential exists for local boards to use money intended for child care for other purposes and recommends setting limits so that any funds allocated for child care are used for that purpose.

Response: Child care funds can be used only for the purpose of providing child care as prescribed by federal and state statutes and regulations, particularly the Child Care Development Fund. The Commission believes the local boards understand this restriction and will not violate financial management regulations. Nevertheless, fiscal monitoring will ensure that funds are used appropriately and take necessary steps to recoup misspent funds to prevent fraud and to ensure funds are not spent in a manner contra to the intent of the applicable legislation.

Comment: One commenter recommended that, if a region does not use all of its child care money, the Commission be required to redistribute it to other regions with children on waiting lists.

Response: The Commission agrees that redistributing funds in other areas is necessary where funds are not being utilized efficiently and the Commission has a deobligation/reobligation rule and policy to address such situations should they arise. The Commission disagrees that the waiting lists should be the only factor in determining whether to deobligate/reobligate funds,

because the Commission does not wish to encourage spending funds to recruit more people than can be served.

Comment: One commenter expressed interest in the opportunity to improve the quality of child care and the option for increasing the amount of funds expended on quality activities beyond the 4% requirement.

Response: The Commission agrees that the regulations do not limit the expenditure of funds for quality activities to only 4%. The rule facilitates the use of Boards' discretion at the local level to determine the percentage of funds used for quality, provided that the other criteria set forth in the federal regulations and this rule are met, including, but not limited to, subsection (f), paragraph (4), of §800.58. Paragraph (4) provides that the percentage of the total expenditure of the funds allocated for child care that is expended in direct child care services in FY 2000 and all succeeding fiscal years, shall equal, or exceed, the percentage of the total expenditure of funds allocated for child care that was expended for direct child care services in FY 1999.

Comment: One commenter asserted the rule would dramatically impact the available funds for the rural areas and give the majority of funding to the metropolitan areas where more people live. The commenter recommends having a base level of funding, somewhere around the FY 99 level, and then applying the proposed rule. Another commenter asserted this will result in a reduction of available funds and recommended a base line of funding before applying the rule.

Response: The Commission agrees that the allocation rule will provide greater funding to areas that demonstrate the greater need for services based on the populations. However, the Commission disagrees that a provision in the rule is necessary to provide for a base level of funding somewhere around the FY99 level because of the population distribution and the level of funding anticipated being available for FY99. The net effect of the allocation will be to provide a proportional amount of funds to areas that have the respective populations. The Commission disagrees that a base level of funding continues to be needed given the various efficiencies Boards are expected to develop in the Boards' management of service delivery in the workforce area, particularly if a Board incorporates the child care management with the one-stop centers or other board administered programs.

Comment: One commenter supported this rule with the assumption that it states that Transitional and Choices clients receive priority without qualifications.

Response: The Commission agrees that there is a priority for Transitional and Choices clients, but states that the only qualifications are those as mandated by the federal and state statutes and regulations. For example, at least 4% of the funds must be spent on quality improvement, thus necessitating that quality improvement is a priority until at least 4% of the funds are expended. Likewise, funds for children in protective services, which are funded through a separate allocation as determined by the Texas Department of Protective and Regulatory Services, may only be used for child care for children in protective services. The Transitional and Choices client priority, should not be applied in conflict with any other obligation imposed by the federal or state statutes or regulations, including the program rules contained in 40 TAC Chapter 809.

Comment: One commenter questioned if the Commission would supply local boards with the statewide totals for the formulas for child care allocations.

Response: This information will be available when the FY 2000 allocation is received.

The new rule is proposed under Texas Labor Code, Title 4, which provides the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

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 January 21, 1999.

TRD-9900388
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Effective date: February 10, 1999
Proposal publication date: November 13, 1998
For further information, please call: (512) 463-8812

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Subchapter H. Commission Monitoring

40 TAC §§800.301–800.307

The Texas Workforce Commission (Commission) adopts new §§800.301 - 800.307, 800.351 - 800.353, and 800.357 - 800.359, concerning monitoring without changes to the proposed text as published in the November 13, 1998, issue of the *Texas Register* (23 TexReg 11569). The adopted text will not be republished here.

The Commission adopts new §§800.354 and 800.355, concerning monitoring with changes to the proposed text as published in the November 13, 1998, issue of the *Texas Register*(23 TexReg 11569). The adopted text will be republished here.

Proposed §800.356 is deleted.

The purpose of the new rules is to consolidate into a general location in Chapter 800, the rules pertaining to monitoring of local workforce development Boards (Boards), Board contractors, and subrecipients.

The Commission recognizes the important role that Monitoring serves in ensuring the fiscal and program accountability of the programs administered. The consolidation of these rules serves to highlight this importance while also clarifying the roles, responsibilities, and expectations for the participating parties.

The Commission held a public hearing on the proposed rules at 1:30 p.m. on November 20, 1998, in Room 644 of the Texas Workforce Commission Building at 101 East 15th Street in Austin, Texas.

The Commission received comments on the rules from local workforce development Boards, and other entities regarding monitoring. Some comments were for the rules, and others did not state whether they supported or opposed the rules. Others had concerns and questions about the rules as proposed, and suggested changes.

The names of interested groups or associations offering comments on the rules are as follows:

The Concho Valley Workforce Development Board;

The North Central Texas Workforce Development Board;

The West Central Texas Workforce Development Board;

The Panhandle Regional Planning Commission;

The East Texas Council of Government (COG);

Catholic Charities Diocese of Beaumont;

Neighborhood Centers, Inc.; and

The State Child Care Advisory Committee.

Following each comment or group of related comments is the Commission's response.

Comment: One commenter asks when the Commission will make its child-care monitoring policies and procedures available to the Boards.

Response: The Commission's Contract Monitoring policies and procedures are reproduced in the Financial Manual for Grants and Contracts (FMGC) published by the Commission's Grants Administration Department. Revisions to the policy manual based on the new child care rules will be sent as soon as feasible.

Comment: One commenter expresses concern that the rules provide contradictory direction concerning who and what to monitor.

Response: The proposed rules serve to document and clarify expectations. Subchapter G summarizes the monitoring work to be done by the Commission. Specifically, §800.303 identifies both the parties subject to monitoring and an overview of the monitoring to be done. Additionally, Subchapter I summarizes the monitoring work to be done by Boards, subrecipients, and contract service providers. Specifically, §800.353 identifies both the parties subject to monitoring and an overview of the monitoring to be done.

Comment: One commenter requested clarification of the term subrecipient and questions whether this definition includes colleges, universities, and proprietary schools.

Response: The term subrecipient refers to any entity receiving federal funds through a Board. If receiving federal funds through a Board, a college, university, or proprietary school would be a subrecipient. If the college, university, or proprietary school were engaged to provide services as a result of a procurement action, it may also be a contract service provider. In either event, both as a subrecipient or a contract service provider, the monitoring responsibilities prescribed in Subchapter I would apply.

Comment: One commenter suggested that the definitions of "contract service provider" and "subrecipient" are somewhat unclear, and could be interpreted to overlap.

Response: The Commission agrees that these terms can and will often times overlap. The term subrecipient refers to any entity receiving federal funds through a Board. If receiving federal funds through a Board, and engaged to provide services as a result of a procurement action, a subrecipient may also be a contract service provider. In either event, both as a subrecipient or a contract service provider, the monitoring responsibilities prescribed in Subchapter I would apply.

Comment: Two commenters suggested that this section should include review of the LOP (List of Providers).

Response: The Commission disagrees that LOP should be named in the rule but agrees that documents necessary to determine compliance and performance may include review of LOP's.

Comment: One commenter suggested that the term "authoritative pronouncements" is vague and recommends specific language be substituted.

Response: The term authoritative pronouncements is used to refer to the vast array of guidance, interpretations, and information provided by the many oversight , administrative, and/or regulatory bodies who govern the more than 28 programs administered by the Commission. Although desired, more specific language would not encompass this broad universe of information.

Comment: One commenter recommended the Commission develop reporting timelines that would ensure timely information is reported and used to improve decision making.

Response: The Commission agrees that reporting timelines are necessary. Existing Monitoring policies and procedures already provide for a 30 day timeline for release of draft monitoring reports.

Comment: Two commenters suggested that this section include procedures for preparing a draft report that the Board and Contractor can respond to before it becomes final and subject to the Open Records Act. In addition, the commenter recommends that monitors prepare findings.

Response: Existing procedures call for a draft report to be issued for Board and/or contractor response prior to public release of the final report. All final reports include the Board's and/or contractor's response to findings. The monitoring team conducting each site visit prepares the related findings and draft report.

Comment: One commenter suggested adding language to require the Commission to issue reports within 30 working days after completion of each monitoring visit.

Response: The Commission agrees that reporting timelines are necessary. Existing Monitoring policies and procedures already provide for the 30 day timeline being recommended.

Comment: One commenter indicated that it is unclear when a Board would submit a written response to the Commission's Resolution Section and questions whether this would be done each time the Board responds to a monitoring report or only in special circumstances.

Response: Monitoring findings not successfully resolved during the monitoring process are turned over to the Resolution Section. Each Board, subrecipient, or contract service provider is notified of the issues being reviewed and allowed reasonable timeframes to provide responses and additional information and/or documentation.

Comment: One commenter suggested adding language to require Boards, subrecipients, or contract service providers to submit written responses to draft monitoring reports within 30 working days of their receipt of the Commission's draft report.

Response: The Commission agrees that response timelines are necessary. However, a rule requiring such action within strict timeframes would be overly restrictive by not recognizing the individual circumstances that may be required of Boards, subrecipients, or contract service providers to adequately respond to monitoring findings.

Comment: One commenter suggested that sections §800.353 and §800.355 conflict with one another: one section asking that Board's monitoring activities be planned to focus on areas of greatest risk; and the other requiring a schedule or timetable for monitoring all funded activities.

Response: The Commission agrees and changes rule §800.355 (a) to reflect the value of risk assessment tools in determining the funded activities to be monitored.

Comment: One commenter requested clarification of the term high-risk.

Response: The term "high-risk" does not refer to a specific Board, subrecipient, or contract service provider, but is a term meant to describe the relative risk of one provider to the others. The results of an effective risk assessment will compare the relative risk of all subrecipients and contract service providers. Those rated with a high risk factor would rate higher than those with a low risk factor, and therefore would be more likely to warrant monitoring coverage.

Comment: One commenter suggested that this section is a duplication of §800.353(c) which requires the use of risk assessment in determining monitoring focus.

Response: The Commission agrees and §800.354(d) is deleted.

Comment: Two commenters suggested that the estimated time budgeted to perform each review would vary for each review and recommended deleting this provision from Monitoring Plans.

Response: Although the time required to complete each review may vary, the Commission believes it is important for each Board, subrecipient, or contract service provider to estimate the time required to perform needed monitoring activities. In addition, this information should also be used to plan and schedule the monitoring activities of the Board, subrecipient, or contract service provider.

Comment: One commenter asserted that this Section is overly prescriptive in establishing local chains of command, requiring separation of monitoring and technical assistance, and assignment of the monitoring function to a specific person or group. The commenter recommends that this section be deleted and any additional legislative requirements be included in §800.355.

Response: The Commission agrees that overly prescriptive rules are not helpful. Accordingly, §800.356 has been deleted.

Comment: Two commenters suggested that the provision requiring separate monitoring and technical assistance functions would not be economically feasible for mid to small size child care managers.

Response: The requirements included in this section describe the functions needed to help ensure effective monitoring. Monitoring activities are more effective in identifying issues and recommending solutions when conducted by independent staff who are not also involved in service delivery.

Comment: One commenter noted the Commission's identification of monitoring responsibilities, but requested the Commission provide specific training on monitoring of Child Care Programs.

Response: The Commission agrees that appropriate training is critical to ensuring programs are effectively managed, operated, and monitored. A training curriculum will be developed that incorporates child care monitoring policies and procedures. A schedule of training will then be distributed to all Boards, child care program administrators, and contractors.

Comment: One commenter suggested that in the case of child care providers with provider agreements, comprehensive reviews seem unnecessary and costly.

Response: The Commission believes in the concept of accountability to help ensure funds are used for authorized purposes, and that programs achieve expected results. Although burdensome at times, monitoring efforts help ensure fiscal and program accountability, while also ensuring that accurate and reliable information is captured and used for decision-making.

Comment: One commenter suggested that the provision requiring separate monitoring and technical assistance functions could increase the costs by requiring outside staff or consultants.

Response: The requirements included in this section describe the functions needed to help ensure effective monitoring. Monitoring activities are more effective in identifying issues and recommending solutions when conducted by independent staff who are not also involved in service delivery.

Comment: One commenter expressed concern that small child care centers will experience financial difficulty complying with the rules. This commenter recommended that additional funding be provided for compliance.

Response: The Commission agrees that overly prescriptive requirements could increase the cost of compliance. However, the monitoring rules being proposed do not create additional responsibilities for Boards, subrecipients, or contract services providers. The requirements identified in these rules serve to summarize those already found in specific program rules, contracts, or agency policy.

Comment: One commenter believed the cost for the monitoring requirement will be greater than the amount estimated. Specifically, the commenter expressed concern that the analysis does not address the requirement that both the administrative entity and the subcontractors perform monitoring activities, thus resulting in greater administrative expenditures. In addition, the commenter requested clarification as to whether the estimated cost is considered an annual cost or a cost per monitoring visit.

Response: The estimated costs included in the preamble are estimates for small businesses as defined by TGC §2006.001. They are defined as legal entities (including partnerships, corporations, or sole proprietorships) that are: formed for the purpose of making a profit; independently owned and operated (non-public and/or non-governmental entity); and have less than 100 employees or less than $1 million in annual gross receipts. Because the proposed rule does not create additional responsibilities for Boards, subrecipients, or contract service providers, there should be no additional costs required to comply with the proposed rules. The estimated costs are expected annual costs.

Comment: One commenter expressed concern that the cost analysis is faulty because it would require more full-time equivalent positions to monitor all of the programs, conduct the detailed monitoring work, develop and implement appropriate written policies and procedures, and adequately train monitoring staff.

Response: The estimate included in the preamble represents the estimated costs applicable to a small business as defined by the Texas Government Code. The estimated costs for "non-small" businesses could be expected to be higher. The increase would be relative to the number of programs administered and the volume of activity within each program area.

The new rules are adopted under Texas Labor Code, Title 4, and particularly §301.061, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

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 January 21, 1999.

TRD-9900386
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Effective date: February 10, 1999
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For further information, please call: (512) 463-8812

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Subchapter I. Monitoring by Boards, Subrecipients, and Contract Service Providers

40 TAC §§800.351-800.355, 800.357-800.359

The new rules are adopted under Texas Labor Code, Title 4, and particularly §301.061, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

§800.354. Risk Assessment.

(a) Boards, subrecipients, or contract service providers shall include a risk assessment tool in their monitoring functions.

(b) The risk assessment tool shall identify high-risk subrecipients or contract service providers and high areas of risk within an individual subrecipient or contract service provider. The entity responsible for including the risk assessment tool in their monitoring functions shall be responsible for determining what constitutes high-risk or a high area of risk.

(c) Boards, subrecipients, or contract service providers shall establish monitoring schedules and customizing monitoring programs that best utilize monitoring resources. Boards, subrecipients, or contract service providers shall quantify, as much as possible, areas of risk identified for assessment.

§800.355. Monitoring Plan.

(a) Boards, subrecipients, or contract service providers shall develop their own local-level monitoring plan based on the results of the risk assessment. This monitoring plan shall incorporate all of the following:

(1) a schedule or timetable for monitoring funded activities, subrecipients, and contract service providers based upon risk assessment results;

(2) the type of review planned for each subrecipient or contract service provider, such as on-site review, comparative financial analysis, desk review, or other type of appropriate review; and

(3) the estimated time budgeted to perform each review.

(b) Boards, subrecipients, or contract service providers may perform monitoring reviews either formally or informally, but shall incorporate the risk assessment results in scheduling decisions.

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

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Chapter 809. Child Care and Development

The Texas Workforce Commission adopts the repeal of §§809.1-809.4, 809.21-809.33, 809.41-809.48, 809.61-809.77, 809.81-809.93, 809.101-809.111, 809.121-809.124, and 809.141-809.155, regarding the Child Care and Development Program without changes to the proposed text published in the November 13, 1998, issue of the *Texas Register*(23 TexReg 11573).

Because of the number of amendments recently proposed to the Child Care Program rules, these changes are better facilitated by the repeal of the majority of the current rules and adoption of new rules. The preamble to the new adopted rules is incorporated herein by reference as it contains comments, responses and additional information related to the repeal as well as the new rules. The preamble to the new adopted rules is published in this same issue of the *Texas Register*.

Subchapter A. General Provisions

40 TAC §§809.1–809.4

The repeals are adopted under Texas Labor Code §301.061 and §302.002 which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035 and 44.002.

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

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Subchapter B. Contractor Requirements

40 TAC §§809.21–809.33

The repeals are adopted under Texas Labor Code §301.061 and §302.002 which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035 and 44.002.

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

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Subchapter C. Child Care Provider Requirements

40 TAC §§809.41-809.48

The repeals are adopted under Texas Labor Code §301.061 and §302.002 which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035 and 44.002.

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Subchapter D. Client Eligibility Requirements

40 TAC §§809.61–809.77

The repeals are adopted under Texas Labor Code §301.061 and §302.002 which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035 and 44.002.

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Subchapter E. Client Eligibility Process Requirements

40 TAC §§809.81–809.93

The repeals are adopted under Texas Labor Code §301.061 and §302.002 which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035 and 44.002.

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

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Subchapter F. Billing and Payment Requirements

40 TAC §§809.101–809.111

The repeals are adopted under Texas Labor Code §301.061 and §302.002 which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035 and 44.002.

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Subchapter G. Program Monitoring and Compliance Requirements

40 TAC §§809.121–809.124

The repeals are adopted under Texas Labor Code §301.061 and §302.002 which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035 and 44.002.

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

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Subchapter H. Corrective and Adverse Actions

40 TAC §§809.141–809.155

The repeals are adopted under Texas Labor Code §301.061 and §302.002 which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035 and 44.002.

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

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Subchapter A. General Provisions

40 TAC §§809.1, 809.2, 809.4

The Texas Workforce Commission (Commission) adopts new §§809.1, 809.2, 809.4, 809.11-809.20, 809.41-809.49, 809.61, 809.62, 809.71-809.77, 809.91-809.93, 809.101-809.105, 809.121-809.124, 809.221-809.235, 809.251-809.253, 809.271-809.273, and 809.281-809.288, regarding the Child Care and Development Program.

New §§809.1, 809.14, 809.15, 809.41-809.44, 809.48, 809.49, 809.61, 809.62, 809.73, 809.92, 809.101, 809.102, 809.105, 809.123, 809.124, 809.221, 809.223-809.225, 809.228, 809.229, 809.231, 809.235, 809.271, 809.285 and 809.288 are adopted with changes to the proposed text as published in the November 13, 1998, issue of the *Texas Register* (23 TexReg 11580).

New §§809.227, 809.230 and 809.234 are withdrawn.

New §§809.2, 809.4, 809.11-809.13, 809.16-809.20, 809.45-809.47, 809.71, 809.72, 809.74-809.77, 809.91, 809.93, 809.103, 809.104, 809.121, 809.122, 809.222, 809.226, 809.232, 809.233, 809.251-809.253, 809.272, 809.273, 809.281-809.284, 809.286 and 809.287 are adopted without changes and will not be republished.

Purpose: The purpose of the rules is to fully integrate child care for low-income families with the system of workforce training and services under the administration of the local workforce development boards (Boards). Child care services are subsidized for families seeking to become independent of or who are at risk of becoming eligible for public assistance, either while parents are working or participating in educational or training activities. The revisions to the rules incorporate changes necessitated by the recently adopted federal regulations set forth in 45 Federal Register Parts 98 and 99 at page 39936 and provide flexibility for the Boards to fulfill their responsibilities in meeting the needs of parents and children residing in the local workforce development areas.

Description of changes from the repealed rules to the adopted rules: The majority of the changes can be described as modifications to incorporate more explicitly and specifically the Boards' role in the management of child care delivery. The changes allow the Boards more flexibility in tailoring delivery to best meet the needs of the residents and employers in the local workforce development areas. The Commission has previously set prescribed methods for compliance with federal and state statutes. The changes make it feasible for the Boards to develop procedures for administering child care services that best fit the local needs.

Flexibility: The level of state median income for eligibility has been changed to match the criteria contained in the federal regulations at 45 Federal Register Parts 98 and 99. The federal regulations set the income limit as that which does not exceed 85% of the state median income for a family of the same size. The Commission encourages the Boards to use the funds in the most effective manner to assist people transitioning off of public assistance or who are at risk of becoming dependent on public assistance, and the Boards may set a lower percentage for eligibility.

Unchanged Rules: Because of the number of amendments, these changes are being facilitated by repeal of the majority of the current rules and being proposed as new rules. Furthermore, reorganization of the eligibility rules makes them easier to read. The unchanged program rules listed below required no

technical or substantive changes and remain applicable to the program:

§809.5. Child Care State Advisory Committee;

§809.78. Parent Responsibility Agreement;

§809.79. Parent Responsibility Agreement, Sanctions and Exceptions;

§809.171 - 809.174. Regarding Subchapter I, Child Care Training Center Pilot Programs; and

§809.201 - 809.205. Regarding Subchapter J, School-Linked Child Care Program.

Program Goals: Child Care services are provided to low-income families to create and promote long-term self-sufficiency by enabling parents to work, attend skills training for work, or increase educational levels by offering affordable, accessible, and quality child care that supports the physical, social, emotional, and intellectual development and safety of children. Recognizing that parents best understand the needs of their children, these services empower parents to make informed choices regarding child care that best suits the family's needs. The Commission also advocates improvements in the availability, affordability, and quality of child care while supporting health, safety, licensing, and regulatory standards for child care providers.

Board Responsibilities and Policy Development: As the Boards have become operational, the need to integrate child care more fully with other workforce support services has become apparent. The chief elected officials of the local workforce development areas are required, through state law, to appoint to the Board a permanent child care representative with expertise in child care to address child care issues consistently. To assist the Boards in adapting to the increased flexibility provided under state law and rules, the Commission offers continued training to the Board members regarding child care services. In addition, a child care services manual will be available to assist the Boards in implementing these rules and making informed local decisions. The Boards must assess the need for child care in their individual local workforce development areas, tailor a unique plan for service delivery, and oversee the delivery of this vital support service to ensure families' steady transition to self-sufficiency. Further, the Boards must evaluate services provided to help low-income families as they move toward self-sufficiency by providing child care subsidies to parents to support work, training, or education. The Boards will manage the delivery of child care subject to the provisions of Texas Government Code, Chapter 2308 as implemented by the Commission through 40 TAC Chapter 801 relating to Local Workforce Development Boards.

In designing their plans for service delivery, the Boards must ensure access to child care services in their networks of one-stop centers. The Boards may choose to integrate intake and eligibility with the services handled by career center operators. Alternatively, they may choose to obtain separate contractors to perform the activities associated with eligibility determination. Telephone access at the career centers to intake and eligibility contractors will meet the law's requirements. Similarly, child care training may be incorporated within other contractors' activities or separated to be performed by a different contracting entity.

These revisions to the rules are intended to provide the Boards with maximum flexibility, in accordance with state and federal law and regulation, to design a service mechanism that will assist the greatest number of families in accessing the most affordable, quality child care in each local workforce development area. The Boards must establish individual policies on several subjects, ranging from absence policies to reimbursement rates. In their role as policymakers, the Boards are subject to all the requirements of the Texas Open Meetings Act, thus ensuring that parents, providers, contractors and potential contractors, employers, and the public in general will have ample opportunity to participate and comment on proposed child care administrative policies.

The enhanced flexibility afforded to the Boards ensures that policies maximize the use of funds by tailoring the management of child care delivery to meet the specific needs of each local workforce development area. The Boards must incorporate into their service delivery plan procedures for implementing policies for child care delivery. Matters that will need to be addressed include, but are not limited to: parent co-payments, absence policies, eligibility verification procedures, service priorities, provider reimbursement rates, and other methods to utilize the funds in a manner to address the needs of the local workforce development area efficiently and effectively. Where applicable, the Boards must also develop the consequences and the procedures for reducing or ending care should the parent fail to uphold the eligibility and participation requirements. Some methods of developing these policies involve examining the past practices of the Commission, examining recommended best practices, or independently tailoring policies to meet local needs.

In developing these policies and plans for delivery of child care services, the Boards will seek input from the local entities as indicated in 45 Federal Register Parts 98 and 99. They will also follow the procedures for making changes to the Boards' strategic and operational plans consistent with Texas Government Code, Chapter 2803 and 40 TAC Chapter 801 relating to Local Workforce Development Boards.

Information Management: To ensure compliance with state and federal reporting requirements, the Commission anticipates continued use of a statewide automated system to manage the functions of client services, vendor and provider management, and financial management until alternative methods of managing information are developed and approved by the Commission.

Effective Date: The effective date of the rules in this Chapter 809 relating to Child Care and Development shall be twenty days after the date of filing the adoption in the Office of the Secretary of State; however, until September 1, 1999, the Boards shall continue to comply with the rules in effect on January 1, 1999.

In the period between January and September 1, 1999, the Boards are expected to receive training, set local policies, and submit a revised local plan for child care to the Commission to prepare to implement the new rules on September 1, 1999. The Commission is required to submit the revised State Plan to the U.S. Department of Health and Human Services by July 1, 1999; therefore, local policies should be developed and set in order for the Board policies to be incorporated into the State Plan by approximately April 15, 1999. The Commission expects to hold a public hearing regarding the State Plan in early June, 1999. This will provide the Boards with time to exercise local discretion to design procedures for administering the services,

procure contractors, as needed, and transition to their unique plan for delivery of child care services in each local workforce development area.

Description and Purpose of New Rules: Subchapter A contains rules regarding the general provisions applicable to the chapter. The purposes of §§809.1-809.2 and 809.4 are, respectively, to set forth the provisions relating to the following: the short title and purpose of the chapter, definitions applicable to the chapter, and waiver request procedures.

Subchapter B contains the Board responsibilities regarding child care. The purposes of §§809.11-809.20 are, respectively, to set forth the provisions relating to the following: Board responsibilities, Board policies and plans for child care services, ensuring parent choice, promoting consumer education, quality improvement activities, procurement, management of finances, information management and reporting requirements, performance standards, and local donations.

Subchapter C contains the rules regarding the requirements to provide child care. The purposes of §§809.41-809.49 are, respectively, to set forth the provisions regarding the following: the general requirements applicable to providers of child care, the minimum requirements for providers, provider agreements, provider general liability insurance requirements, collection of parent fees and subsidies, assessing parent fees, reduction of assessed parent fees, attendance tracking, and provider advisory groups.

Subchapter D contains the rules regarding the requirements for persons or entities providing self-arranged care. The purposes of §§809.61 and 809.62 are, respectively, to set forth the provisions regarding the qualifications to provide self-arranged care and the provisions regarding reimbursement for self-arranged care.

Subchapter E contains the rules regarding the provisions on parent rights and responsibilities. The purposes of §§809.71-809.77 are, respectively, to set forth the provisions regarding the following: parental choice, general parent rights, responsibilities regarding eligibility documentation, rights and responsibilities regarding enrollment agreements, parent reporting requirements, parent appeal rights, and a parent's right to withdraw or refuse care.

Subchapter F contains the rules regarding the general eligibility requirements for child care. The purposes of §§809.91-809.93 are, respectively, to set forth the provisions regarding applicable definitions, general eligibility requirements, and calculating income for determining eligibility.

Subchapter G contains the rules regarding the provisions for child care for children of people transitioning off public assistance. The purposes of §§809.101-809.105 are, respectively, to set forth the requirements relating to transitional child care, children of parents participating in the Choices Program, Texas Workforce Commission applicant child care, children of parents participating in the Food Stamps Employment and Training Program, and children receiving or needing protective services.

Subchapter H contains the rules regarding the provision of child care to children of parents at risk of becoming dependent on public assistance. The purposes of §§809.121-809.124 are, respectively, to set forth the requirements relating to children living in families with very low incomes, children with disabilities, children of teen parents, and children served by special projects.

Subchapter K contains the rules regarding funds management. The purposes of §§809.221-809.226, 809.228-809.229, 809.231-809.233, and 809.235 are, respectively, to set forth the provisions relating to the following: general funds management, effective utilization of funds, eligibility verification, custody and visitation arrangements, continuity of care, provider billing requirements, units of services of child care, provider payment based on child care enrollment, provider reimbursement rates, provider reimbursements for transportation, reduction of parent fees and child care subsidies, and billing.

Subchapter L contains the rules regarding fraud investigation. The purposes of §§809.251-253 are, respectively, to set forth the provisions relating to the following: general fraud investigation procedures, suspected fraud, and action to prevent or correct suspected fraud.

Subchapter M contains the rules regarding the appeal procedure. The purposes of §§809.271-809.273 are, respectively, to set forth the provisions relating to the following: child care during appeal, Board review, and appeals to the Commission.

Subchapter N contains the rules regarding corrective and adverse actions. The purposes of §§809.281-809.288 are, respectively, to set forth the provisions relating to the following: contractor agreement violations, provider agreement violations, corrective and adverse actions, noncompliance with other state or federal programs, reapplication for provider status after termination or nonrenewal of the provider agreement, recovery of overpayment, recovery of overpayment to a provider or parent, and failure to meet performance standards.

Public Hearing: The Commission held a public hearing on the proposed rules at 1:30 p.m. on November 20, 1998, in Room 644 of the Texas Workforce Commission Building at 101 East 15th Street in Austin, Texas.

The Commission received comments throughout the comment period as well as during the public hearing. The public comments on the rules were from two Texas state legislators, Boards, state agencies, providers, contractors, a private attorney, and two members of The State Child Care Advisory Committee. Some comments supported the rules, some were against the rules and others did not state whether they were for or against the rules. Several commenters expressed concerns and questions about the rules as proposed, and suggested changes.

The names of interested groups or associations that offered comments on the rules were as follows:

two Texas state legislators;

Amarillo, Lubbock, and Odessa areas and Concho Valley Workforce Development Board;

Capital Area Workforce Development Board;

Coastal Bend Workforce Development Board;

East Texas Workforce Development Board;

Gulf Coast Workforce Development Board;

North Central Texas Workforce Development Board;

Southeast Texas Workforce Development Board;

Tarrant County Workforce Development Board;

West Central Texas Workforce Development Board; and

two members of The State Child Care Advisory Committee.

Other groups or associations, which commented included:

Catholic Charities Diocese of Beaumont;

Child Care, Inc., Wichita Falls;

El Paso YWCA;

The Child Care Group;

East Texas Career Center Operator;

Neighborhood Centers, Inc., Houston;

Southeast Texas Regional Planning Commission; and

West Texas Opportunities, Inc.

The following state agencies commented:

The Child Care Licensing Division and Child Protective Services Division of the Texas Department of Protective and Regulatory Services (TDPRS); and

The Texas Department of Human Services.

As a result of comments, the following changes were made to the proposed text.

New §809.1 Short Title and Purpose. Add: "(c) The effective date of the rules in this Chapter 809 relating to Child Care and Development shall be twenty days after the date of filing the adoption in the Office of the Secretary of State; however, until September 1, 1999, the Boards shall continue to comply with the rules in effect on January 1, 1999."

New §809.14 Promoting Consumer Education. Replace the language in (a) with the following: "(a) A Board shall make available to parents a consumer guide to child care providers who have Provider Agreements to provide Commission-funded child care in the local workforce development area and shall represent the name, address, and phone number of each provider and shall represent whether each provider:" Delete (a)(3) and renumber the paragraphs accordingly. Replace the language in (b) with the following: "(b) The consumer guide shall set forth the requirements to be licensed and registered with the Texas Department of Protective and Regulatory Services as set forth in Texas Human Resources Code, Chapter 42 and applicable administrative rules and a description of the types of facilities or homes, which may be licensed or registered including, but not limited to, the following: day-care centers, group day-care homes, and family homes." In (c), replace "list of providers" with "consumer guide," add "obtain or" after "may," and add at the end of the sentence "and check compliance history." In (d), replace "list of providers" with "consumer guide."

New 809.15 Quality Improvement Activities. In (c), add at the end of the sentence, "except the Boards may not provide loans." In (d)(1), replace "is" with "are."

New §809.42 Minimum Requirements for Providers. Delete (a)(3) and renumber accordingly. In (b), delete (b)(2), add "and" at the end of (b)(1); and change "(3)" to "(2)." Replace the language in (c) with the following: "(c) When a Board or the Board's contractor, in the course of fulfilling its responsibilities, gains knowledge of any possible violation regarding regulatory standards, the Board or its contractor shall report the information to the appropriate regulatory agency."

New §809.44 Provider General Liability Insurance Requirements. Replace the language in the section with the following: "The Boards shall determine whether general liability insurance, including transportation insurance, will be required of providers in their areas and, if so, the amount."

New §809.48 Attendance Tracking. Replace the language in (a) with the following: "(a) A Board shall set the attendance standards for eligible children in the local workforce development area, including provisions consistent with §809.224 of this Chapter (relating to Custody and Visitation Arrangements). Providers and self-arranged providers shall document and maintain a record of each child's attendance and submit such documents to the Board's designated contractor upon request." In (c), add "in" after "result."

New §809.49 Provider Advisory Groups. Add "that are licensed centers," after "Providers."

New §809.61 Qualification to Provide Self-Arranged Care. In (d), add after the first sentence, "Boards may choose to not allow "listed" providers as self-arranged providers."

New §809.62 Reimbursement for Self-Arranged Care. Replace the language in the section with the following wording:

(a) A Board shall ensure that reimbursement for self-arranged care is paid:

(1) to the self-arranged provider; and

(2) after the Board or its contractor receives a complete Declaration of Services Statement (Declaration) verifying that services were rendered.

(b) The Declaration shall contain:

(1) the name, age, and identifying information of the child;

(2) the amount of care provided in terms of units of care;

(3) the rate of payment;

(4) the dates services were provided;

(5) the name and identifying information of the self-arranged provider, including the location where care is provided;

(6) verification by the self-arranged provider that the information submitted in the Declaration is correct; and

(7) additional information as may be required by the Boards.

New §809.73 Eligibility Documentation. In (a), delete everything after the first sentence. Delete (c).

New §809.92 General Eligibility Requirements. Replace the language in (c), including (c)(1) and (2), with the following: "For purposes of this chapter, child care is needed to support participation in education for a limited time as determined by the Board."

New §809.101. Transitional Child Care. Rename the section "Transitional Child Care" and replace with the following language:

(a) A Board shall ensure that transitional child care services will be provided for children of parents who have been denied TANF because of:

(1) employment and an increase in earnings which results in being ineligible for TANF payments, or

(2) expiration of TANF time limits.

(b) Transitional child care is available for a period of up to 12 months except in the case of an exempt TANF client who

voluntarily participates in the Choices program. For these individuals, transitional child care is available for a period up to 18 months.

(c) TANF clients who are not employed when TANF expires may receive up to 4 weeks of transitional child care, in order to allow these individuals to search for work.

(d) TANF clients who are engaged in an education or training component that extends beyond the date that TANF expires may receive transitional child care in order to complete the component.

New §809.102. Children of Parents Participating in the Choices Program. Delete (e).

New §809.105. Children Receiving or Needing Protective Services. Replace the title with "Children Receiving or Needing Protective Services." In (b), add "and funded" after "authorized." Add: "(c) In cases where the Child Protective Services (CPS) case is closed and child care will no longer be funded by Texas Department of Protective and Regulatory Services, the Board shall continue the child care by using other funding for the child care slot for up to six months after they are no longer eligible for Texas Department of Protective and Regulatory Services funds if the CPS worker or other Texas Department of Protective and Regulatory Services staff states that the child needs to receive protective services and child care is an integral factor of those services.

New §809.123 Children of Teen Parents. Replace the title with "Children of Teen Parents" and replace the language in (a) with the following: "(a) A teen parent (teen) is an individual 18 years of age or younger, or 19 years of age and attending high school or the equivalent, who has a child."

New §809.221 General Funds Management. Add "(a)" before the first paragraph and add: "(b) Children referred by Child Protective Services (CPS) workers, for which care shall be provided through Texas Department of Protective and Regulatory Services funds, shall also receive priority for available child care openings. When Texas Department of Protective and Regulatory Services funding stops and the CPS worker indicates that the child continues to need protective services, the Boards shall continue the child care using the Child Care and Development funds up to six months after they are no longer eligible for Texas Department of Protective and Regulatory Services funds, so long as the provision of care to the child does not result in another child being removed from care."

New §809.223 Eligibility Verification. Replace the language in (b) with the following: "(b) Eligibility for child care shall be redetermined: (1) any time there is a change in family income or other information that could affect eligibility to receive child care, and (2) on an established frequency, at the Board's discretion."

New §809.224 Custody and Visitation Arrangements. Replace the language in (b) with the following: "(b) A Board may encourage parents of other children to temporarily utilize the space the child under court-ordered custody or visitation arrangement has vacated until the child returns so that he or she can return to the same provider."

New §809.225 Continuity of Care. At the end of (a), add: "Children who no longer receive Texas Department of Protective and Regulatory Services funded care shall also continue receiving child care funded through the Commission if eligible to receive care based on other eligibility criteria or if the Texas Department of Protective and Regulatory Services or its CPS worker indicates that the child is in need of protective services."

New §809.227 Provider Payments. Delete the entire section.

New §809.228 Units of Service of Child Care. In (a), add to the beginning of the first sentence, "Unless otherwise determined by the Board and approved by the Commission for automated reporting purposes," and replace "The" with "the."

New §809.229 Provider Payment Based on Child Care Enrollment. Replace the language in (a) with the following: "(a) Enrollment in child care begins the first day the child is scheduled to attend child care as authorized by the contractor." Replace the language in (b) with the following: "(b) A Board or its contractor shall ensure that providers are not paid for holding spaces open except as consistent with attendance policies as established by the Boards."

New §809.230 Inclusion Assistance Rates. The proposed section is deleted and the language will be incorporated into 809.231.

New §809.231 Provider Reimbursement Rates. The provisions regarding Inclusion Assistance Rates are added as (c) as follows:

(c) A Board or its contractor shall ensure that providers who are reimbursed for additional staff needed to assist in the care of a child with disabilities are paid a rate up to 190% of the provider's reimbursement rate for a child of that same age.

(1) The higher rate, which may be called an inclusion assistance rate, is an increased provider reimbursement rate to provide for additional staff to assist in the care of a child with disabilities, which shall take into consideration the estimated cost of the additional staff needed by a child with disabilities.

(2) The Board shall ensure that a professional, who is familiar with assessing the needs of children with disabilities, certifies the need for the inclusion assistance rate.

New §809.234 Payment for Operating Expenses. Delete the section.

New §809.235 Billing. Delete all except the first sentence of (a) and remove the "(a)."

New §809.271 Child Care During Appeal. In (b)(5), move the "or" to (b)(6), add "(7) non-payment of parent fees" and punctuate accordingly.

New §809.285 Reapplication for Provider Status after Termination or Nonrenewal of the Provider Agreement. Replace the language in (a) with the following: "(a) If a Provider Agreement has not been renewed or has been terminated for violations of the terms of the Provider Agreement, the provider shall wait for a period of time, to be determined by the Board, after the termination or nonrenewal date of the Provider Agreement before reapplying."

New §809.288 Failure to Meet Performance Standards. Delete (b) and (c) and remove the "(a)."

New §809.41 General Requirements, §809.43 Provider Agreements, §809.61 Qualifications to Provide Self-Arranged Care, and §809.124 Children Served by Special Projects. Change "*Federal Register*" to "*Code of Federal Regulations*" because the new citations are appropriate and incorporate the amendments to Parts 98 and 99 published in the July 24 1998, issue of the *Federal Register* (63 FedReg 39936).

Following each comment or group of related comments is the Commission's response.

809.2 Definitions.

Comment: One commenter requested a definition of "vendor" since a vendor agreement has responsibilities that could be understood to create a subcontractor relationship with the contractor.

Response: The term "provider agreement" is used in these rules rather than "vendor agreement." The definition of "provider" is included in §809.2. For purposes of determining the status of "vendor," the relationship should not change, merely because of the name change.

Comment: One commenter asserted that the definitions of "parent" and "child" are too limiting and only give parents and legal guardians the ability to receive child care services for their children. The commenter recommended the definitions should include TANF and SSI caretakers.

Response: The Commission disagrees with extending the definition of parent to TANF and SSI caretakers because the Commission believes that the intent of the federal regulations is to strengthen the role of the family. The Commission believes that extending the definition beyond what was previously contained in the child care rules may result in parents who are by blood relationship, marriage, adoption, or legal guardianship not being the primary beneficiaries of the workforce support service.

809.11 Board Responsibilities.

Comment: One commenter suggested that the rule needed to define career development centers or be changed to reflect that a Board shall provide services through full-service centers or at least one center. The commenter noted that the word "all" may impose unreasonable hardships on Boards with a large number of centers and recommended the word "all" be eliminated.

Response: As child care intake and eligibility information, as well as services, can be arranged via telephone, access to a telephone for this purpose would be in conformity with the rule; therefore, the Commission declines to revise the rule.

Comment: One commenter questioned if access to child care at career centers means eligibility determinations must be performed at career centers.

Response: Access to eligibility determination must be available at the career center. Eligibility determination by the child care contractor is often performed via telephone; therefore, access to the contractor via telephone at the career center would satisfy the access requirement.

Comment: Two commenters requested a definition of "access."

Response: Access means that services are available to the client.

809.12 Board Policies and Plans for Child Care Services.

Comment: One commenter requested a definition of what entities are to be identified by the Board for coordination in development of the child care delivery plan and questioned if the Commission intends for the Board to have direct contact with the federal agency responsible for administering the child care and development fund. Another commenter questioned the requirement that the Board service delivery plan contain evidence of coordination with the federal level when the federal regulations state they will only interact with the lead agency.

Response: Coordination should include any entity in the local area that has a particular interest or expertise in regard to child care issues, such as those entities indicated in the federal regulations. As these differ by local area, the Commission declines to specify particular entities. The Board would not necessarily contact the federal agency responsible for administering the Child Care and Development Fund, but there may be federally funded organizations in the local area, such as Head Start, that would be relevant for coordination activities.

Comment: Two commenters requested clarification of "representatives of local governments."

Response: Local government may be a city, a county, or a multi-county area. The appropriate representative would be an individual designated through official channels of the city or county administration.

Comment: One commenter recommended that the Child Care Management Services Child Care Advisory Council be retained as a state requirement for child care contractors as referenced in §809.29 of the repealed rules.

Response: The Boards will establish policies for the delivery of child care services in the local areas and have the discretion to establish an advisory council or an ad hoc committee for input related to child care issues if the Boards so choose.

809.14 Promoting Consumer Education.

Comments and responses regarding persons or entities "listed" with the Texas Department of Protective and Regulatory Services (TDPRS) are addressed with comments to §809.42.

Comment: One commenter recommended adding a provision to the rule that the Boards shall make available to parents information on where to find the requirements to be licensed, registered, and listed with the TDPRS as well as information about the types of facilities or homes, which may be licensed, registered, or listed and whether or not the types of facilities and homes are inspected by TDPRS. The commenter also recommended referencing the Texas Administrative Code, §§720 and 725 in the rule.

Response: Information established by the Commission for the Boards to provide to parents will include this information. The Commission declines to include it in the rule because some of the information may be changed periodically by other agencies or laws, and the complete rule process would have to be followed to amend the rule.

809.15 Quality Improvement Activities.

Comment: One commenter asserted that the Designated Vendor criteria are too restrictive in rural areas and recommended that the Boards be allowed to set all of the criteria rather than being required to use Designated Vendor criteria established by the Commission.

Response: The Boards may establish their own criteria, which may be applicable to any provider. However, the Designated Vendor criteria established by the Commission will continue to be used, because the percentage of providers that reach Designated Vendor status, as defined by the Commission, is required to be reported to the Legislative Budget Board for fiscal years (FY) 2000 and 2001. The Commission urges Boards to consider alternate performance criteria that the Commission could suggest to the Legislative Budget Board and Governor's Office in subsequent bienniums.

Comment: One commenter questioned the ability of the state, or the Boards, to grant loans to child care providers as allowed as a quality improvement activity in federal regulations. Another commenter questioned whether state law allows loans to providers.

Response: Under the recently adopted federal regulations, loans are now approved as means of improving quality. Although the present State Plan does not provide for loans from the funds administered by the Commission and the rules are clarified to exclude loans from this rule, the Commission is reviewing this new concept for improving quality of care and strongly urges the Boards to submit suggestions and comments on the possible implementation of such a provision so that the appropriate changes may be incorporated into the State Plan. The Commission also encourages Boards, contractors, and providers to utilize other loan programs, such as the loans provided pursuant to Texas Government Code §491.191, regarding the linked-deposit program through the Texas Department of Economic Development to historically underutilized businesses, businesses located in an enterprise zone, and to child care providers for development of "child-care services provided by and activities engaged in this state by nonprofit organizations; and quality, affordable child-care services in this state."

Comment: One commenter recommended consideration for raising the Designated Vendor's maximum rate by 15% to offer an incentive for vendors to become Designated Vendors. The commenter further recommended allowing Designated Vendors who maintained status to receive their full-published rate.

Response: The Commission declines to establish a fixed amount of increased rate for Designated Vendors, because the Boards may determine additional incentives, including higher reimbursement rates, for vendors engaged in such quality improvement activities, consistent with the intent of the federal regulations at 45 Federal Register §98.51.

Comment: One commenter questioned if the Boards can change the Designated Vendor criteria or only make additions.

Response: The percentage of Designated Vendors is a measure that is reported to the Legislative Budget Board and the Governor's Office, which, therefore, must have a statewide definition. The provision of §809.15(d) enables the Boards to establish quality criteria at their discretion, but providers in this category would not be referred to as Designated Vendors. If all the Boards concurred on Designated Vendor criteria, the statewide definition could be changed. The Commission urges the Boards to submit their recommendations for this definition for the Commission to put forth during the next biennium budget process for FY 2002-2003.

Comment: Two commenters requested additional definition and explanation.

Response: Criteria established by the Commission to identify a provider as a Designated Vendor, when the provider exceeds the minimum standards established by the Texas Department of Protective and Regulatory Services (TDPRS), will be provided to the Boards. The rule requires that the criteria and Designated Vendor status be maintained. The rule also provides for the Boards to establish other voluntary criteria for improving quality at their discretion and to recognize providers appropriately, although these would not be identified as Designated Vendors based on state criteria.

Comment: One commenter suggested that the proposed rule allows the Child Care Management System (CCMS) to step into the regulatory burdens of TDPRS Child Care Licensing Division by improving health and safety conditions.

Response: The rule does not give the contractor any regulatory authority related to health and safety conditions. The rule identifies improvement of health and safety conditions as one criterion that may be considered as a quality improvement activity.

Comment: One commenter recommended rewarding quality care and providing an incentive for other providers to increase the quality of care by paying a higher reimbursement rate to providers who meet Designated Vendor or National Association for the Education of Young Children standards and also negotiating with the State Board of Insurance to provide Designated Vendors a discount on their liability premiums.

Response: The rule authorizes the Boards to establish the reimbursement rate for providers and to plan and develop activities for the improvement of quality in child care services. The Boards could pay a higher rate for providers who meet higher standards if they so choose. The recommendation regarding a discount on liability insurance will be forwarded to the State Board of Insurance.

809.20 Local Donations.

Comment: One commenter asserted the rule should identify who would be responsible for pursuing local donations.

Response: As stated in the rule, the Boards are responsible for ensuring that local donations are pursued. The Boards can designate the responsible party, or parties, for this activity. The Boards' members have knowledge of community organizations and community resources and are in a stronger position to plan an effective approach for optimizing local donations.

Comment: One commenter asserted that Texas does not appropriate enough general revenue funds to draw down all the federal child care money available for low-income working families and parents in job training programs and recommended that the legislature appropriate enough money to draw down all of the available federal money for child care.

Response: The Commission recognizes the limitation on funding for this critical support service and has requested additional state funds to match the increased amount of federal child care funds available for Texas.

809.41 General Requirements.

Comment: One commenter asserted the activity addressed in this rule is a Child Care Licensing Division and Health Department task and that, when possible non-compliance is noted, it is called in to both agencies.

Response: The Commission agrees and emphasizes that the Board or the contractors should report possible violations of health or safety standards to the appropriate regulatory agency.

Comments Regarding Persons or Entities Listed With TDPRS ("listed") concerning §§809.14, 809.42, and §809.61. Thirteen commenters recommended deleting "listed" because of one or more of the following: TDPRS does not have minimum health and safety requirements for "listed," TDPRS does not inspect unless there is an allegation of abuse or neglect, TDPRS is responsible for this task, TDPRS does not monitor or visit the "listed," there is no minimum age, it is unreasonable and

dangerous to expect Boards to ensure compliance, adding "listed" would not be beneficial as the "listed" only care for three children and probably could not afford general liability insurance, adding "listed" may negatively impact the quality of care, the amount of resources to implement would cause concern, there may be no applicable local laws, the contractor or Boards would be liable for actions of the "listed," and the "listed" facility do not qualify to sign vendor agreements or to provide self-arranged care. If the rules include "listed," one commenter stated that Boards should determine whether "listed" meet the criteria, and, if not, that Board could decline the provider agreement. One or more of the commenters suggested adding the following: that there are no state regulatory standards and no inspections, the federal health and safety regulations, how the Commission or the Boards will ensure enforcement of local laws, a minimum age of at least 18, and that Child Protective Services children are not placed with "listed" family homes. Another commenter asserted that a plan needs to be developed to include "listed" in the consumer guide that considers input from the Commission, TDPRS, the Boards, contractors, and providers.

Response Regarding §809.42, Minimum Qualifications for Providers, the following applies. In response to the numerous comments received regarding the "listed" providers, the Commission removes this category of providers, except as a self-arranged provider, from the list of options for child care which may be funded by Commission-allocated funds. The Commission sought to enlist the services of all available child care providers to handle the influx of parents into the workforce due to welfare-to-work requirements, recognizing that many entry-level jobs necessitate child care during the second or third shifts or on weekends when the traditional child care services are not available. The Commission also recognizes that federal laws and regulations on child care require that child care providers reimbursed with federal funds must meet health and safety standards established by state, local, or tribal law. The Commission, in its proposed rules, sought to provide the Boards with the opportunity to solicit local health and safety inspectors' assistance to ensure appropriate standards of care, if needed to meet the needs of families and demands of the labor market in their particular area for general providers and providers of self-arranged care. The Commission now believes that it may place too great a burden on the Boards for the Boards to ensure health and safety standards are met for "listed" facilities who are not chosen through self-arrangement by the parent, and removes from §809.42 the categories of eligible child care providers those facilities that are "listed" with TDPRS. The Commission, however, may choose to include these providers in the future, as capacity is needed to ensure parent choice.

Response Regarding §809.61, Qualifications to Provide Self-Arranged Care, the Commission believes that "listed" providers should be included as a Board option in self-arranged care based on the following. As the "listed" are recognized by state law to provide child care, and as parental choice is a basic tenet in the state's support of child care services, the Commission declines to remove the "listed" from the self-arranged providers to be considered. In accordance with the proposed rules, the "listed" cannot be used unless there are local laws regarding health and safety that apply to these providers. In areas with few providers for child care, and particularly for non-routine hours, the Boards may want to pursue implementation of local laws, if they do not exist, to benefit from the availability of these providers. This is not a requirement, but the Boards' option. The Commission appreciates the significance of this task and agrees that some of the Boards may not be able to ensure that there are in effect, under local law, requirements designed to protect the health and safety of children that are applicable to the "listed," as required by 45 Federal Register §98.41. Other boards may determine that such local laws do not exist. The Commission does not require that the Boards include "listed" providers as self-arranged providers or that Boards work to establish any new or additional local laws, but wants to provide the option for the Boards to do so if the Board deems it necessary in their areas. The Commission believes that the "listed" persons or entities may be a viable avenue for rural or other locations where licensed and registered providers are scarce or not accessible to parents, provided the Board ensures that local laws exist that meet the requirements of the federal regulations. As part of required consumer education, the parent should be given information to ascertain what requirements/restrictions the providers are subject to so that these can be considered in making their selection of a child care provider. The Commission declines to impose requirements on the "listed" beyond those established by state or federal law or the regulatory agency. The Commission will include in the contract with the Boards any special provisions that TDPRS requests for use of their funds, insofar as the special provisions are not in conflict with federal or state law or regulations. The Commission agrees that collaboration is important in developing any part of the local plan for delivery of child care services.

Comment: One commenter asserted that this is a TDPRS Child Care Licensing Division and Health Department task and that, when possible noncompliance is noted, it is called in to both agencies. Another commenter requested clarification of "applicable regulatory standards" and, specifically, if this includes the regulatory standards that TDPRS enforces. The commenter suggested that the Board or its contractors should not be responsible for assuming or duplicating any licensing or regulatory enforcement responsibilities of TDPRS or other licensing agencies, including the health and safety of children.

Response: The Commission agrees that the rule is not stated as intended and deletes the provision in (2) from §809.42. Section 809.42 is further amended to include a new subsection to clarify that the Board or its contractor is responsible for reporting to the appropriate regulatory agency any possible violation that it gains knowledge of in the course of fulfilling its responsibilities.

809.43 Provider Agreements.

Comment: One commenter noted lack of provisions for renewing Provider Agreements and asserted that the rules should clearly define the parameters for initiating and renewing vendor agreements in order to minimize risk to all concerned parties. Another commenter questioned if there is a potential impact on quality if the Board is no longer required to renew a Provider Agreement at regular intervals.

Response: The boards are responsible for maintaining Provider Agreements which are in conformance with regulations and rules. As a part of this responsibility, the Boards may determine the time period for renewal.

809.44 Provider General Liability Insurance Requirements.

Comment: One commenter asserted the general liability should include the provision of transportation insurance and that, if the

state is allowing payment for transportation, the provider should be adequately covered.

Response: In order to avoid misunderstanding, the Commission revises the rule to include the phrase "including transportation insurance" following "general liability insurance." The local board has the authority to determine reimbursement rates, as well as insurance requirements.

Comment: One commenter supported the rule that gives the Boards the ability to decide if general liability insurance will be required of the child care providers and, if so, how much.

Response: On the issue of general liability and commercial transportation insurance policies required of providers, the Commission notes the following: state law already imposes the requirements of $300,000 in general liability insurance on the state's licensed child care centers, and places no specific liability requirements on providers transporting children. The Commission believes that these additional regulatory burdens should fall upon the appropriate regulatory bodies, the Texas Department of Protective and Regulatory Services as the state's child care regulatory agency, and the Texas Department of Transportation as the agency setting transportation requirements on commercial entities carrying certain numbers of passengers, and we strongly encourage those agencies to consider the need for imposing these requirements.

Comment: One commenter stated that the Texas Department of Protective and Regulatory Services (TDPRS) only requires that direct child care providers have general liability insurance and asserted that the group day homes and registered family homes would not have liability insurance unless required by the child care contractor. The commenter stated that a contractor cannot make another agency enforce insurance or give the contractor a copy.

Response: The Commission defers to the state agency responsible for establishing minimum standards. Any perceived violations should be reported to the appropriate agency. Failure to comply with provider eligibility requirements would be grounds for terminating a provider agreement.

Comment: One commenter recommended that the rule require that general liability insurance be required of providers at a standardized amount, such as $300,000, to ensure statewide consistency.

Response: The Commission believes that statewide consistency has been established by the state law and rules of TDPRS, which is the agency invested with the authority and responsibility for regulation of licensed child care centers. The rule enables the Boards to establish further standards at their discretion.

Comment: One commenter recommended insurance requirements in the rule for registered family homes and transportation in order to ensure that safeguards to protect the child care contractor, the Boards, and the state are being met.

Response: The Commission declines to impose requirements beyond state law and the state regulatory agency's requirements, but requires the Boards to review the issues and establish a policy to address local needs.

Comment: One commenter questioned if the authority of the Boards to establish liability insurance requirements for child care providers will be an exception to the requirements for liability insurance in the Financial Manual for Grants and Contracts.

Response: The Financial Manual provides general guidelines. A specific rule may be more or less specific. In this case, the rule requires the Boards to consider the issue of liability insurance and make a determination in regard to what the Boards require.

Comment: One commenter asserted general liability insurance should be required in an amount consistent with protecting the state, Boards, the employers, and the injured parties.

Response: Although the Commission agrees with the importance of insurance protection, any requirement beyond state law and state regulatory authority will be a policy of the Boards.

Comment: One commenter asserted that, if only certain vendors are required to have general liability insurance because of the areas in which they are located, this would be discriminatory to them.

Response: The state law establishes the statewide requirements for licensed centers. The Boards may impose greater requirements in this regard.

Comment: One commenter expressed appreciation for the flexibility of determining general liability insurance requirements for providers.

Comment: Two commenters asserted that $300,000 liability and transportation insurance should be required, and further asserted that the Boards have the authority to authorize optional coverage amounts for group day homes and registered family homes. Two other commenters also stated that liability insurance should be required.

Response: State law requires $300,000 liability insurance for licensed day care centers and does require that a specific commercial transportation insurance level be set for vehicles carrying fewer than 13 passengers. Beyond those requirements, the Boards may establish additional local requirements.

809.45 Collection of Parent Fees and Subsidies.

Comment: One commenter expressed support for the rule that gives the Boards the responsibility to establish policy regarding the consequences when a parent fails to pay the parent fee. The commenter further noted that the Boards, rather than the state, should set the minimum amount in the automated system.

Response: The Boards must establish a policy on parent fees, and the minimum accepted in the automation system can be changed. However, the current minimum provides for a parent fee of only $1.00 per week. Federal regulations require the cost sharing structure, with certain exceptions, and a reasonable amount should be considered and encouraged.

Comment: One commenter recommended a revision to the rule to require contractors to compensate providers if a parent fails to pay the parent fee rather than giving the Boards the flexibility to make this decision. Another commenter questioned whether the Boards will be responsible for ensuring providers are paid in full if the parent does not pay.

Response: The Commission declines to mandate this payment and gives the Boards the authority to establish the policy for their local area. The Boards, in turn, will determine this policy in accordance with rules for establishing policy.

Comment: One commenter contended that it is not the contractor's responsibility to ensure that the parent fee is paid to the provider.

Response: This rule provides for the Boards to establish policies in regard to failure of the parent to pay the provider. Although action required of the contractor would be a local decision, the Commission believes it would be reasonable for the contractor to work with the parent to determine if there is a valid reason for a reduction in the fee or to develop a payment plan.

809.46 Assessing Parent Fees.

Comment: One commenter expressed support for the transfer of responsibility of setting parent fees to the Boards, but recommended deletion of the range for the fee that is established in the rule by the Commission.

Response: The range cited in the rule is a recommendation, not a requirement. The Commission further notes that federal regulations recommend 10% so as not to impose a burden on a low-income family's budget.

Comment: One commenter recommended limiting the cost of the parent's fee for child care to 10% of family income, regardless of family size.

Response: The rule gives the authority to the Boards to establish the policy for assessment of the parent fee.

Comment: Two commenters asserted that this statement contradicts §809.93 (Calculating Income #1).

Response: The provision in §809.46 relates to a teen parent with her own child; the provision in §809.93 relates to a child in the family who is between 14 and 18 years old and whose earnings count toward family income. As these address different circumstances, the Commission does not see a contradiction in these statements.

Comment: One commenter asserted that the option for the Boards to raise parent fees above the current 11% maximum would place an undue hardship on low income families struggling to maintain their independence and recommended the parent fees remain at 9% for one child and 11% for two or more children.

Response: The Boards are given the authority to establish parent fees because they can better address local needs. The reasoning for maintaining the current fee structure should be presented to the Board for its consideration.

Comment: One commenter suggested parent fees should be based on a sliding fee scale based on the parent's income.

Response: The rule requires the parent fee to be assessed based on the family's gross monthly income, which, in effect, becomes a sliding fee scale. The Boards have the ability to add more steps on the scale if they so desire.

809.48 Attendance Tracking.

Comment: One commenter expressed support for the rule that gives the Boards responsibility to set attendance standards rather than setting an arbitrary statewide number.

Response: The Commission acknowledges the comment and believes that each Board should set forth its attendance policy. The Commission believes that the prior statewide attendance policy was not arbitrary, but was based on criteria designed to be applicable statewide.

809.49 Provider Advisory Groups.

Comment: One commenter suggested that, based on the definition of provider in 809.2, it appears that registered homes would be required to establish Parent Advisory Groups which could impose a hardship on small providers and an additional requirement for monitoring by the Boards. The commenter also questioned what the penalties would be for failure to comply with this requirement. The commenter recommended revision to specify this requirement does not apply to registered homes.

Response: In accordance with Texas Human Resources Code §44.002, providers with greater than 30% of licensed capacity purchased with Commission funds are each required to establish a Parent Advisory Group. The statute only applies to licensed centers, and the rule will be revised to clarify this.

Comment: Two commenters recommended including the pertinent section of Chapter 44 of the Texas Human Resources Code.

Response: In the interest of not restating the law and, thus, lengthening the rule, the Commission prefers to reference, rather than repeat, other statutes and regulations that apply.

809.61 Qualifications to Provide Self-Arranged Care.

See comments regarding the "listed" addressed with comments regarding §809.42.

809.62 Reimbursement for Self-Arranged Care.

Comment: One commenter recommended that clients be required to provide written verification that providers of self-arranged care were paid in full for the previous month.

Response: The provision in (a)(2) of this section indicates that the declaration is made verifying that the services were rendered. The Board shall require that the verification referenced in (b)(6) of this section be written.

809.71 Parental Choice.

Comment: One commenter contended that the rule requires that the CCMS know how to do the Texas Department of Regulatory Services (TDPRS) Child Care Licensing Division's job in order to assure CCMS clients are informed about the various licensing, registration, and health and safety standards that providers shall follow.

Response: This type of information is required by federal regulations in order to help parents make informed child care choices. The requirement is to provide factual consumer information to parents, not to expound on the licensing worker's duties.

Comment: One commenter asserted that the proposed rule states that the CCMS will give the parents assistance in choosing the initial or additional child care referrals and that the CCMS should not take on the liability of referring parents or children to particular facilities. The commenter recommended that the CCMS provide the parents with a vendor list, TDPRS Child Care Licensing Division's phone number, and encourage the parent to visit facilities and call the Child Care Licensing Division. The commenter further asserted that, if the CCMS begins to refer to particular facilities, this could also be considered discrimination.

Response: The rule does not give the contractor the responsibility or authority to refer to a particular facility. Parental choice is a basic premise of the child care services provided through Commission-allocated funds. The rule requires that a list of providers, with pertinent information, be provided to parents, as

the commenter suggested. The rule also requires this list to include the telephone number of TDPRS and any other information that would assist parents in choosing a provider. As a part of parental choice, the rule states the right of parents to visit available child care facilities before making a choice, as well as when services are being provided, and the parents' right to receive assistance in choosing initial or additional referrals. This is to ensure parents have all the information they need to make an informed choice, but not to be directed to a particular facility.

Comment: One commenter noted a fine line between giving information regarding day care providers and recommending a provider. The commenter stated concern with liability issues if they do not encourage parent choice.

Response: The Commission fully concurs with the decision of a provider being the choice of the parent. The rule requires information to be given to the parent so that an informed choice may be made.

809.72 General Parent Rights.

Comment: Two commenters recommended that the time period be 12 days to be uniform with other time frames.

Response: The Commission changes the notification period from 12 days in the previous rules to 10, 15, or 20 days as specified in the respective new rules.

809.73 Eligibility Documentation.

Comment: One commenter recommended that Boards have maximum flexibility to design eligibility processes and procedures within federal regulations and state definitions of eligibility. The commenter recommended deleting all except the first sentence of §809.73 (a) and deleting all of (c).

Response: The Commission agrees, and the rule is revised accordingly.

809.75 Parent Reporting Requirements.

Comment: One commenter recommended this section be deleted and the requirements addressed by local board procedures.

Response: Although the Commission agrees with operations based on local board-developed procedures, these provisions are stated because they would be minimally required.

Comment: One commenter recommended the time limit in which a client must report changes to the child care contractor be the decision of the Boards.

Response: The Commission believes it has a responsibility to establish a maximum time period in which changes can be reported to ensure that timely action can be taken in regard to eligibility issues.

Comment: Two commenters recommended that the time period be kept at 12 days for uniformity with other time frames.

Response: The Commission changes the notification periods from 12 days in the previous rules to 10, 15, or 20 days as specified in the respective new rules.

809.78 Parent Responsibility Agreement.

Comment: Two commenters requested clarification of this rule and stated this is a source of confusion.

Response: This rule is not included in the proposed rules because it is unchanged from a previous rule publication. Although the commenter does not explain the issue(s) of confusion, a Workforce Development Letter is being issued to address questions that have been submitted to program staff.

809.91 Definitions.

Comment: One commenter requested further clarification of "household dependent" and questioned how the contractor verifies that a child or other minor living in the household is the responsibility of the parents and what time period must the child have lived there in order for the parent(s) to qualify for child care payments.

Response: The responsibility is established by the child being born to the parents or being adopted by either or both parents, the parents being given legal responsibility for the child by a court, or otherwise being provided supervision and care by the parents. The contractor may establish the provision of supervision and care by declaration of the parent; this may be verified by collateral contacts if needed. There is not a duration related to the residence requirement.

Comment: One commenter recommended that these rules be streamlined and collapsed into a single section concerning eligibility with revisions to provide the Boards with more flexibility and to eliminate residual ties to past funding methods.

Response: The Commission agrees with simplification of rules insofar as possible and revises some of the rules in accordance with this commenter's specific suggestions. Others are not revised for reasons stated in response to the specific comments.

Comment: One commenter noted that the definition of "family" does not include the concept of non-traditional family such, as a legal guardian, and suggested that a broader definition would encompass children who are eligible to receive services.

Response: The definition of "family" includes the parents of a child eligible to receive child care services. The definition of "parent," in §809.2, includes legal guardian.

809.92 General Eligibility Requirements.

Comment: One commenter asserted that the Boards should be allowed to establish time limits for training completion and recommended a revision to require the Boards to establish policies related to time limits. Another commenter asserted that the two-year time limit on students is an obstacle for parents who need extra time to learn English or to take remedial classes before completing a degree program. The commenter recommended changing the time limit to a progress standard so that as long as a parent shows satisfactory progress in a declared program he/she is entitled to receive child care. The commenter further suggested that satisfactory progress could be defined as maintaining a 2.0 grade point average while enrolled in at least 12 credit hours, not to exclude English as a second language and remedial classes.

Response: The Commission agrees and the rule is amended accordingly. The Commission agrees with the Board deciding what criteria to use to determine whether satisfactory progress is being made to justify continued funding for child care beyond the proposed two year limit. The Commission revises the rule to provide for the local board to establish a policy related to training limitations.

Comment: Two commenters recommended the additional requirement that the client must reside in the Board's service delivery area unless the Board approves an exception.

Response: The Board is responsible for the clientele and activities only in their local workforce development area. If a Board chooses to approve an exception and enter into agreements with another Board or contractor for reimbursement for incidental services, then that would be within the Board's discretion. However, contracting for more than infrequent or incidental reimbursement would likely be subject to procurement procedures. It is generally not expected that the Boards would be serving clients in other areas; therefore, the Commission does not see a need to include this provision in the rules.

Comment: One commenter asserted that applying the income limitation to transitional clients is a conflict with the intent of House Bill 1863 which was passed in 1995 when federal and state child care rules did not impose an income limit on transitional clients.

Response: Federal regulations now include income limits as a condition of eligibility, and, as the commenter noted, House Bill 1863 provides for transitional child care in accordance with department rules and federal law. Regardless of timing, federal law always supercedes state law.

Comment: One commenter questioned broadening the scope of the eligible population and setting income limits at 85% of state median income when waiting lists are long and funding is limited.

Response: The federal regulations which were effective in July 1998 authorized the income level for eligibility to be 85% or less of the state's median income for a family of the same size. The Commission understands this may increase the eligible population, but the Commission believes the Boards should be afforded the flexibility incorporated in the new federal regulations. It would be a Board's determination as to how to manage the funds to best meet the needs in the Board's local area.

Comment: One commenter asserted there is need to consider establishing a longer period of time for training and education and that this would be more cost effective because it would generally result in higher earnings, more taxes paid, higher productivity, and higher return on the investment. The commenter further noted that disadvantaged participants have greater barriers to overcome and generally require more than two years to complete a training program or degree.

Response: The Commission agrees that the Boards should determine the best method of addressing local needs given the limited funding available and the need to support working families. Setting longer time limits for education may be an avenue in which the Boards wish to develop specific local policies to meet local needs; and thus, the rule is amended accordingly.

Comment: One commenter requested flexibility to allow people who are close to finishing a degree that will help them achieve self-sufficiency to complete their course with child care assistance even though they exceed the 65 hour limit.

Response: The Commission agrees and revises the rule to provide for the Boards to establish the policy for limitations on education.

Comment: One commenter expressed the opinion that parents should be allowed up to 130 semester hours in order to complete a four-year degree.

Note: The commenter referenced §809.92 (b)(1), but the comments relate to §809.92 (c)(1).

Response: The Commission revises the rule to provide for the Boards to establish a policy in regard to length of training allowed.

Comment: One commenter asserted that the limitation of 65 semester hours of college credit defeats the goal of self-sufficiency.

Response: The Commission agrees that this may be insufficient training time in some instances and revises the rule to give the local board the authority to establish training limitations.

Comment: Two commenters asserted that 150% of the federal poverty income level is appropriate with the Boards' option to increase to 85% of state median income.

Response: The Commission believes the Boards should have the discretion provided by federal regulations.

809.93 Calculating Income.

Comment: One commenter questioned the method for calculating total gross income for eligibility purposes and questioned if overtime pay during the income determination period should be averaged.

Response: The Commission disagrees with the commenter that overtime should not be averaged because the income is estimated based on the person's history of receiving pay.

809.101 Children of Parents Eligible for Transitional Child Care.

Comment: One commenter recommended revisions in the wording for this section, which would make it more understandable.

Response: The Commission agrees, and the rule is changed accordingly.

Comment: One commenter recommended adding two additional groups, those on transitional Medicaid programs who have been denied TANF due to new earnings or the removal of the earned income disregards.

Response: As this rule is based on state law, it reflects the provisions of House Bill 1863, and the Commission declines to expand on this requirement.

Comment: One commenter recommended a revision in wording to conform with a revision in House Bill 1863 which changes the word "volunteers" to "voluntarily participates."

Response: The Commission agrees, and the rule is revised accordingly.

Comment: One commenter asserted that the Boards should be allowed to establish time limits for transitional services and recommended a revision to require the Boards to establish policies related to time limits.

Response: The time limits in the proposed rule are statutorily provided in House Bill 1863. The Commission supports legislation that would revise the statute and give the Boards the authority to establish the time limits; but, unless and until the statute is revised, the time limits remain in the rule.

809.102 Children of Parents Participating in the Choices Program.

Comment: One commenter recommended adding "and Board policies" to this rule.

Response: As this is a requirement of House Bill 1863, Board policies could not change the eligibility stated in this rule.

Comment: One commenter recommended deleting (d) from this rule.

Response: The Commission believes that the Boards should determine whether and in what instances child care services are needed to support Choices participants to those approved for Choices but waiting to enter an approved initial component of the program.

809.105 Children Receiving or Needing Protective Services.

Comment: One commenter recommended requiring the assignment of priority status to children at risk of abuse and neglect. Another commenter noted that the proposed rules do not give priority status for children at risk of abuse and neglect.

Response: Children referred by CPS workers shall receive priority services for care provided by the Texas Department of Protective and Regulatory Services (TDPRS) funds, and §809.221 of the rule has been revised to clarify this. The Boards shall provide priority for child care services to a child needing to receive protective services if care for the child is no longer funded by TDPRS, the CPS worker indicates that the child needs to receive protective services, and the provision of care to the child does not result in another child being removed from care.

Comment: One commenter asserted child care is a needed service which provides families the support necessary to complete the transition to a safe, stable, and self-sufficient family unit and recommended the former CPS day care category be continued and included in the rules. One commenter recommended that the Commission continue to provide child care services for former CPS clients. One commenter referenced elimination of the provision to provide child care for an additional six months following closure of a protective service case and noted the federal regulations allow states to serve these children. One commenter asserted that the Commission currently or previously budgeted for care for former CPS clients and questioned if this will continue. One commenter noted that the program goals do not address the need to provide child care services for children who are or have been abused or neglected and recommended that services be provided to these children whether or not the parents are working.

Response: Children being served through a CPS worker will receive care as directed by the CPS worker and funded through the CPS allocation in accordance with the interagency contract between the Commission and TDPRS. When the child care is no longer being funded through the CPS allocation, the Commission agrees that the Boards shall provide child care for children who meet the federal requirements contained in 45 Federal Register §98.20 and revises the rule accordingly. Specifically, the rule is changed to require the Boards to provide Child Care and Development-funded care to a child if TDPRS or the CPS worker determines that the child "needs to receive protective services and that the child resides with a parent or parents...if determined to be necessary on a case-by-case basis" by a CPS worker "or in consultation with, an appropriate protective services worker." Likewise, the rule name is modified to incorporate children needing to receive protective services.

Comment: One commenter referenced the current procedure of referring CPS clients to Designated Vendors unless a waiver is obtained by the Director of CPS and recommended that the designated day care vendor referral and waiver process be continued and reflected in the rules. Another commenter questioned if the child care contractor will continue to refer designated vendors to CPS staff who refer children for general protective day care and establish a waiver process if no designated vendors exist in the family's area.

Response: The Commission declines to impose rules in relation to TDPRS funded services. If TDPRS requests this requirement, it will be made a provision of the Commission's contract with the board in the allocation of TDPRS funds.

Comment: One commenter questioned if this provision is based on funding provided by CPS or another category of funding service.

Response: This provision relates to child care funded by TDPRS, except for the provisions of (c) added to the rule.

809.121 Children Living At Very Low Incomes.

Comment: One commenter recommended deleting this section and adding the phrase "or are receiving federal Supplemental Security Income" to §809.92 (b)(1).

Response: The Commission agrees that this action would cover eligibility, but believes it is important to identify this category of eligibility along with others that are specified.

Comment: Two commenters referred to a previous comment recommending use of 150% of the federal poverty income level.

Response: The Commission believes the Boards should have the discretion provided by federal regulations.

809.122 Children with Disabilities.

Comment: One commenter stated that the definition leaves out some developmental areas such as language and less severe disabilities that are not being covered and that there is no mention of medical conditions in this definition.

Response: The definition is consistent with federal regulations, and the Commission declines to be more or less restrictive than the federal regulations.

Comment: One commenter recommended deleting this section and adding this provision to §809.93.

Response: Although this would provide appropriate information regarding calculating income for eligibility, the Commission believes the provision should be included with the eligibility provisions for this specific group.

Comment: Two commenters referred to a previous comment recommending use of 150% of the federal poverty income level.

Response: The Commission believes the Boards should have the discretion provided by federal regulations.

809.123 Children of Teen Parents.

Comment: One commenter asserted that parents are currently considered teen parents if the teen parent is under 20 years of age and completing high school or the equivalent and that this age should be retained as there are parents still in high school who are 19 years old.

Response: The Commission agrees that a parent who is 19 years of age should be encouraged to complete high school. The rule is revised accordingly.

Comment: Two commenters recommended staying with 20 years of age.

Response: The rule is revised to include individuals 19 years of age who are still in high school.

Comment: Two commenters referred to a previous comment recommending use of 150% of the federal poverty income level.

Response: The Commission believes the Boards should have the discretion provided by federal regulations.

Comment: One commenter recommended deleting this section and adding this provision to §809.93.

Response: Although this would provide appropriate information regarding calculating income for eligibility, the Commission believes the provision should be included with the eligibility provisions for this specific group.

809.124 Children Served by Special Projects.

Comment: One commenter recommended the funding mechanism for children served by special projects be addressed since the money for these projects would potentially come from an already inadequate funding level for other programs needed to meet other federal standards. The commenter also suggested the amounts should be capped in order to prevent special projects from taking needed funds from other programs with federal standards that must be met or funded separately.

Response: Any funding relating to special projects, such as funds for use in infant and toddler care, will be made available to the Boards. The requirements will also be available to the Boards.

809.221 General Funds Management.

Comment: One commenter requested clarification of the rule which requires priority for Transitional and Choices eligible children when other rules state that care for these children shall be provided.

Response: Child care services for Transitional and Choices eligible children are required by House Bill 1863. The rule questioned refers to managing resources so that this requirement can be met.

Comment: One commenter expressed support for the rule that gives the Boards the flexibility to set the priority of client groups who will receive child care services.

Response: The Commission acknowledges the comment and agrees, subject to the limitations in (a) and (b).

Comment: One commenter questioned what will happen if a Board spends all of its allotted money, if the Commission can transfer money between the Boards, and if there is additional money that the Commission can access.

Response: All of the available child care funds are allocated to the Boards, except for less than three percent retained for state administration. As stated in the rule, the Boards are responsible for ensuring that resources are proportionately allocated. As the Boards have experience and expertise in financial management of large and complex allocations, the Commission believes they will manage funds appropriately. The Commission does have a rule for deobligation and reobligation of funds if a Board area cannot utilize funds effectively and another area could benefit from additional funds.

809.222 Effective Utilization of Funds.

Comment: One commenter asserted the rule requires changes to the waiting list documentation requirements, which will require enhancements to the automation system, and questioned if the Commission will fund the required enhancements. Another commenter questioned if there will be a cost associated with required changes to the waiting list document and who will pay the added costs.

Response: The Commission will work with the Boards to implement necessary revisions to the automation system and/or to assist in development of local systems. Additional funding is not available at this time for local system enhancements.

809.223 Eligibility Verification.

Comment: One commenter recommended the Boards be given the authority to set the standard for how often eligibility should be redetermined.

Response: The Commission agrees and revises the rule, but cautions that services provided for an ineligible client will result in disallowed costs.

Comment: One commenter recommended revision of the rule to read that eligibility for child care be redetermined no more than once a year and noted that eligibility redetermination is not a provision of federal regulations.

Response: The Commission revises the rule to give the Board the authority to determine frequency of redetermining eligibility, but emphasizes that services provided for ineligible clients will result in disallowed costs. Monitoring and redetermining eligibility is critical to ensuring that funds are not spent on ineligible clients, but are utilized for those eligible.

809.224 Custody and Visitation Arrangements.

Comment: One commenter asserted that assuring that a child who is absent from child care due to a court-ordered custody arrangement may receive care at the same provider site when the child returns is costly child care and requiring a child selected from the waiting list to temporarily fill a slot is contrary to parent choice. The commenter recommended that the child be guaranteed to return to care, although not necessarily with the same provider. Another commenter recommended this provision be deleted because it is harmful to children and difficult to track.

Response: The Commission disagrees that the cost of the child care would outweigh the benefits of preserving continuity of care for the child subject to the court order. The rules do not require a parent selected from the waiting list to temporarily fill a slot, and the Commission also disagrees that the temporary filling of a slot is contrary to parent choice because a parent is not required to accept the temporary slot nor does the parent lose their place on the waiting list for declining a temporary slot. The Commission believes that providing a temporary slot for someone who, under the old rules, would not receive even the temporary slot while it remained empty is more supportive of parents in employment, training, or education than providing no support at all. Regarding the recommendation that the child be guaranteed to return to the same provider, the Commission revises the rule to allow, but not require, the Board to maintain the availability of the slot for the child returning from court-

ordered visitation or custody if this can be accomplished without paying for the empty slot.

Comment: One commenter recommended deletion of the rule because the commenter believed it would be difficult for the contractor to find the right aged child in the same area, disruptive for the child taken from the waiting list to be moved to another provider for a short time period, and the time period would be over before the eligibility and enrollment process could be completed. A second commenter asserted that it is unfair to make a child care facility hold a spot for a child on court-ordered visits. The second commenter questioned why children referred by a child care contractor should be guaranteed return to care after they have been removed for a temporary period of time when private paying parents do not have this guarantee unless they put down a deposit. A third commenter disagreed with the rule and stated that most vendors will request payment for the slot. Another commenter cited a conflict between §§809.224 and 809.229 and questioned if custody spots must be held.

Response: The Commission requires the Boards to maintain the availability of the slot for the child returning from court-ordered visitation or custody if this can be accomplished without paying for the empty slot.

Comment: One commenter questioned whether this provision applies to children referred by the contractor or private paying parents, if the child is removed from child care when the original child returns, and how this relates to consistency of care.

Response: This provision applies to children referred by the contractor for Commission-funded or Texas Department of Protective and Regulatory Services-funded care, but does not apply to private paying parents, because neither the Boards nor the contractors would have input regarding parents who are not receiving state assistance. The temporary care would be offered to a parent on that basis, temporarily until the original child returns. This action does not contradict the continuity of care requirement because the care for the second child in this instance is offered on a temporary basis. The long-term continuity of care of the child subject to the court-ordered visitation is the intent of this section.

Comment: One commenter recommended this be deleted as it is harmful to children and difficult to track.

Response: The Commission requires the Boards to maintain the availability of the slot for the child returning from court-ordered visitation or custody if this can be accomplished without paying for the empty slot.

Comment: One commenter questioned if the contractor is expected to go through the waiting list to find a parent who wants the particular vendor for a limited time and then is removed from care when the original child returns and questioned how this is keeping them from being at risk.

Response: With limited child care resources, the Commission believes that every opportunity to provide care should be explored.

Comment: One commenter agreed that children should not lose their space for child care by complying with court-ordered visits but questioned by what means Boards will be able to ensure that the space remains available. The commenter further asserted that the Boards need authority to arrange for payment for children who are affected by this arrangement and requested clarification of the provision that providers are not paid for holding spaces open.

Response: The Commission requires the Boards to maintain the availability of the slot for the child returning from court-ordered visitation or custody if this can be accomplished without paying for the empty slot.

809.225 Continuity of Care.

Comment: One commenter expressed support for the rule that allows children to move between funding streams as long as their parent is eligible for care regardless of the waiting list.

Response: The Commission agrees that continuing children in care whenever feasible is in the best interest of child care and development. Stability provided by the child care support service for families working, in training or education, or subject to the continuing need for protective services is the purpose behind this section.

Comment: One commenter asserted the child care contractor staff should determine if a child/family would meet another day care funded category before the Texas Department of Protective and Regulatory Services (TDPRS) or Commission-funded day care services are terminated and recommended that the rule include TDPRS funded child care.

Response: Enrolled children shall receive child care as long as the parent remains eligible for any available source of Commission-funded child care. Nothing in this chapter shall be interpreted in a manner as to result in a child being removed from care. Children who no longer receive TDPRS funded care shall also continue receiving child care funded through the Commission if eligible to receive care based on other eligibility criteria or if the TDPRS or its caseworker indicates that the child is in need of protective services.

Comment: One commenter questioned if the child care contractor will make efforts to determine if the child is eligible for another funding category of child care after being informed by a CPS worker that the child will no longer be eligible for general protective day care services.

Response: Enrolled children shall receive child care as long as the parent remains eligible for any available source of Commission-funded child care. Nothing in this chapter shall be interpreted in a manner as to result in a child being removed from care. Children who no longer receive TDPRS funded care shall also continue receiving child care funded through the Commission if eligible to receive care based on other eligibility criteria or if the TDPRS or its case worker indicates that the child is in need of protective services. The child care contractor would be responsible for determining if the child is eligible for care through another funding source consistent with the Board's policies.

809.227 Provider Billing Requirements.

Comment: One commenter recommended deleting this section based on the requirement being contained in the Commission's policy manual on financial systems.

Response: The Commission agrees with deleting this section. These provisions should be contained in the contract between the Board and the child care contractor.

Comment: Two commenters recommended adding a provision for these requirements to also apply to self-arranged child care.

Response: The Commission agrees that self-arranged child care should be subject to the provisions contained in the contract between the Board and the child care contractor as applicable to provide the benefit to the parent who chooses to self-arranged care with someone who has not executed a provider agreement.

Comment: One commenter recommended changing the rule to read: "...later than 45 (or 30) days after the end of the month in which the child care has been delivered" to allow time for document turnaround.

Response: The Commission agrees with this recommendation, but will delete this section because the terms of payment will be contained in the applicable contracts.

809.228 Units of Service of Child Care.

Comment: One commenter recommended allowing Boards to decide the definition of full-day and part-day and perhaps other designations of unit of service to avoid overpayments and underpayments in specific situations.

Response: The Commission agrees with the Boards defining full-day and part-day, and the rule is revised accordingly; however, the automated payment system currently in use will accept only one full-day and one part-day entry per day.

809.229 Provider Payment Based on Child Care Enrollment.

Comment: One commenter recommended adding to the end of the sentence "as authorized by contractor."

Response: Although the Commission believes the rule is clear in its implication, the recommended statement is added in order to clarify the meaning.

One commenter requested a definition of "occasionally."

Response: As circumstances will vary, the Commission declines to impose a rigid definition. "Occasionally" would be defined as the dictionary definition as determined by the Board and generally indicates an infrequent occurrence. It would be within a Board's discretion to determine what would constitute "occasionally."

Comment: One commenter expressed disagreement with the rule based on the possibility that the provider may have to prepare an extra meal or pay a worker to stay later because the child was there full time. The commenter further suggested that the parent be required to contact the contractor for advance authorization to attend full time.

Response: As this addresses an occasional circumstance, the Commission does not consider it to impose a hardship on the provider and declines to revise the rule.

809.230 Inclusion Assistance Rates.

Comment: One commenter asserted that the inclusion rate currently covers the cost of allowing a more skilled staff to work with the child on a one-on-one basis.

Response: The Commission agrees that the inclusion assistance rate may include additional skilled staff to work with the child but may not necessarily require a one-on-one basis. The Commission notes that the Boards have the authority to establish all reimbursement rates, including those needed for care for children with disabilities. Therefore, the rules are revised to delete §809.230, and an additional provision is included in §809.231 to clarify its relationship to provider reimbursement rates.

809.231 Provider Reimbursement Rates.

Comment: One commenter expressed concern that reimbursement to child care providers is not keeping pace with the market. Another commenter questioned what measures are being, or will be, taken to raise reimbursement rates since provider reimbursement rates that are lower than the local market rate have deterred some child care programs from becoming vendors.

Response: The proposed rule gives the Boards the authority to establish reimbursement rates for purchased child care based on a market-rate study, which will be provided by the Commission. The Commission will monitor the Boards for compliance with this provision.

Comment: One commenter asserted local markets can be defined in various ways and recommended the addition of the option that the Boards may conduct their own market surveys.

Response: The Commission will continue to provide a market-rate survey for each area every two years, which is the time period required by federal regulations. If the Board wants a survey more frequently, the rule does not prohibit it from conducting additional surveys. The survey is considered essential for ensuring equal access, but is not the only factor to be used by the Board in its determination of reimbursement rates.

Comment: One commenter expressed support for the rule that allows the Boards to establish the reimbursement rates for child care using the market-rate survey provided by the Commission. Another commenter appreciates the flexibility for the Boards to design the service delivery system and particularly to set child care reimbursement rates.

Response: The Commission believes that rates are best set at the local level, taking into consideration the state survey of local market rates and the federal requirements of providing equal access to child care. Based on the guidance provided in the preamble to the federal regulations in 45 Federal Register Part 98, regarding §98.43, Equal Access, at pages 39958 through 39960, the Commission believes that the Boards should have the flexibility at the local level for setting rates that provide equal access. In addition to other guidance, the preamble to the federal regulations states that "It must be presumed that a rate that provides access to at least three-quarters of all care does, in fact, provide equal access. "

Comment: One commenter requested clarification of the methodology for how access to at least three-fourths of all child care services in the local market will be determined, a timeline for when the first market-rate survey will be available to the Boards, and the frequency of subsequent surveys. Another commenter questioned if the survey will provide the rate amount that 75% of providers in the region will accept.

Response: A market-rate survey will be available to the Boards prior to the effective date of the rules, and a survey will be conducted every two years in accordance with federal requirements. A Board may conduct additional local surveys more frequently if it chooses to do so. The Commission notes that the cost of a local survey may be prohibitive, and the Commission does not require that such survey be performed. The survey will provide the data collected regarding rates

charged by providers in the area for the different categories of care. From that data, the Board can establish the appropriate rate. The Commission will provide technical assistance if needed by the Boards to interpret survey data.

Comment: One commenter noted that reimbursement rates have not been increased by the state since 1992 with the exception of an adjustment due to the increase in minimum wage and contends that, as the reimbursement rate falls behind the actual cost of providing child care, not for-profit providers are forced to raise money to subsidize the amount being paid by the state or close their programs. The commenter further contends that setting the rates on any regional basis means that providers in some areas earn less than their counterparts in other areas. The commenter recommended an increase of the reimbursement ceiling by at least 10% in 2000 and 2001 and to continue to base regional surveys on the cost of providing care.

Response: The proposed rule gives the Boards the authority to establish reimbursement rates based on a market-rate survey that will be provided to the Boards by the Commission. The survey will continue to be based on the actual cost of providing child care in the respective area.

Comment: Two commenters recommended the provision that the Boards have the option to provide higher reimbursements rates for providers on the Designated Vendor track.

Response: As a Board can establish reimbursement rates, a Board already has the authority to establish higher reimbursement rates for Designated Vendors if it so chooses.

Comment: One commenter asserted that the Boards should be allowed to conduct market-rate surveys as a basis for setting reimbursement rates, perhaps with Commission guidelines for survey requirements. The commenter recommended the phrase "provided by the Commission" be eliminated. Two other commenters recommended that the Boards be authorized to conduct the market rate study.

Response: The Commission will provide a survey every two years in accordance with federal guidelines. However, the rules do not preclude the Boards from conducting a survey more frequently. The Boards have the authority to establish the reimbursement rates using the results of the survey along with other criteria.

Comment: One commenter requested a revision to require that market-rate surveys be conducted every two years.

Response: The federal regulations require payment rates to be based on a local market-rate survey conducted no earlier than two years prior to the effective date of the State Plan. Therefore, the survey will be conducted no less than every two years. The Commission does not believe it is necessary to reiterate this requirement in the state rule.

Comment: One commenter noted that setting rates that allow access to at least three-fourths of all child care services in the local market, with no increase in funds, will result in a decrease in the number of children in care and will hinder the Welfare to Work efforts.

Response: The Commission understands this dilemma; however, the requirement to have payment rates that ensure equal access for children receiving Commission-funded child care is a federal regulation. The problem exists whether the Commission or the Boards establish the reimbursement rates. The Commission believes the Boards have more comprehensive information regarding the availability of services in the local area and, therefore, can better establish rates that meet the local need.

809.232 Provider Reimbursement for Transportation.

Comment: One commenter requested that transportation be reimbursed separately and not subject to the limitations in §809.231 in order to encourage more providers to provide transportation. The commenter recommended a maximum transportation rate of $2.00 per trip.

Response: The Commission believes this is a decision most appropriately made by the Boards based on local needs and circumstances. However, reimbursement rates should comply with the equal access regulations and the requirements in §809.231. The recommended maximum transportation rate may be too high or too low, depending on the local market and what is required for equal access.

809.234 Payment for Operating Expenses and 809.235 Billing.

Comment: One commenter recommended deleting these sections based on the requirements being contained in the Commission's policy manual on financial systems.

Response: The Commission agrees with deleting §809.234 and revises §809.235 to retain only the provision that the Boards are responsible for ensuring that bills are processed and submitted to the Commission in a timely and efficient manner.

809.235 Billing.

Comment: One commenter recommended the time limit for the Boards to bill the Commission, after obtaining billing from the contractors, be extended to 60 days to give consideration to small Boards who may not have a large accounting staff. Another commenter requested that the rule clarify that payment for services provided are made on a cost reimbursement basis. The commenter also recommended the rule include requirements for submittal of bills by providers.

Response: Fiscal procedures between the Commission and the Boards are included in the Board contracts and the fiscal management manual. Subject to those limitations, the Boards have the authority to establish procedures, and the Commission revises this section to reflect that the Boards have general responsibility for ensuring that bills are processed and submitted to the Commission in a timely and efficient manner. The Commission does not believe the rules should prescribe arrangements between a Board and its contractors.

809.251 General Fraud Investigation Procedures.

Comment: One commenter expressed concern that the fraud investigations procedures will be difficult to implement, that staff are neither trained nor experienced in investigative procedures or legal processes, and that the Boards do not have adequate staff to carry out this requirement. Another commenter questioned who is accountable for investigating suspected fraud.

Response: The Commission does not expect the Board to pursue criminal investigations. As situations that may be fraudulent arise, the board is responsible for documenting the relevant facts and forwarding an incident report to the Commission. Commission staff will review the facts and determine the nature of the investigation required and, consequently, if it will be a state or local responsibility. Cases that need procedural follow-up will be returned for Board action. Those that may require prosecutorial action will be further investigated by the Commission. The Commission will provide training for Board staff to

assist them in understanding the procedural issues and appropriate action. The Commission will also clarify the responsibilities of the Commission and the Boards in this process.

Comment: Two commenters stated an assumption that the United States Department of Health and Human Services (HHS) and the Department of Labor (DOL) policies are taken into account when developing fraud procedures.

Response: The Commission continually coordinates with federal agencies. Proposed rules are not in conflict with HHS or DOL policies.

Comment: Two commenters asserted that the Commission should be responsible for fraud investigation because the Boards do not have the resources to pursue investigations.

Response: A Board's responsibility concerning fraud investigations will be in relation to procedural activities for which the Board is responsible. The Board will have more knowledge and expertise regarding these issues than the state staff could obtain. Criminal investigations will be pursued by the Commission.

809.253 Action to Prevent or Correct Suspected Fraud.

Comment: One commenter recommended deleting this statement.

Response: If there is a suspicion of fraud, temporarily withholding payment is a responsible and necessary action until the suspected violation has been investigated and determined to be true or false.

809.271 - 809.273 Subchapter M. Appeal Procedure.

Comment: Two commenters asserted that a Board's review of adverse action will require additional costs of time and money for the Boards and customers and that the customer who elects to continue receiving child care services through the process, including appeal to the Commission, incurs a great debt to be repaid.

Response: As the Boards have administrative responsibility for delivery of child care services, the Commission believes they must be included in the process for review of adverse action.

809.271 Child Care During Appeal.

Comment: One commenter asserted that parents should not be allowed to continue child care during the appeal process and cites money owed from parents who lost their appeal, which will not be repaid.

Response: The Commission believes that the maximum amount of due process would include delaying termination of services pending an appeal until a decision is reached.

Comment: Two commenters recommended adding non-payment of parent fees to the list of reasons for not continuing child care during an appeal.

Response: The Commission agrees and revises the rule because this is consistent with the intent of the section.

Comment: One commenter questioned how likely it is that the cost of providing services during the appeal process would be recovered from parents, if the Boards will be given technical assistance prior to implementing this sanction, and under what circumstances this would be deemed an appropriate sanction.

Response: The Commission will assist the Boards in understanding appropriate action in regard to this process, including efforts to recover overpayments. Services will continue during any appeal, except for the provisions of §809.271 (b), and would be considered an overpayment if the appeal decision is rendered against the parent. The likelihood of recouping the cost of services would depend on the circumstances of the appeal.

809.272 Board Review.

Comment: One commenter asserted that adverse action as a result of a federal or state rule should be appealed direct to the Commission and does not need a Board's review.

Response: Although the Boards cannot overrule a federal or state requirement, the Board should review the issue to determine that appropriate action was taken in accordance with the federal or state requirement before an appeal is forwarded to the Commission. This procedure will allow the Boards to cure local errors and assist in ensuring that appropriate action is taken.

Comment: One commenter expressed support for the Boards being responsible for the first round of the appeals process but anticipates a financial burden as a result of staff time required. The commenter requested additional funds for this purpose.

Response: All child care funds have been contracted to the Boards with the exception of less than three percent retained for state administration.

Comment: Two commenters recommended that the appeals process should remain with the Commission and this section should be deleted. Another commenter questioned how a Board can also be the entity to hear appeals of parents and providers and if this will be the responsibility of their contractor.

Response: The Boards have administrative responsibility for delivery of child care services and is the first level of review of a situation involving adverse action. The Boards have an inherent advantage to resolving appeals at the local level and potentially modifying actions, educating parties, and implementing and monitoring procedures to improve communication and implementation at the local level. The local review is an integral part of improving local education of both parties and improving communication and dispute resolution methods to address matters that may arise at the local level. After the local review is performed, in which a Board may choose to reconsider the initial local action or support the local action, the party that disagrees with the Board action can then appeal to the Commission for a state level review. The Commission believes that the two-tiered appeal process benefits the Board in its implementation and understanding of all issues related to the local child care delivery system. The Board, not the contractor, is responsible for reviewing a case, upon request, to determine if appropriate action was taken. If any party does not agree with the determination made by the Board, the party may request a Commission hearing to appeal the results of the review.

809.273 Appeals to the Commission.

Comment: Two commenters recommended changes in this process because of a previous recommendation to delete the provision for a Board to review adverse action.

Response: The Commission declines to delete the provision for a Board to review adverse action because changes in this provision are not appropriate. The Commission believes that local consideration and responsibility make local review a means of improving quality and communication at the local level.

809.282 Provider Agreement Violations.

Comment: One commenter noted that the proposed rule asks that the CCMS ensure corrective action is taken by CCMS when a vendor does not comply with licensing standards and contends that the CCMS should work in cooperation with the Texas Department of Protective and Regulatory Services (TDPRS) Child Care Licensing Division but should not initiate corrective action concerning another agency's regulatory burden.

Response: The Commission agrees that the corrective action regarding a licensing violation is under the purview of TDPRS. The corrective action referred to in the rule is corrective action on the part of the Board to ensure that children are not placed in care with a provider who is in violation of licensing standards.

Comment: One commenter objected to the rule that specifies the Boards shall ensure payments are not made to vendors on a day in which the attendance exceeds the state-licensed capacity and recommended that the Board be given discretion in this area to put more emphasis on the staff-child ratio.

Response: The Commission recognizes the importance of health and safety requirements and believes that the standards, particularly those relating to providers not exceeding capacity levels, should be adhered to by providers receiving Child Care Development Funds and, thus, the Commission disagrees with revising the rule.

809.283 Corrective and Adverse Action.

Comment: One commenter recommended clarification that the Board or its child care contractor may terminate a Provider Agreement for failure to adhere to the requirements of the agreement itself.

Response: The Commission believes that §809.282 provides this clarification.

Comment: One commenter requested further definition of terms for termination of a Provider Agreement, specifically, the situation of repeated non-compliance with the agreement.

Response: §809.282(f) authorizes a Board to take corrective action as a response to agreement violations including, but not limited to, those indicated under §809.283. This gives the Board the latitude to take the action it deems appropriate.

809.284 Noncompliance with Other State or Federal Programs.

Comment: One commenter requested clarification concerning the state and federal laws for which the Boards are responsible for ensuring compliance of contractors and providers.

Response: The requirements contained in 45 Federal Register Parts 98 and 99 set forth requirements applicable to providers, particularly with regards to non-discrimination, and other compliance requirements.

809.285 Reapplication for Provider Status after Termination or Nonrenewal of the Provider Agreement.

Comment: One commenter asserted that the reapplication process involves local processes and should be determined by the Boards.

Response: The Commission agrees and the rule is revised accordingly.

Comment: One commenter requested the words "or nonrenewal" be inserted after "termination" and before "date of the Provider Agreement...."

Response: The Commission agrees and the rule is revised to add this wording because it is consistent with the intent behind this section.

809.286 Recovery of Overpayment.

Comment: One commenter concurred that the child care contractor should be responsible for overpayments, but recommended consideration be given for unusual circumstances that might arise that would be out of the contractor's control and that, in these cases, the Commission be responsible for the overpayment.

Response: The Commission does not have a contingency fund for these payments; the administrative responsibility is transferred to the Boards along with the authority to establish policies and procedures.

Comment: Two commenters asserted the Boards should not be liable for overpayments for which a reasonable effort has been made to collect.

Response: Child care funds have been contracted to the Boards along with administrative responsibility for the delivery of child care services. Thus, liability for overpayments is an administrative responsibility.

809.288 Failure to Meet Performance Standards.

Comment: Two commenters asserted that it will be difficult and expensive for a Board or its contractor to recover payments made during the appeals process, which is lengthened by the new appeal procedures, and suggest that the additional costs of tracking and staffing may exceed the benefit of collection of the debt.

Response: Due process requires that benefits not be denied during an appeal process. Fiscal responsibility requires that recoupment be attempted for any payment for which it is later determined the recipient was not eligible.

Comment: One commenter asserted the principal parts of this section refer to process measures for eligibility determination and Provider Agreements rather than to performance standards. The commenter questioned if the process measurements need to continue, but, if so, recommended revised wording.

Response: In response to another comment, this rule has been revised. Although the process for reviewing eligibility determinations has been deleted from the rule, the Commission emphasizes the importance of ensuring accurate eligibility determinations.

Comment: One commenter asserted it should be a Board decision to determine how many cases should be monitored, the benchmarks for acceptable levels of service, and the penalties for non-compliance. The commenter further asserted the Boards have a plan and process for monitoring the contractor using a monitoring instrument that is more comprehensive and that it is more appropriate for the Commission to monitor the Board's monitoring schedule and instruments.

Response: The Commission agrees that the rule may provide more flexibility and modifies the rule by removing the provisions in subsection (b) and following. The Commission intends to provide the Boards with as much flexibility as feasible, while ensuring that appropriate monitoring is achieved. The rule is revised accordingly.

Comment: One commenter questioned the appropriateness of the Commission's authority to sanction the Board's contractors and also questioned what the authority is for the Board to sanction contractors. The commenter suggested that the Commission establish procedures for holding the Boards accountable for the failings of their contractors.

Response: In response to another comment, the section referencing sanctions of contractors has been deleted. The Boards will establish the procedures for contractor accountability.

Comment: Two commenters questioned if this refers to only the quality assurance standard and not Legislative Budget Board standards.

Response: The performance standards include references to all measures of quality, including Legislative Budget Board standards, quality assurance standards, performance measures, and other outcome measures. The proposed rule addresses standards for client eligibility. Additional performance standards will be developed with the assistance of a work group that includes representation from the Boards. The Commission intends to modify performance measures by working with local partners to determine appropriate standards and measures.

Comment: One commenter questioned under what circumstances the Commission would recoup administrative costs in response to a Board's failure to meet performance standards.

Response: In response to another comment, the provisions addressed by this commenter are deleted from the rule.

Comment: One commenter questioned the basis of determining a monitoring sample, consistently and fairly, and how frequently the Commission will monitor.

Response: The monitoring sample will be determined by a risk assessment study, including such factors as the results of prior reviews, size of the area and contract, and changes in management and staff. Several factors, including the risk assessment results, could impact the monitoring frequency, but each area can expect to be reviewed at least once each year.

Comment: One commenter requested clarification regarding what a Board and its contractor are supposed to monitor as opposed to what other agencies are monitoring so as to avoid duplication as well as to establish lines of responsibility. The commenter further questioned if the Board and its contractors need to be trained in the licensing standards used by the Texas Department of Protective and Regulatory Services (TDPRS).

Response: There will be variations between contracts and workforce development areas. Each Board is responsible for developing a monitoring plan based on the risks associated with each contract, as well as federal requirements for monitoring and oversight. A Board may determine that it has a high degree of reliance on the internal monitoring performed by a contractor or the contractor's monitoring of subcontractors and vendors. Overall responsibility for Board monitoring includes the provisions in the rules, as well as federal and state regulations cited in the rules. The Commission will monitor the Board in regard to fulfillment of its oversight role and will review some contractor functions to verify adequate Board oversight. The Boards are not responsible for monitoring requirements established by other agencies not specified in the rules, but the Boards and the Boards' contractor(s) should be familiar with TDPRS requirements so that they will be able to report to TDPRS for further investigation any possible violations that the Board or its contractor become knowledgeable of in the course of fulfilling the responsibility.

General Comments.

Comment: One commenter expressed concern with the repeal of Texas Education Code Chapter 9, which leaves CCMS without any legal basis, and how the legislature will view the necessity for funding child care when it is an option.

Response: Note: As there is no Texas Education Code Chapter 9, the response to this comment relates to the repeal of Texas Administrative Code Chapter 809 regarding the Child Care and Development Program. The majority of the current rules are repealed and proposed as new rules. The status of child care as a federal and state funded program does not change. The Child Care Management System was developed before the workforce system. With the passage of House Bill 1863, services were integrated with the Boards because child care is vital to working parents served by the Boards. Boards will continue to contract with service providers for intake, eligibility determinations, and training services.

Comment: One commenter expressed concern with issues of planning, strategy, quality control, and accountability as the state transitions from a unified system to numerous Boards and the ability to guarantee consistency and congruence. The commenter cites the automation system, federal guidelines, priority for abused children, the labor intensity of child care, and the importance of children as significant issues.

Response: The Commission agrees that child care services are critical to our state's workforce and recognizes that today's children will become the workforce of the future. We trust the Legislature's vision to integrate this significant support service with other services available to families through the local workforce delivery system. Further, the concept of local control enables the Boards to establish policies and develop plans for services that meet their residents' needs. All local plans will not be exactly the same, but all will be based on common state and federal requirements, while incorporating aspects unique to the particular area.

Comment: One commenter requested guidelines for the Boards in implementation of their child care management system.

Response: The Commission intends to provide training and written information for the Boards to use in designing and implementing their child care service delivery system.

Comment: One commenter commended the Commission for clear instructions to the Boards, a succinct list of assistance available to families transitioning off public assistance, recognition of the need to balance quality control by the state with flexibility at the local level, use of funds for quality enhancement and training, and the requirement for "listed" homes to fulfill health and safety requirements.

Response: The Commission appreciates this commenter's intensive analysis of the rules.

Comment: One commenter expressed concern in melding the child care industry with the workforce development system, particularly in regard to access to child care services in career centers. The commenter noted that these systems are mutually interdependent and there are numerous operational issues to be considered.

Response: The Commission agrees that these issues require careful consideration and believes the Boards are uniquely positioned to make these important decisions.

Comment: One commenter recommended that the rule be clear in regard to intent so that the responsibilities of the various parties are understood.

Response: The Commission concurs and has made every effort to minimize state requirements and give the Boards the authority to establish appropriate controls at the local level.

Comment: One commenter expressed concern that complying with the rules will be too great an expense for some child care centers to bear and that small centers will find it difficult to stay in business if they must pay someone to help bring them into compliance. The commenter suggested it may be necessary to provide partial funding for the compliance process in order to assure that child care spaces remain available.

Response: The Commission has eliminated many requirements from the rule other than those imposed by federal regulations. The Boards are given authority to establish policies that were previously imposed at the state level so that they can better address local circumstances. Providers are encouraged to work with the Boards and provide information relevant to their policy decisions.

Comment: One commenter recommended that the Boards be given more autonomy in their operations, which would enable them to tailor their use of funds to respond to the particular needs of their geographical regions as well as to: 1) assure the Board has a permanent member who has expertise in current child care practices; 2) provide training to Board members on child care needs and services; and 3) assure fairness in contracting with service providers for child care training and other services.

Response: The Commission agrees with providing the Boards with as much autonomy as feasible to meet the needs of the local areas while balancing the various federal and state statutory and regulatory requirements, including, but not limited to, the eligibility, reporting, and funding requirements. The Commission has granted a great deal of autonomy to the Boards with the expectation that the Boards will plan service delivery to meet the needs of the local area. To the extent that further flexibility can possibly be incorporated, the Commission will strive to incorporate that flexibility as the Boards tailor the local child care delivery in coordination with other workforce support services. The Commission agrees with the first enumerated point and responds that the chief elected officials in the local workforce development areas are required, through state law, to appoint to the Boards a permanent representative with expertise in child care in accordance with Texas Government Code §2308.256(g). The Commission also agrees with the second and third points and is committed to ensuring that training to Board members on child care needs and services is accomplished, that available child care funds are contracted to the Boards, and that the Boards have the discretion to use funds for training as needed, including training for providers.

Comment: One commenter recommended that the Boards take advantage of the newly established ability to use local donations to apply for federal funds.

Response: Although local funds have traditionally been used to match federal funds, the Commission agrees that the Boards are in a unique position to be more effective in obtaining and utilizing local donations to match federal funds.

Comment: One commenter recommended the state continue to be diligent in pursuing federal money and noted that grants are needed to match state funds, as well as local funds.

Response: The Commission agrees with making all efforts to obtain the maximum amount of federal funds.

Comment: One commenter agreed with increased flexibility for the Boards but recommended continued state oversight, maintenance of the current service delivery and automation system, and provision by the state of a basic planning and service guide.

Response: The Commission plans to provide training, as well as written guidance, for the Boards' consideration in developing their policies and procedures. The Commission will also monitor local programs. The Commission will work with the Boards to transition to an automated system that meets their needs. The local service delivery system will be developed by the Boards in accordance with the concept of local control established by House Bill 1863.

Comment: One commenter recommended that, where federal regulations governing the Child Care and Development Fund do not require further regulation or explication, that there be no further definition in state rules.

Response: The Commission agrees with this in concept but believes there are some issues for which additional state guidance is prudent, particularly during the integration of the child care support service with other workforce services.

Comment: One commenter recommended that as much flexibility as possible should be provided to the Boards in determining who will be served through the local child care broker and how funds will be used to provide such services. The commenter further suggested that defining eligibility too narrowly or placing extraordinary requirements not in federal or state law or regulations on the expenditure of funds limits the ability of the Boards to meet the needs of their customers.

Response: The Commission agrees and believes that flexibility has been granted to the Boards.

Comment: Two commenters requested more definitive language in the rules to clarify responsibilities in regard to monitoring child care providers, specifically the responsibility of TDPRS to monitor compliance with licensing standards including those associated with the health and safety of children in care and the responsibility of the Board's child care contractor to ensure compliance with the terms of the provider agreement.

Response: Additional information regarding responsibilities is provided in §809.42 (c).

Comment: One commenter expressed support for the rules moving responsibility from the Commission to the Boards. Another commenter expressed support for the autonomy that is proposed for the Boards and noted that the flexibility provided will enable the Boards to address the needs and concerns of the local areas. Another commenter is supportive of the Commission's efforts to enhance local control of the child care management system. One commenter expressed support for the proposed rules that allow more flexibility in how the child care program is administered.

Response: The Commission acknowledges the comments and agrees that the changes will enable the Boards to be responsive to the local employment, education, and training needs of the local workforce areas through integrating services with the workforce system designed to support working families and move families off of public assistance.

Comment: One commenter noted that provisions in the proposed rules can positively impact the education and information available to parents, financial and programmatic support for improved quality in programs for children, and stability in the child care industry.

Response: The Commission agrees that additional steps to continually improve the quality of child care and child development is an integral part of providing the child care support service. The Commission believes the Consumer Guides will enhance parent choice through educating parents regarding various child care options specific to the local area.

Comment: One commenter requested the Commission set out clear parameters and expectations and provide extensive training, technical assistance, and support, in addition to assigning responsibility for decision-making to the Boards.

Response: The Commission understands these needs and intends to provide the necessary information to the Boards.

Comment: One commenter expressed concern that all clients in the state with the same or similar circumstances will not be treated equally as a result of the Boards being allowed to determine certain eligibility requirements and other policies. Examples cited are §809.46 and §809.92.

Response: As local circumstances vary, the Commission believes local control over policies and procedures, beyond requirements of federal or state statutes and regulations, results in a more effective service delivery system, as well as being in accordance with state law which promulgates local control. State law created the Boards as the method of delivery of workforce services including the child care workforce support service. State law contemplates local discretion to address the local needs of residents, employers, and persons transitioning into the workforce.

Comment: One commenter expressed support for Commission rules that purport a consistent statewide child care system and asserted that the rules should provide an orderly process for: 1) communication about regulatory policies, 2) services to Child Protective Services families, including former cases; 3) exchanges between TDPRS and local child care services contractors; and 4) adequate consumer information for parents to make informed choices about child care. The commenter also suggested the rules should contribute to a consistent, ongoing automated data collection system to accumulate child care information which may be shared with other state and federal agencies and to record the cost and quality of care across the state.

Response: The Commission agrees with the importance of interagency communication at both the state and local levels, as well as comprehensive consumer education being provided to parents. The need to provide flexibility for Boards to integrate child care services with other workforce support services will result in local service delivery systems rather than a statewide system. The transition away from a rigid central control is intended to enable and empower local residents, employers, and communities to specifically address local needs. Nothing in the new rules is intended to change the federal reporting and state data collection to forecast and effectively support statewide workforce improvements and economic development. The federally required data collection and state data collection can be shared with other state and federal agencies, in addition to the Commission.

Comment: One commenter expressed concern that all interested parties may have not had the opportunity to respond to the proposed rules due to the relatively short public comment period and recommended that the public comment period be lengthened to allow all stakeholders to participate in the process. The commenter requested an extension of the comment period to approximately February 15 in order to read, understand, and prepare comments; to get input from other parties; and to assess quality versus quantity.

Response: The Commission believes it is important to finalize rules as quickly as possible so that the Boards can develop their plans and implement the plans on a timely basis. The comment period is in accordance with standard state procedures, and the Commission also mailed a copy of the proposed rules to Board chairs, Board executive directors, child care contractors, the Child Care Advisory Committee, other state agencies, and interested legislators prior to the Texas Register publication of the proposal. Further, a public hearing was held to obtain comment on the proposal. The Commission believes it has made a good faith effort to solicit public comment and declines to extend the comment period.

Comment: One commenter expressed concern that the contract language clearly define and clarify the role of the child care contractor vs. the role of other agencies established to work with child care issues. The concern is related to regulatory responsibilities of TDPRS and potential for litigation if the child care contractor assumes these roles.

Response: The rules do not redirect regulatory responsibilities from TDPRS to the child care contractor. The rules require the Boards to ensure that appropriate action is taken in regard to management of services funded through the Child Care and Development Fund.

Comment: One commenter urged that input from the child care contractors be considered in the transition of child care service delivery to the Boards and access to child care through career centers.

Response: The Commission supports this concept.

Comment: One commenter asserted that Texas places too great a burden on the current child care subsidy pool to meet the needs of parents in job training programs and recommended that the legislature include funds specifically for child care in all job retraining allocations.

Response: The commenter submitted this comment to the respective State Senator, and the Commission agrees that this was the appropriate action. The Commission has asked for general revenue funds to draw down additional federal matching funds.

Comment: One commenter opposed a plan that would dismantle the statewide system that handles all child care paperwork and urges the Commission to maintain systems that have proven to be effective tools in child care administration. The commenter recommended continuation of the current computer system.

Response: The current automated system will remain in place until a system that better meets local needs may be developed with Board input.

Comment: One commenter asserted there is confusion over which functions will remain with the Commission and which will be the responsibility of the Boards and recommended determining and publishing who has responsibility for these functions.

Response: The Commission believes that the rule specifies for which functions the Boards have responsibility.

Comment: One commenter recommended establishment of a loan program for workers who have been in child care for two years to enable them to advance in their formal child development education and, if the student stays in child care for three years after graduating, to forgive the loan.

Response: All child care funds are allocated to Boards except for state operational costs. The Boards may choose to implement innovative programs to improve the quality of child care.

Comment: One commenter questioned why the performance standards address only the accuracy and timeliness of eligibility determinations and redeterminations, considering that the Commission is advocating improvements in the availability, affordability, and quality of child care.

Response: The Commission intends to convene a work group, including Board representatives, in the near future to address comprehensive performance standards for the child care system.

Comment: One commenter questioned whether the Boards will have much flexibility in the design and implementation of a unique service delivery system, assuming there are separate allocations for Board administration and contractor operations which will not allow for much creativity regarding efficiencies and redesign. The commenter further stated there will be opportunity for redesign and improvements as operations move to the career centers, but there will be associated costs, and the Boards need to have the flexibility to determine the best use of operational funds.

Response: For FY 2000, there will be one allocation to the Boards for child care, which will include administration and operational costs. For FY 1999, a separate allocation was made for administration and operations; however, a recently adopted Commission amendment to the current allocation rule enables Boards to transfer funds between direct care categorical allocations. There is a requirement that the total amount of administration and operational costs not exceed the current allocation without a proportionate increase in the number of children receiving services.

Comment: One commenter expressed concern with the liability associated with the Boards or their subcontractors having the responsibility to oversee compliance with health and safety issues of providers.

Response: Neither the Boards nor the contractors are responsible for oversight regarding health and safety issues. In the course of monitoring operational activities, any knowledge of a possible violation should be reported to the cognizant agency.

Comment: One commenter agreed with the purpose of the rules, the program goals, input from local entities in developing policies and plans for service delivery, continued use of a statewide automated system until alternative methods of managing information are developed, the proposed effective date, the schedule for a public hearing, the general description of changes, and the description of Subchapter A regarding general provisions. The commenter also agreed with §809.2, 809.4, 809.13, 809.16-20, 809.41, 809.43, 809.45, 809.47-48, 809.62, 809.71, 809.73-74, 809.76-77, 809.91, 809.93, 809.101-105, 809.124, 809.221-223, 809.225-226, 809.228-230, 809.232-235, 809.252-253, 809.281-285, and 809.282.

Response: The Commission appreciates the public comments and agrees.

Comment: One commenter questioned whose responsibility it is to ensure access to child care services through career centers and expressed concern with resource requirements for this connectivity. The commenter requested that the word "access" be fully defined and questioned if it means a presence or full intake and referral capabilities. The commenter further questioned how the Commission intends for the Boards to fund the connectivity if it is required. Another commenter questioned if the Boards will be expected to assume costs of co-locating child care services at one-stop centers.

Response: "Access" means having services available in the career center. This could include a staff presence or, since individuals may apply for child care services via telephone, telephone access to the child care contractor could suffice. The extent of access provided after, at least, a minimum amount of access is provided, is a Board decision, and the determining factor would be that the client has full access to child care services. Additional funding is not available for the connectivity required because all available funds have been contracted to the Boards. It is the responsibility of the Boards to ensure that access to child care services is provided through the career centers. All of the resources for this activity have been contracted to the Boards in those areas where a Board has a master contract with the Commission and would be included in the amount allocated. The efficiencies of reducing administrative costs at the local level through combining facilities and or similar functions would be to the benefit of the Boards and at the discretion of the Boards.

Comment: One commenter encouraged use of "child development" as a part of the process of creating the workforce system.

Response: The Commission concurs with the importance of child development as a part of child care.

Comment: One commenter contended that the issue of general liability should encompass the roles and responsibilities of the CCMS contractors and the multitude of regulatory agencies that carry specific regulatory burdens via state and federal laws.

Response: The Commission agrees that liability is a concern of all interested parties; however, the Commission believes it would be inappropriate to impose additional requirements beyond those established by another state agency which is invested with this responsibility. The rule provides for additional requirements to be established, at the discretion of the Boards, because local decisions will best meet the needs of the residents of the local area.

Comment: One commenter disagreed that the burden of regulation for general liability and transportation should fall to the two agencies overseeing these areas of operation. The commenter asserted that PRS would not be able to enforce these regulations in the near future and that the

regulations would have a major financial impact on registered and licensed facilities. The commenter also asserted it would be difficult to ensure that continued transportation insurance was carried once the registration was completed. The commenter believes that insurance is essential in advocating for the health and safety of children and recommended that the current requirement of general liability and transportation insurance be continued as a vendor requirement.

Response: The Commission believes that the requirements for insurance should be addressed by the agencies that have the knowledge and authority related to these issues. The Commission does not believe that the enforcement of regulations or financial impact is a greater or lesser issue depending on which agency establishes the regulation. The Commission supports diligence in ensuring the health and safety of children, but defers to the cognizant agencies for state requirements, as well as the Boards for local policies and procedures.

Comment: One commenter expressed support for access to child care services through the career centers and the options that will enable the Boards to best meet the needs of the local areas.

Response: The Commission appreciates the comment and agrees that "access" is a necessary component of the child care support service.

Comment: One commenter recommended retaining the current statewide automated system to establish eligibility for child care assistance.

Response: The statewide automated system will be continued until alternative methods of managing information are developed. This will enable the Boards to determine their needs and develop a management and payment system that meets those needs.

Comment: One commenter recommended adding "federal and state laws and regulations" as criteria for development of Board policies.

Response: The Commission believes it is fully understood that federal and state laws and regulations must be complied with as Board policies are developed and that it is unnecessary to make this statement.

Comment: One commenter recommended adding "while still complying with federal and state laws and regulations" to the statement that the Boards may develop procedures for administering child care services that best fit the local needs.

Response: The Commission believes the Boards will develop their procedures fully in compliance with federal and state laws and regulations and does not believe this qualifier is necessary.

Comment: One commenter referenced state law which requires licensed child care centers to maintain $300,000 in general liability insurance and mandates coordination of inspections by eliminating redundant inspections. The commenter also referenced the Agreement of Joint Responsibility between the Commission and TDPRS which addresses monitoring of day care centers for liability insurance and asserted that funds will need to be provided to TDPRS if it assumes the Commission's responsibility for monitoring. The commenter further stated that TDPRS cannot legally monitor group day homes and registered family day homes because the group day homes and registered family day homes are not required by law to carry liability insurance. The commenter recommended continuation of the current rule requiring providers of purchased child care to maintain $300,000 in general liability insurance and a requirement for child care services contractors to monitor the needed liability insurance.

Response: The Commission declines to impose insurance requirements beyond those established by state law and the regulatory agency. The Board or its contractor will continue to monitor child care providers to ensure that their insurance coverage complies with what is required for their type of facility.

Comment: Two commenters requested clarification of "child care expertise" in relation to the Board child care representative and questioned the meaning of "permanent child care representative." The commenters also questioned if all other Board member requirements apply.

Response: "Child care expertise" means special skill or knowledge on the subject of child care. "Permanent child care representative" means there will continue to be a child care representative on the Board. The individual is subject to other Board member requirements, such as representative of the private sector, or a representative of organized labor and community-based organizations. This individual would serve in a dual capacity. The 74th Legislature amended Texas Government Code §2308.256 regarding Board Membership to include that "(g) At least one of the members of a Board appointed under Subsection (a) must, *in addition to the qualifications required for the member under the subsection*, have expertise in child care or early childhood education. " [Emphasis added].

Comment: Two commenters inquired as to the status of the Child Care Services Manual.

Response: A new manual will be published after the final rules are adopted by the Commission and as soon as feasible to aid the Boards in exercising the new flexibility incorporated into the new rules. Subchapter A. General Provisions

The new rules are adopted under Texas Labor Code §301.061 and §302.002, which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035, and 44.002.

§809.1. Short Title and Purpose.

(a) The rules contained in this chapter may be cited as the Child Care and Development Rules. The purpose of these rules is to interpret and implement the requirements of state and federal statutes and regulations governing child care and quality improvement activities funded through the Commission, fully integrating child care services with other workforce training and services under the jurisdiction of local workforce development boards.

(b) For local workforce development areas where there is no certified local workforce development board with an approved plan and the Commission continues to administer the delivery of child care services, the rules contained in this chapter shall apply to the Commission, its contractors, and its providers of services.

(c) The effective date of the rules in this Chapter 809 relating to Child Care and Development shall be twenty days after the date of filing the adoption in the Office of the Secretary of State; however, until September 1, 1999, the Boards shall continue to comply with the rules in effect on January 1, 1999.

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

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Subchapter B. General Management Requirements

40 TAC §§809.11–809.20

The new rules are adopted under Texas Labor Code §301.061 and §302.002, which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035, and 44.002.

§809.14. Promoting Consumer Education.

(a) A Board shall make available to parents a consumer guide to child care providers who have Provider Agreements to provide Commission-funded child care in the local workforce development area and shall represent the name, address, and phone number of each provider and shall represent whether each provider:

(1) is licensed by the Texas Department of Protective and Regulatory Services;

(2) is registered with the Texas Department of Protective and Regulatory Services;

(3) has met the Designated Vendor standards of the Commission;

(4) has submitted proof of general liability insurance; and

(5) has submitted proof of appropriate commercial transportation insurance.

(b) The consumer guide shall set forth the requirements to be licensed and registered with the Texas Department of Protective and Regulatory Services as set forth in Texas Human Resources Code, Chapter 42 and applicable administrative rules and a description of the types of facilities or homes, which may be licensed or registered including, but not limited to, the following: day-care centers, group day-care homes, and family homes.

(c) A Board shall ensure that the consumer guide also includes the telephone number of the Texas Department of Protective and Regulatory Services or applicable regulating agency, so parents may obtain or verify the information regarding the providers and check compliance history.

(d) The consumer guide may include additional information including, but not limited to, the following:

(1) information the Board determines would assist parents in choosing a provider; and

(2) information as established by the Commission.

§809.15. Quality Improvement Activities.

(a) A Board shall ensure that providers receive orientation, technical assistance, and ongoing training to improve the quality of child care.

(b) A Board shall ensure that the quality of child care is improved by recognizing providers who voluntarily exceed the minimum standards for qualification set by the Texas Department of Protective and Regulatory Services by using the Designated Vendor criteria as established by the Commission.

(c) A Board shall ensure that the quality of child care is improved by using quality improvement activities including, but not limited to, the activities described in 45 Code of Federal Regulations §98.51, except the Boards may not provide loans.

(d) In addition to the Designated Vendor criteria, a Board may establish other voluntary criteria for improving quality and recognize providers that meet or exceed the voluntary standards for quality.

(1) The quality improvement criteria may include, but are not limited to one or more of the following activities:

(A) reducing group sizes;

(B) improving health and safety conditions;

(C) improving linkage to parents and community services; or

(D) improving teacher training.

(2) Boards may also choose to recognize professional center accreditation as a means to improve quality.

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Subchapter C. Requirements to Provide Child Care

40 TAC §§809.41–809.49

The new rules are adopted under Texas Labor Code §301.061 and 302.002, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035, and 44.002.

§809.41. General Requirements.

(a) A Board shall ensure that child care is provided only by persons or entities chosen by the parents and who:

(1) meet provider requirements set forth in this chapter, or

(2) are eligible to provide self-arranged care.

(b) A Board shall ensure that providers of child care comply with all appropriate health and safety provisions as required by federal regulations including, but not limited to, 45 Code of Federal Regulations Part 98 as may be amended.

§809.42. Minimum Requirements for Providers.

(a) A Board shall ensure that providers are at a minimum:

(1) licensed by the Texas Department of Protective and Regulatory Services;

(2) registered with the Texas Department of Protective and Regulatory Services;

(3) licensed by the Texas Department of Health as a youth day camp; or

(4) operated and monitored by the United States military services.

(b) A Board shall ensure that the providers:

(1) provide child care in compliance with a Provider Agreement as specified in this subchapter; and

(2) are not the subject of corrective or adverse action with the Texas Department of Protective and Regulatory Services, the Texas Department of Health, the United States military services, or any other state or federal agency.

(c) When a Board or the Board's contractor, in the course of fulfilling its responsibilities, gains knowledge of any possible violation regarding regulatory standards, the Board or its contractor shall report the information to the appropriate regulatory agency.

§809.43. Provider Agreements.

(a) Provider Agreements are agreements between the Board or the Board's designee and the providers of child care, which:

(1) are in writing and signed by the provider and the Board or the Board's designee before child care services are rendered, and

(2) specify the roles and responsibilities of the parties.

(b) A Board shall ensure that the Provider Agreements include notices, statements, and terms that detail provider obligations for complying with federal and state statutes and regulations relating to child care including, but not limited to, statements to ensure that discrimination is prohibited as referenced in 45 Code of Federal Regulations §§98.20, 98.46, and 98.47, as may be amended.

(c) Failure to maintain a Provider Agreement shall result in disallowed costs by the Commission.

§809.44. Provider General Liability Insurance Requirements.

The Boards shall determine whether general liability insurance, including transportation insurance, will be required of providers in their areas and, if so, the amount.

§809.48. Attendance Tracking.

(a) A Board shall set the attendance standards for eligible children in the local workforce development area, including provisions consistent with §809.224 of this Chapter (relating to Custody and Visitation Arrangements). Providers and self-arranged providers shall document and maintain a record of each child's attendance and submit such documents to the Board's designated contractor upon request.

(b) When an enrolled child is absent, providers shall inform the Board's designated contractor and shall follow attendance reporting and tracking procedures required by the Commission, Board, or, if applicable, the Board's contractor.

(c) Failure by the provider to keep required attendance records may result in withholding payment or in termination of the Provider Agreement.

§809.49. Provider Advisory Groups.

Providers, that are licensed centers, are required to establish a Parent Advisory Group consistent with Chapter 44 of the Texas Human Resources Code.

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

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Subchapter D. Self-Arranged Care

40 TAC §809.61, §809.62

The new rules are adopted under Texas Labor Code §301.061 and 302.002, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035, and 44.002.

§809.61. Qualifications to Provide Self-Arranged Care.

(a) A relative who is at least 18 years of age and is one of the following is eligible to provide self-arranged care:

(1) the child's grandparent;

(2) the child's great-grandparent;

(3) the child's aunt;

(4) the child's uncle; or

(5) the child's sibling, if the sibling does not reside in the same household as the eligible child.

(b) If chosen by the parent, a person or entity who has not signed a Provider Agreement is eligible to provide self-arranged care if:

(1) licensed by the Texas Department of Protective and Regulatory Services;

(2) registered with the Texas Department of Protective and Regulatory Services;

(3) listed with the Texas Department of Protective and Regulatory Services;

(4) licensed by the Texas Department of Health as a youth day camp; or

(5) operated and monitored by the United States military services.

(c) A Board shall ensure that requests made by the Texas Department of Protective and Regulatory Services, for specific providers or persons eligible to provide self-arranged care, are enforced for children in protective services.

(d) Before authorizing a person or entity "listed" with the Texas Department of Protective and Regulatory Services to provide child care, a Board shall ensure that there are in effect, under local law, requirements designated to protect the health and safety of children that are applicable to the persons or entities "listed" with the Texas Department of Protective and Regulatory Services. Boards may choose to not allow "listed" providers as self-arranged providers. Pursuant to federal regulations at 45 Code of Federal Regulations §98.41, the requirements shall include:

(1) the prevention and control of infectious diseases (including, immunizations);

(2) building and physical premises safety; and

(3) minimum health and safety training appropriate to the child care setting.

§809.62. Reimbursement for Self-Arranged Care.

(a) A Board shall ensure that reimbursement for self-arranged care is paid:

(1) to the self-arranged provider; and

(2) after the Board or its contractor receives a complete Declaration of Services Statement (Declaration) verifying that services were rendered.

(b) The Declaration shall contain:

(1) the name, age, and identifying information of the child;

(2) the amount of care provided in terms of units of care;

(3) the rate of payment;

(4) the dates services were provided;

(5) the name and identifying information of the self-arranged provider, including the location where care is provided;

(6) verification by the self-arranged provider that the information submitted in the Declaration is correct; and

(7) additional information as may be required by the Boards.

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Subchapter E. Parent Rights and Responsibilities

40 TAC §§809.71–809.77

The new rules are adopted under Texas Labor Code §301.061 and 302.002, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035, and 44.002.

§809.73. Eligibility Documentation.

(a) Parents shall provide the Board's contractor with all information necessary to determine eligibility according to the Board's administrative policies and procedures.

(b) Failure to submit documents may result in:

(1) denial or termination of child care services, or

(2) no payment for self-arranged care claims.

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Subchapter F. General Eligibility for Child Care

40 TAC §§809.91–809.93

The new rules are adopted under Texas Labor Code §301.061 and 302.002, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035, and 44.002.

§809.92. General Eligibility Requirements.

(a) The eligibility criteria set forth in this chapter are based primarily on the federal and statute funding limitations. Nothing in this chapter shall be applied in a manner that conflicts with those limitations and the limitations contained in the use-of-funds provisions in the Commission's child care allocation rule contained in Subchapter B of Chapter 800 of this title (relating to Allocations and Funding).

(b) For a child to be eligible for child care services, the child's parents shall:

(1) have a total gross income that does not exceed 85% of the state median income for a family of the same size;

(2) require child care to participate in training, education, or employment activities; and

(3) need the child care for a child under thirteen years of age, unless a different age requirement is indicated in the applicable eligibility rule contained in this chapter.

(c) For purposes of this chapter, child care is needed to support participation in education for a limited time as determined by the Board.

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Subchapter G. Child Care for People Transitioning off Public Assistance

40 TAC §§809.101–809.105

The new rules are adopted under Texas Labor Code §301.061 and 302.002, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035, and 44.002.

§809.101. Transitional Child Care.

(a) A Board shall ensure that transitional child care services will be provided for children of parents who have been denied TANF because of:

(1) employment and an increase in earnings which results in being ineligible for TANF payments, or

(2) expiration of TANF time limits.

(b) Transitional child care is available for a period of up to 12 months except in the case of an exempt TANF client who voluntarily participates in the Choices program. For these individuals, transitional child care is available for a period up to 18 months.

(c) TANF clients who are not employed when TANF expires may receive up to 4 weeks of transitional child care in order to allow these individuals to search for work.

(d) TANF clients who are engaged in an education or training component that extends beyond the date that TANF expires, may receive transitional child care in order to complete the component.

§809.102. Children of Parents Participating in the Choices Program.

(a) Children eligible to receive Choices child care include children of TANF recipients participating in the Choices program, in accordance with the provisions of the Texas Human Resources Code, §§31.0035 and 31.012(c).

(b) Child care shall be provided to children of parents participating in the Choices program who need child care to accept employment and remain employed.

(c) Child care services for children of parents participating in the Choices program shall continue for parents to participate in on-the-job training unless the parents' on-the-job training earnings cause the denial of a TANF grant.

(d) Persons approved for Choices but waiting to enter an approved initial component of the program may receive up to two weeks of child care:

(1) when child care will prevent loss of the Choices placement, and

(2) if child care is available to meet the needs of the child and parent.

§809.105. Children Receiving or Needing Protective Services.

(a) A Board shall ensure that determinations of eligibility for children needing protective services are performed by the Texas Department of Protective and Regulatory Services.

(b) Child care continues as long as authorized and funded by the Texas Department of Protective and Regulatory Services.

(c) In cases where the Child Protective Services (CPS) case is closed and child care will no longer be funded by the Texas Department of Protective and Regulatory Services, the Board shall continue the child care by using other funding for the child care slot for up to six months after they are no longer eligible for Texas Department of Protective and Regulatory Services funds if the CPS worker or other Texas Department of Protective and Regulatory Services staff states that the child needs to receive protective services and child care is an integral factor of those services.

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Subchapter H. Children of Parents at Risk of Becoming Dependent on Public Assistance

40 TAC §§809.121–809.124

The new rules are adopted under Texas Labor Code §301.061 and 302.002, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035, and 44.002.

§809.123. Children of Teen Parents.

(a) A teen parent (teen) is an individual 18 years of age or younger, or 19 years of age and attending high school or the equivalent, who has a child.

(b) A child of a teen may be eligible for child care if:

(1) the teen needs child care services to complete high school or the equivalent; and

(2) the family's total gross income does not exceed 85% of the state median income for a family of the same size.

(c) For purposes of determining whether the family's total gross income does not exceed 85% of the state median income for a family of the same size, the following applies.

(1) If residing with the teen's parent (the child's grandparent), the teen shall include in the family's total gross income, the income of the child's grandparent.

(2) The teen is not required to include the grandparent's income in the family's total gross income if the teen:

(A) does not reside with the child's grandparent; or

(B) is, or has been, married.

§809.124. Children Served by Special Projects.

(a) Special projects developed in federal and state statutes or regulations may add groups of children eligible to receive child care.

(b) The eligibility criteria as stated in the statutes or regulations shall control for the special project, unless otherwise indicated by the Commission in the Board Planning Guidelines.

(c) Special projects may include child care provided through match initiatives as described in 45 Code of Federal Regulations Part 98.

(d) The time limit for receiving child care for children served by special projects may be:

(1) specifically prescribed by federal or state statutes or regulations according to the particular project;

(2) otherwise set by the Commission depending on the purpose and goals of the special project; and

(3) limited to the availability of funds.

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Subchapter K. funds Management

40 TAC §§809.221–809.226, 809.228, 809.229, 809.231–809.233, 809.235

The new rules are adopted under Texas Labor Code §301.061 and 302.002, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035, and 44.002.

§809.221. General Funds Management.

(a) Boards shall ensure that resources are proportionately allocated among eligibility groups so that priority for intake services is assured for Transitional and Choices eligible children.

(b) Children referred by Child Protective Services (CPS) workers, for which care shall be provided through Texas Department of Protective and Regulatory Services funds, shall also receive priority for available child care openings. When Texas Department of Protective and Regulatory Services funding stops and the CPS worker indicates that the child continues to need protective services, the Boards shall continue the child care using the Child Care and Development funds up to six months after they are no longer eligible for Texas Department of Protective and Regulatory Services funds, so long as the provision of care to the child does not result in another child being removed from care.

§809.223. Eligibility Verification.

(a) A Board shall ensure that its contractor confirms eligibility before the contractor authorizes child care.

(b) Eligibility for child care shall be redetermined:

(1) any time there is a change in family income or other information that could affect eligibility to receive child care; and

(2) on an established frequency, at the Board's discretion.

§809.224. Custody and Visitation Arrangements.

(a) A Board shall ensure that a child who is required by a court-ordered custody or visitation arrangement to leave a provider's care is permitted to continue receiving child care by the same provider, or another provider if agreed to by the parent in advance of the leave, upon return from the court-ordered custody or visitation arrangement.

(b) A Board may encourage parents of other children to temporarily utilize the space the child under court-ordered custody or visitation arrangement has vacated until the child returns so that he or she can return to the same provider.

(c) A Board shall ensure that parents who choose to accept temporary child care to fill a position opened due to court-ordered custody or visitation shall not lose their place on the waiting list.

(d) A Board shall ensure that parents who choose not to accept temporary child care to fill a position opened due to court-ordered custody or visitation shall not lose their place on the waiting list.

§809.225. Continuity of Care.

(a) Enrolled children shall receive child care as long as the parent remains eligible for any available source of Commission-funded child care. Nothing in this chapter shall be interpreted in a manner as to result in a child being removed from care. Children who no longer receive Texas Department of Protective and Regulatory Services funded care shall also continue receiving child care funded through the Commission if eligible to receive care based on other eligibility criteria or if the Texas Department of Protective and Regulatory Services or its caseworker indicates that the child is in need of protective services.

(b) Children currently enrolled in child care shall remain in care when the Board assumes management of the child care services contract and shall remain eligible as long as eligibility criteria are met.

§809.228. Units of Service of Child Care.

Unless otherwise determined by the Board and approved by the Commission for automated reporting purposes, the funding of child care is based on the unit of service delivered, as follows:

(1) a full day unit of service is six to 12 hours of care provided within a 24-hour period; and

(2) a part-day unit of service is less than six hours of care provided within a 24-hour period.

§809.229. Provider Payment Based on Child Care Enrollment.

(a) Enrollment in child care begins the first day the child is scheduled to attend child care as authorized by the contractor.

(b) A Board or its contractor shall ensure that providers are not paid for holding spaces open except as consistent with attendance policies as established by the Boards.

(c) If the child does not attend the first three days of scheduled care, the provider has until the close of the third day of scheduled attendance to contact the Board or the Board's contractor regarding the child's absence.

(d) A Board or the Board's contractor shall not pay providers:

(1) less when a child enrolled full time attends occasionally for a part day; or

(2) more when a child enrolled part time attends occasionally for a full day.

§809.231. Provider Reimbursement Rates.

(a) Based on a market rate survey provided by the Commission, a Board shall establish the reimbursement rates for purchased child care to ensure that the rates provide access to at least three-fourths of all child care services in the local market and in a manner consistent with state and federal statutes and regulations governing child care.

(b) The Board or its contractor shall not reimburse a provider retroactively for new reimbursement rates.

(c) A Board or its contractor shall ensure that providers who are reimbursed for additional staff needed to assist in the care of a child with disabilities are paid a rate up to 190% of the provider's reimbursement rate for a child of that same age.

(1) The higher rate, which may be called an inclusion assistance rate, is an increased provider reimbursement rate to provide for additional staff to assist in the care of a child with disabilities, which shall take into consideration the estimated cost of the additional staff needed by a child with disabilities.

(2) The Board shall ensure that a professional, who is familiar with assessing the needs of children with disabilities, certifies the need for the inclusion assistance rate.

§809.235. Billing.

A Board is responsible for ensuring that bills are processed and submitted to the Commission in a timely and efficient manner.

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

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Subchapter L. Fraud Investigations

40 TAC §§809.251–809.253

The new rules are adopted under Texas Labor Code §301.061 and 302.002, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035, and 44.002.

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Subchapter M. Appeal Procedure

40 TAC §§809.271–809.273

The new rules are adopted under Texas Labor Code §301.061 and 302.002, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs, and under Texas Human Resources Code §§31.010, 31.0035, and 44.002.

§809.271. Child Care During Appeal.

(a) A Board shall ensure that child care continues during the appeal process until a decision is reached, if the parent requests a hearing.

(b) A Board shall ensure that child care does not continue during the appeal process if the child's enrollment is denied, delayed, reduced, or terminated because of:

(1) excessive absences;

(2) voluntary withdrawal from child care;

(3) change in federal or state laws or regulations;

(4) lack of funding;

(5) a sanctions recommendation against the parent participating in the Choices program;

(6) voluntary withdrawal of a parent from the Choices program; or

(7) non-payment of parent fees.

(c) The cost of providing services during the appeal process is subject to recovery from the parent by the Board, if the appeal decision is rendered against the parent.

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

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Subchapter N. Corrective and Adverse Actions

40 TAC §§809.281–809.288

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§809.285. Reapplication for Provider Status after Termination or Nonrenewal of the Provider Agreement.

(a) If a Provider Agreement has not been renewed or has been terminated for violations of terms of the Provider Agreement, the provider shall wait for a period of time, to be determined by the Board, after the termination or nonrenewal date of the Provider Agreement before reapplying.

(b) The provider shall be informed at the time of the termination or nonrenewal of the Provider Agreement when they may reapply for provider status.

§809.288. Failure to Meet Performance Standards.

A Board and its contractors are subject to recoupment of costs and other applicable corrective action as detailed in this chapter, and as set forth in Subchapter E of Chapter 800 of this title (relating to Sanctions), when they fail to meet performance standards specified by the Commission.

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REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by the 75th Legislature, Regular Session, House Bill 1 (General Appropriations Act) Art. IX, Section 167. Included here are: (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the ***Texas Administrative Code*** on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the ***Texas Register*** office.

Proposed Rule Reviews

Texas Department of Health

Title 25, Part I

The Texas Department of Health (department) will review and consider for readoption, revision or repeal Title 25, Texas Administrative Code, Part I, Chapter 205, Product Safety, Bedding Rules, §§205.1-205.11.

The review and consideration is being conducted in accordance with the General Appropriations Act, Article IX, Rider 167, passed by the 75th Legislature.

An assessment will be made by the department as to whether the reasons for adopting or readopting these rules continue to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the department. The review of all rules must be completed by August 31, 2001.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Jayne Nussbaum, Environmental and Consumer Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. Any proposed changes to these rules as a result of the review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption or repeal by the department.

TRD-9900563
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: January 27, 1999

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The Texas Department of Health (department) will review and consider for readoption, revision or repeal Title 25, Texas Administrative Code, Part I, Chapter 229, Food and Drug, Subchapter L. Licensure of Manufacturers of Food And Wholesale Distributors of Food–including Good Manufacturing Practices, §§229.181 - 229.184; and Subchapter N. Chemical and Pesticide Tolerance Levels in Food, §§229.221 - 229.222.

The review and consideration is being conducted in accordance with the General Appropriations Act, Article IX, Rider 167, passed by the 75th Legislature.

An assessment will be made by the department as to whether the reasons for adopting or readopting these rules continue to exist. This assessment will be continued during the rule review process. These rules will be reviewed to determine whether it is obsolete, whether the rules reflects current legal and policy considerations, and whether the rules reflects current procedures of the department. The review of all rules must be completed by August 31, 2001.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Jayne Nussbaum, Environmental and Consumer Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. Any proposed changes to these rules as a result of the review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption or repeal by the department.

TRD-9900562
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: January 27, 1999

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Texas Natural Resource Conservation Commission

Title 30, Part I

The Texas Natural Resource Conservation Commission (commission) proposes the review of 30 TAC Chapter 120, concerning Control of Air Pollution from Hazardous Waste or Solid Waste Management Facilities. This review complies with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997. Section 167 requires state agencies to review and consider for readoption rules adopted under the Administrative Procedure Act. The reviews must include, at a minimum, an assessment that the original reason for the rules continues to exist.

Chapter 120 and 30 TAC Chapter 335, Subchapter L, are joint rules for the control of air pollution from hazardous waste or industrial (solid) waste management facilities which were first adopted by the Texas Air Control Board and the Texas Water Commission in 1986, under requirements of the Solid Waste Disposal Act (SWDA). The two sets of rules containing the same permitting requirements were needed for "one-stop" permitting until the two agencies merged on September 1, 1993, creating the Texas Natural Resource Conservation Commission. The commission has reviewed these joint rules and has determined that the agency no longer needs two sets of rules containing the same requirements.

Today, applicants whose projects require more than one permit from the commission may avail themselves of the commission's new consolidated permitting rules, 30 TAC §;33.11-33.51. These rules allow applicants to seek multiple authorizations through consolidated processes, and receive a single consolidated permit or separate permits. Permittees holding existing "one-stop" permits for solid waste facilities may renew or amend those permits using the existing statutory authority of the SWDA and the rules of the commission in 30 TAC Chapter 335. In addition, 30 TAC Chapter 116 may be used by those seeking separate air authorization.

The commission proposed the repeal of Chapter 120 in the Proposed Rule section of the January 29, 1999, issue of the Texas Register (24 TexReg 503). The repeals are proposed as a result of the commission's review of the rules and the action conforms to the commission's regulatory reform policy.

Comments on the commission's review of the rules contained in Chapter 120 may be submitted to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-6385. All comments should reference Rule Log Number 98037-120-AI. Comments must be received by 5:00 p.m., March 8, 1999. For further information, please contact Barry Irwin, Air Policy and Regulations Division, (512) 239-1461

TRD-9900279
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: January 15, 1999

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Public Utility Commission of Texas

Title 16, Part II

The Public Utility Commission of Texas files this notice of intention to review §23.91 relating to Long Run Incremental Cost Methodology for Dominant Certificated Telecommunications Utility (DCTU) Services pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167). Project Number 20102 has been assigned to the review of this rule section.

As part of this review process, the commission is proposing the repeal of §23.91 and is proposing new §26.215 of this title (relating to Long Run Incremental Cost Methodology for Dominant Certificated Telecommunications Utility (DCTU) Services) to replace §23.91. The proposed repeal and new rule may be found in the Proposed Rules section of the *Texas Register*. As required by Section 167, the commission will accept comments regarding whether the reason for adopting the rule continues to exist in the comments filed on the proposed new section.

Any questions pertaining to this notice of intention to review should be directed to Rhonda Dempsey, Rules Coordinator, Office of Regulatory Affairs, Public Utility Commission of Texas, 1701 N. Congress Avenue, Austin, Texas 78711-3326 or at voice telephone (512) 936-7308.

16 TAC §23.91. Long Run Incremental Cost Methodology for Dominant Certificated Telecommunications Utility (DCTU) Services.

TRD-9900520
Rhonda Dempsey
Rules Coordinator
Public Utility Commission on Texas
Filed: January 25, 1999

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The Public Utility Commission of Texas files this notice of intention to review §23.104 relating to Telecommunications Pricing pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167). Project Number 18846 has been assigned to the review of this rule section.

As part of this review process, the commission is proposing the repeal of §23.104 and is proposing new §26.213 of this title (relating to Telecommunications Pricing) to replace §23.104. The proposed repeal and new rule may be found in the Proposed Rules section of the *Texas Register.* As required by Section 167, the commission will accept comments regarding whether the reason for adopting the rule continues to exist in the comments filed on the proposed new section.

Any questions pertaining to this notice of intention to review should be directed to Rhonda Dempsey, Rules Coordinator, Office of Regulatory Affairs, Public Utility Commission of Texas, 1701 N. Congress Avenue, Austin, Texas 78711-3326 or at voice telephone (512) 936-7308.

16 TAC §23.104. Telecommunications Pricing.

TRD-9900483
Rhonda Dempsey
Rules Coordinator
Public Utility Commission on Texas
Filed: January 25, 1999

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Texas Workers' Compensation Commission

Title 28, Part II

The Texas Workers' Compensation Commission files this notice of intention to review the rules contained in Chapter 140 concerning Dispute Resolution General Provisions. This review is pursuant to the General Appropriations Act, Article IX, Section 167, 75th Legislature.

The agency's reason for adopting the rules contained in these chapters continues to exist and it proposes to readopt these rules.

Comments regarding the Section 167 requirement as to whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on March 8, 1999, and submitted to Donna Davila, Office of General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH 35, Austin, Texas 78704-7491.

§140.1 Definitions.

§140.2 Special Accommodations.

§140.3 Expedited Proceedings.

§140.4 Conduct and Decorum.

§140.5 Correction of Clerical Error.

TRD-9900541
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: January 26, 1999

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Adopted Rule Reviews

Texas Education Agency

Title 19, Part II

The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 150, Commissioner's Rules Concerning Educator Appraisal, Subchapter AA, Teacher Appraisal, pursuant to the 1998-99 General Appropriations Act, Section 167. The TEA proposed the review of 19 TAC Chapter 150, Subchapter AA, in the November 27, 1998, issue of the *Texas Register* (23 TexReg 11969).

The TEA finds that the reason for adopting continues to exist. The TEA received no comments related to the rule review requirement as to whether the reason for adopting the rules continues to exist. As part of the review, the TEA is proposing an amendment to 19 TAC §150.1003, which may be found in the Proposed Rules section of this issue.

TRD-9900505
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: January 25, 1999

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Texas Commission on Fire Protection

Title 37, Part XIII

The Texas Commission on Fire Protection adopts the review of 37 TAC Chapter 449, concerning head of a fire department. This review was conducted in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997. The proposed review was published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12479).

The Commission concurrrently adopts the repeal of §449.1 and new §449.1 in the Adopted Rules section of this issue of the *Texas Register*. This change was proposed as a result of the Commission's review of the rules. The new section assures that personnel appointed as a department head for a fire department are properly trained, tested, and possess experience deemed necessary for the position. No comments were received regarding the readoption of this chapter.

TRD-9900494
Thomas R. Thompson
General Counsel
Texas Commission on Fire Protection
Filed: January 25, 1999

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The Texas Commission on Fire Protection adopts the review of 37 TAC Chapter 461, concerning general administration. This review was conducted in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997. The proposed review was published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12479).

The Commission concurrrently adopts amendments to §461.4 in the Adopted Rules section of this issue of the *Texas Register*. This change was proposed as a result of the Commission's review of the rules. The amendments conform legislative changes that transferred administration of the Texas Fire Incident Reporting System from the commission to the Texas Department of Insurance. Sections 461.1, 461.2, and 461.3 are adopted without changes. No comments were received regarding the readoption of this chapter.

TRD-9900493
Thomas R. Thompson
General Counsel
Texas Commission on Fire Protection
Filed: January 25, 1999

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The Texas Commission on Fire Protection adopts the review of 37 TAC Chapter 463, concerning application criteria. This review was conducted in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997. The proposed review was published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12479).

The Commission concurrrently adopts amendments to §§463.3, 463.4, and 463.6 in the Adopted Rules section of this issue of the *Texas Register*. This change was proposed as a result of the Commission's review of the rules. The amendments simplify the application process for loans and grants and criteria deemed necessary by the commission are eliminated. Sections 463.1, 463.2, and 463.5 are adopted without changes. No comments were received regarding the readoption of this chapter.

TRD-9900492
Thomas R. Thompson
General Counsel
Texas Commission on Fire Protection
Filed: January 25, 1999

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The Texas Commission on Fire Protection adopts the review of 37 TAC Chapter 465, concerning equipment, facilities, and training standards. This review was conducted in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997. The proposed review was published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12480).

Sections 465.1, 465.2, and 465.3 are adopted without changes. No comments were received regarding the readoption of this chapter.

TRD-9900491
Thomas R. Thompson
General Counsel
Texas Commission on Fire Protection
Filed: January 25, 1999

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The Texas Commission on Fire Protection adopts the review of 37 TAC Chapter 495, concerning regulation of nongovernmental departments. This review was conducted in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997. The proposed review was published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12480).

The Commission concurrrently adopts an amendment to §495.1 in the Adopted Rules section of this issue of the *Texas Register*. This change was proposed as a result of the Commission's review of the rules. The amendment adds language to allow for the acceptance of a public protection classification assigned by the Insurance Services Office as an alternative to a key rate assigned by the Texas Department of Insurance. Sections 495.3, 495.5, 495.201, 405.203, 495.205, and 495.207 are adopted without changes. No comments were received regarding the readoption of this chapter.

TRD-9900490
Thomas R. Thompson
General Counsel
Texas Commission on Fire Protection
Filed: January 25, 1999

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Public Utility Commission of Texas

Title 16, Part II

The Public Utility Commission of Texas (commission) has completed the review of Procedural Rules, Subchapter L (relating to Evidence and Exhibits in Contested Cases), §22.221 relating to Rules of Evidence in Contested Cases; §22.222 relating to Official Notice; §22.223 relating to Witnesses to be Sworn; §22.224 relating to Documentary Evidence; §22.225 relating to Written Testimony and Accompany Exhibits; §22.226 relating to Exhibits; §22.227 relating to Offers of Proof; and §22.228 relating to Stipulation of Facts as noticed in the October 23, 1998 *Texas Register* (23 TexReg 10926). The commission readopts these sections, pursuant to the requirements of the Appropriations Act of 1997, HB 1, Article IX, §167 (§167) and finds that the reason for adopting these rules continues to exist. Project Number 17709 is assigned to this proceeding.

As part of this review process, the commission proposed amendments to §22.222 and §22.225 as published in the Texas Register on October 23, 1998 (23 TexReg 10789). The commission received comments on the proposed amendments from Central Power and Light Company (CPL), Southwestern Electric Power Company (SWEPCO) and West Texas tilities Company (WTU), collectively the Texas Central and South West electric utility operating companies (CSW Companies). CSW Companies did not address the Section 167 requirement as to whether the reason for adopting the rules continues to exist in their comments. The comments are summarized in the adoption of the proposed amendments found in the Adopted Rules section of the Texas Register.

These sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

TRD-9900470
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 22, 1999

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Texas Water Development Board

Title 31, Part X

Pursuant to the notice of proposed rule review published in the *Texas Register*, 23 TexReg 12481, December 4, 1998, the Texas Water Development Board (board) has reviewed and considered for readoption, revision or repeal 31 TAC Chapter 365, Investment Rules, in accordance with the Appropriations Act, Section 167.

The board considered, among other things, whether the reasons for adoption of these rules continues to exist. No comments were received on the proposed rule reviews.

As a result of the board's review, the board determined that the rules are still necessary because they govern all funds managed by the board and readopts the sections except as noted. The board concurrently adopts amendments to §;365.2, 365.8, 365.11, 365.12, 365.18, 365.20 and 365.21. The changes are adopted as a result of the board's rule review for clarification and investment process improvements and to comply with the Public Funds Investment Act.

TRD-9900418
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: January 22, 1999

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Pursuant to the notice of proposed rule review published in the *Texas Register*, 23 TexReg 12481, December 4, 1998, the Texas Water Development Board (board) has reviewed and considered for readoption, revision or repeal 31 TAC Chapter 375, State Water Pollution Control Revolving Fund, in accordance with the Appropriations Act, Section 167.

The board considered, among other things, whether the reasons for adoption of these rules continues to exist. No comments were received on the proposed rule reviews.

As a result of the board's review, the board determined to repeal 31 TAC Chapter 375, State Water Pollution Control Revolving Fund, and adopt new Chapter 375, Clean Water State Revolving Fund (CWSRF), in order to consolidate all rules governing the CWSRF under one chapter. The board concurrently adopts the repeal of §§375.1-375.4, 375.14-375.22, 375.31-375.38, 375.40, 375.51 375.52, 375.61-375.63, 375.72, 375.74, 375.75, 375.81-375.86, 375.88, and 375.101-375.103 and new §;375.1-375.4, 375.11-375.18, 375.31-375.42, 375.51, 375.52, 375.61, 375.62, 375.71-375.73, 375.81-375.87, 375.101-375.105, 375.201, 375.211-375.214 and 375.221-375.222.

TRD-9900439
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: January 22, 1999

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TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word “Figure” followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on. Multiple graphics in a rule are designated as “Figure 1” followed by the TAC citation, “Figure 2” followed by the TAC citation.

Figure 7 TAC 97.113(b)

For Credit Unions with Total Assets Of:	The Operating Fee is:
Less than $200,000	$0
$200,000 but less than $500,000	$450 + $2.21 per $1,000 of the amount over $200,000
$500,000 but less than $1M	$1,113 + $.85 per $1,000 of the amount over $500,000
$1M but less than $2.5M	$1,538 + $.37 per $1,000 of the amount over $1M
$2.5M but less than $5M	$2,093 + .35 per $1,000 of the amount over $2.5M
$5M but less than $10M	$2,968 + $.32 per $1,000 of the amount over $5M
$10M but less than $25M	$4,568 + $.14 per $1,000 of the amount over $10M
$25M but less than $50M	$6,668 + $.17 per $1,000 of the amount over $25M
$50M but less than $100M	$10,918 + $.19 per $1,000 of the amount over $50M
$100M but less than $250M	$20,418 + $.082 per $1,000 of the amount over $100M
$250M but less than $500M	$32,718 + $.076 per $1,000 of the amount over $250M
$500M but less than $750M	$51,718 + $.074 per $1,000 of the amount over $500M
$750M but less than $1,000MM	$69,468 + $.071 per $1,000 of the amount over $750M
$1,000MM and over	$87,218 +$.069 per $1,000 of the amount over $1,000MM

Figure: 25 TAC §289.301(cc)(1)

Wavelength (nm)	Emission duration (seconds)	Class I - Accessible Emission limits		
		(value)	(units)	(quantity)
≥180 but	≤3.0×10^{4} ---	$2.4\times10^{-5}k_1k_2$*	Joules (J)*	radiant energy
≤400	>3.0×10^{4} ---	$8.0\times10^{-10}k_1k_2$*	Watts (W)*	radiant power
	>1.0×10^{-9} to 2.0×10^{5}	$2.0\times10^{-7}k_1k_2$	J	radiant energy
	>2.0×10^{-5} to 1.0×10^{1}	$7.0\times10^{-4}k_1k_2\ t^{3/4}$	J	radiant energy
	>1.0×10^{1} to 1.0×10^{4}	$3.9\times10^{-3}k_1k_2$	J	radiant energy
>400 but	>1.0×10^{4} ---	$3.9\times10^{-7}k_1k_2$	W	radiant power
but				
	OR			
≤140	>1.0×10^{-9} to 1.0×10^{1}	$10k_1k_2t^{-1/4}$	J $cm^{-2}sr^{-1}$	integrated radiance
	>1.0×10^{1} to 1.0×10^{4}	$20k_1k_2$	J $cm^{-2}sr^{-1}$	integrated radiance
	>1.0×10^{4} ---	$2.0\times10^{-3}k_1k_2$	W $cm^{-2}sr^{-1}$	radiance
>1400 but	>1.0×10^{-9} to 1.0×10^{-7}	$7.9\times10^{-5}k_1k_2$	J	radiant energy
≤2500	>1.0×10^{-7} to 1.0×10^{1}	$4.4\times10^{-3}k_1k_2t^{-1/4}$	J	radiant energy
	>1.0×10^{1} ---	$7.9\times10^{-4}k_1k_2$	W	radiant power
>2500 but	>1.0×10^{-9} to 1.0×10^{-7}	$1.0\times10^{-2}k_1k_2$	J cm^{-2}	radiant exposure
≤1.0×10^{6}	>1.0×10^{-7} to 1.0×10^{1}	$5.6\times10^{-1}k_1k_2t^{1/4}$	J cm^{-2}	radiant exposure
	>1.0×10^{1} ---	$1.0\times10^{-1}k_1k_2t$	J cm^{-2}	radiant exposure

The variable in the expression is the magnitude of the sampling interval (t), in units of seconds

* Class I accessible emission limits for wavelengths equal to or greater than 180 nm but less than or equal to 400 nm shall not exceed the class I accessible emission limits for the wavelengths greater than 1400 nm but less than or equal to 1.0×10^{6} nm with a k_1 and k_2 of 1.0 for comparable sampling intervals.

Figure: 25 TAC §289.301(cc)(2)

Wavelength (nm)	Emission duration (seconds)	Class II - Accessible Emission limits		
		(value)	(units)	(quantity)
>400 ≤710 but	$>2.5x10^{-1}$ ---	$1.0x10^{-3}$	W	radiant energy

Figure: 25 TAC §289.301(cc)(3)

Wavelength (nm)	Emission duration (seconds)	Class IIIa - Accessible emission limits		
		(value)	(units)	(quantity)
>400 but ≤700	$>3.8\times10^{-4}$	2.5×10^{-3}	Wcm^{-2}	irradiance
		OR*		
		5.0×10^{-3}	W	radiant power

*Class IIIa accessible emission limits shall exceed neither of the accessible emission limits.

Figure: 25 TAC §289.301(cc)(4)

Wavelength (nm)	Emission duration (seconds)	Class IIIb - Accessible emission limits		
		(value)	(units)	(quantity)
≥180 but ≤400	$\leq 2.5\times10^{-1}$ ---	$3.8\times10^{-4}k_1k_2$	J	radiant energy
	$>2.5\times10^{-1}$ ---	$1.5\times10^{-3}k_1k_2$	W	radiant power
>400 but ≤140	1.0×10^{-9} to 2.5×10^{-1}	$10k_1k_2t^{1/3}$ to a maximum value of 10	J cm^{-2}	radiant exposure
			J cm^{-2}	radiant exposure
	$>2.5\times10^{-1}$ ---	5.0×10^{-1}	W	radiant power
>1400 but ≤1.0×10^{6}	$>1.0\times10^{-9}$ to 1.0×10^{1}	10	J cm^{-2}	radiant exposure
	1.0×10^{1} ---	5.0×10^{-1}	W	radiant power

The variable in the expression is the magnitude of the sampling interval (t), in units of seconds.

Wavelength, λ (μm)	Exposure Time, T (s)	MPE (cm^{-2})	Notes for Calculation & Measurement
Ultraviolet			
0.200 - 0.302	10^{-9} - $3x10^{4}$	$3x10^{-3}$ J	
0.303	10^{-9} - $3x10^{4}$	$4x10^{-3}$ J	
0.304	10^{-9} - $3x10^{4}$	$6x10^{-3}$ J	or $0.56t^{\kappa}$ J x cm^{-2}, whichever is lower.
0.305	10^{-9} - $3x10^{4}$	$1x10^{-2}$ J	
0.306	10^{-9} - $3x10^{4}$	$1.6x10^{-2}$ J	
0.307	10^{-9} - $3x10^{4}$	$2.5x10^{-2}$ J	
0.308	10^{-9} - $3x10^{4}$	$4x10^{-2}$ J	1-mm limiting aperature.
0.309	10^{-9} - $3x10^{4}$	$6.3x10^{-2}$ J	
0.310	10^{-9} - $3x10^{4}$	$1x10^{-1}$ J	
0.311	10^{-9} - $3x10^{4}$	$1.6x10^{-1}$ J	See subsection (dd)(4) & (5) of this section for graphic representation.
0.312	10^{-9} - $3x10^{4}$	$2.5x10^{-1}$ J	
0.313	10^{-9} - $3x10^{4}$	$4x10^{-1}$ J	
0.314	10^{-9} - $3x10^{4}$	$6.3x10^{-1}$ J	
0.315 - 0.400	10^{-9} - 10	$0.56\ t^{\kappa}$ J	
0.315 - 0.400	10 - 10^{3}	1 J	
0.315 - 0.400	10^{3} - $3x10^{4}$ *	$1x10^{-3}$ W	
Visible and Near Infrared*			
0.400 - 0.700	10^{-9} - $1.8x10^{-5}$	$5x10^{-7}$ J	
0.400 - 0.700	$1.8x10^{-5}$ - 10	$1.8t^{\kappa}x10^{-3}$ J	7-mm limiting aperture.
0.400 - 0.550	10 - 10^{4}	$10x10^{-3}$ J	
0.550 - 0.700	10 - T_1	$1.8t^{\kappa}x10^{-3}$ J	
0.550 - 0.700	T_1 - 10^{4}	$10C_Bx10^{-3}$ J	
0.400 - 0.700	10^{4} - $3x10^{4}$	C_Bx10^{-6} W	
0.700 - 1.050	10^{-9} - $1.8x10^{-5}$	$5C_Ax10^{-7}$ J	
0.700 - 1.050	$1.8x10^{-5}$ - 10^{3}	$1.8C_At^{\kappa}x10^{-3}$ J	See subsection (dd)(3) & (9) of this section for graphic representation & subsection (dd)(7), (8) & (10) of this section for correction factors.
1.051 - 1.400	10^{-9} - $5x10^{-5}$	$5x10^{-6}$ J	
1.051 - 1.400	$5x10^{-5}$ - 10^{3}	$9t^{\kappa}\ x10^{-3}$ J	
0.700 - 1.400	10^{3} - $3x10^{4}$	$320C_Ax10^{-6}$ W	

Wavelength, λ (μm)	Exposure Time, T (s)	MPE (cm^{-2})	Notes for Calculation & Measurement
Far-Infrared			
$1.4 - 10^3$	$10^{-9} - 10^{-7}$	10^{-2} J	See subsection (dd)(12) of this section for apertures. See subsection (dd)(6) of this section for graphic representation.
	$10^{-7} - 10$	$0.56\ t^{¼}$ J	
	> 10	0.1 W	

The variables in the expressions are the magnitude of the exposure time(t) in units of seconds, and the magnitude of the wavelength (λ) in units of micrometers. This material is from American National Standard for the Safe use of Lasers, ANSI Z136.1.

NOTES: $C_A = 1$ for $\lambda = 0.400 - 0.700$ μm,

$C_A = 10^{2.00(\lambda - 0.700)}$ for $\lambda = 0.700 - 1.050$ μm (see subsection (dd)(7) of this section),

$C_A = 5$ for $\lambda = 1.050 - 1.400$ μm,

$C_B = 1$ for $\lambda = 0.400 - 0.550$ μm,

$C_B = 10^{150(\lambda - 0.550)}$ for $\lambda = 0.550 - 0.700$ μm (see subsection (dd)(8) of this section),

$T_1 = 10 \times 10^{20(\lambda - 0.550)}$ for $\lambda = 0.550 - 0.700$ μm (see subsection (dd)(8) of this section).

*See subsection (dd)(3), (4), and (5) of this section for graphic representation.

Wavelength, λ (μm)	Exposure Time, t (s)	MPE (cm^{-2})	Notes for Calculation & Measurement
Ultraviolet			
0.200 - 0.302	10^{-9} - $3x10^{4}$	$3x10^{-3}$ J	
0.303	10^{-9} - $3x10^{4}$	$4x10^{-3}$ J	or $0.56t^{¼}$ J x cm^{2}
0.304	10^{-9} - $3x10^{4}$	$6x10^{-3}$ J	whichever
0.305	10^{-9} - $3x10^{4}$	$1x10^{-2}$ J	is lower.
0.306	10^{-9} - $3x10^{4}$	$1.6x10^{-2}$ J	
0.307	10^{-9} - $3x10^{4}$	$2.5x10^{-2}$ J	
0.308	10^{-9} - $3x10^{4}$	$4x10^{-2}$ J	
0.309	10^{-9} - $3x10^{4}$	$6.3x10^{-2}$ J	1-mm limiting
0.310	10^{-9} - $3x10^{4}$	$1x10^{-1}$ J	aperture.
0.311	10^{-9} - $3x10^{4}$	$1.6x10^{-1}$ J	
0.312	10^{-9} - $3x10^{4}$	$2.5x10^{-1}$ J	See subsection
0.313	10^{-9} - $3x10^{4}$	$4x10^{-1}$ J	(dd) (4) & (5) of this
0.314	10^{-9} - $3x10^{4}$	$6.3x10^{-1}$ J	section for graphic
0.315 - 0.400	10^{-9} - 10	$0.56t^{¼}$ J	representation.
0.315 - 0.400	10 - 10^{3}	1 J cm^{-2}	
0.315 - 0.400	10^{3} - $3x10^{4}$	$1x10^{-3}$ W cm^{-2}	
Visible*			
0.400 - 0.700	10^{-9} - 10	$10t^{¼}$ J cm^{-2} sr^{-1}	1-mm limiting
0.400 - 0.550	10 - 10^{4}	21 J cm^{-2} sr^{-1}	aperture or
0.550 - 0.700	10 - T_1	$3.83t^{¼}$ J cm^{-2} sr^{-1}	α_{min}, which-
0.550 - 0.700	T_1 - 10^{4}	$21C_B$ J cm^{-2} sr^{-1}	ever is greater
0.400 - 0.700	10^{4} - $3x10^{4}$	$2.1C_B10^{-3}$ $Wcm^{-2}sr^{-1}$	See subsection (dd)(6), (7) - (10) of this section for graphic representation and multiple pulse limitations.

Wavelength, λ (μm)	Exposure Time, t (s)	MPE (cm^{-2})	Notes for Calculation & Measurement
Ultraviolet			
0.200 - 0.302	10^{-9} - $3x10^{4}$	$3x10^{-3}$ J	
0.303	10^{-9} - $3x10^{4}$	$4x10^{-3}$ J	or $0.56t^{¼}$ J x cm^{2}
0.304	10^{-9} - $3x10^{4}$	$6x10^{-3}$ J	whichever
0.305	10^{-9} - $3x10^{4}$	$1x10^{-2}$ J	is lower.
0.306	10^{-9} - $3x10^{4}$	$1.6x10^{-2}$ J	
0.307	10^{-9} - $3x10^{4}$	$2.5x10^{-2}$ J	
0.308	10^{-9} - $3x10^{4}$	$4x10^{-2}$ J	
0.309	10^{-9} - $3x10^{4}$	$6.3x10^{-2}$ J	1-mm limiting
0.310	10^{-9} - $3x10^{4}$	$1x10^{-1}$ J	aperture.
0.311	10^{-9} - $3x10^{4}$	$1.6x10^{-1}$ J	
0.312	10^{-9} - $3x10^{4}$	$2.5x10^{-1}$ J	See subsection
0.313	10^{-9} - $3x10^{4}$	$4x10^{-1}$ J	(dd) (4) & (5) of this
0.314	10^{-9} - $3x10^{4}$	$6.3x10^{-1}$ J	section for graphic
0.315 - 0.400	10^{-9} - 10	$0.56t^{¼}$ J	representation.
0.315 - 0.400	10 - 10^{3}	1 J cm^{-2}	
0.315 - 0.400	10^{3} - $3x10^{4}$	$1x10^{-3}$ W cm^{-2}	
Visible*			
0.400 - 0.700	10^{-9} - 10	$10t^{¼}$ J cm^{-2} sr^{-1}	1-mm limiting
0.400 - 0.550	10 - 10^{4}	21 J cm^{-2} sr^{-1}	aperture or
0.550 - 0.700	10 - T_1	$3.83t^{¼}$ J cm^{-2} sr^{-1}	α_{min}, which-
0.550 - 0.700	T_1 - 10^{4}	$21C_B$ J cm^{-2} sr^{-1}	ever is greater
0.400 - 0.700	10^{4} - $3x10^{4}$	$2.1C_B10^{-3}$ $Wcm^{-2}sr^{-1}$	See subsection (dd)(6), (7) - (10) of this section for graphic representation and multiple pulse limitations.

Figure: 25 TAC §289.301(cc)(7)

Wavelength, λ (μm)	Exposure Time, t (s)	MPE (cm^2)	Notes for Calculation & Measurement
Ultraviolet			
0.200 - 0.302	10^{-9} - $3x10^{4}$	$3x10^{-3}$ J	or $0.56t^{¼}$ J x cm^{-2}, whichever is lower.
0.303	10^{-9} - $3x10^{4}$	$4x10^{-3}$ J	
0.304	10^{-9} - $3x10^{4}$	$6x10^{-3}$ J	
0.305	10^{-9} - $3x10^{4}$	$1x10^{-2}$ J	
0.306	10^{-9} - $3x10^{4}$	$1.6x10^{-2}$ J	1-mm limiting aperture.
0.307	10^{-9} - $3x10^{4}$	$2.5x10^{-2}$ J	
0.308	10^{-9} - $3x10^{4}$	$4x10^{-2}$ J	
0.309	10^{-9} - $3x10^{4}$	$6.3x10^{-2}$ J	See subsection (dd)(4)& (5) of this section for graphic representation.
0.310	10^{-9} - $3x10^{4}$	$1x10^{-1}$ J	
0.311	10^{-9} - $3x10^{4}$	$1.6x10^{-1}$ J	
0.312	10^{-9} - $3x10^{4}$	$2.5x10^{-1}$ J	
0.313	10^{-9} - $3x10^{4}$	$4x10^{-1}$ J	
0.314	10^{-9} - $3x10^{4}$	$6.3x10^{-1}$	
0.315 - 0.400	10^{-9} - 10	$0.56t^{¼}$ J	
0.315 - 0.400	10 - 10	1 J	
0.315 - 0.400	10^{3} - $3x10^{4}$	$1x10^{-3}$ W	
Visible and Near Infrared			
0.400 - 1.400	10^{-9} - 10^{-7}	$2C_Ax10^{-2}$ J	1-mm limiting aperture. See subsection (dd)(5) & (7) of this section.
	10^{-7} - 10	$1.1C_A^{¼}$ J	
	10 - $3x10^{4}$	$0.2C_A$ W	
Far Infrared			
1.4 - 10^{-3}	10^{-9} - 10^{-7}	10^{-2} J	1-mm limiting aperture for 1.4 to 100 μm 11 mm limiting aperture for 0.1 mm to 1 mm.
	10^{-7} - 10	$0.56t^{¼}$ J	
	> 10	0.1 W	

The variables in the expressions are the magnitude of the exposure time (t), in units of seconds and the magnitude of the wavelength (λ) in micrometers.

Figure: 25 TAC §289.301(cc)(9)

(9) Values of wavelength dependent correction factors k_1 and k_2. The following table contains values of wavelength dependent correction factors k_1 and k_2.

Wavelength (nm)	k_1	k_2		
180 to 302.4	1.0	1.0		
> 302.4 to 315	$10^{\left[\frac{\lambda-302.4}{5}\right]}$	1.0		
> 315 to 400	330.0	1.0		
> 400 to 700	1.0	1.0		
> 700 to 800	$10^{\left[\frac{515}{\lambda-699}\right]}$	if: $t \leq \frac{10100}{\lambda-699}$ then: $k_2 = 1.0$	if: $\frac{10100}{\lambda-699} < t \leq 10^4$ then: $k_2 = \frac{t(\lambda-699)}{10100}$	if: $t > 10^4$ then: $k_2 = \frac{\lambda-699}{1.01}$
> 800 to 1060	$10^{\left[\frac{\lambda-700}{515}\right]}$	if: $t \leq 100$ then: $k_2 = 1.0$	if: $100 < t \leq 10^4$ then: $k_2 = \frac{t}{100}$	if: $t > 10^4$ then: $k_2 = 100$
> 1060 to 1400	5.0			
> 1400 to 1535	1.0	1.0		
1535 to 1545	$t \leq 10^{-7}$ sec $k_1 = 100.0$	1.0		
	$t > 10^{-7}$ sec $k_1 = 1.0$			
> 1545 to 1.0×10^6	1.0	1.0		

NOTE: The variables in the expressions are the magnitudes of the sampling interval (t), in units of seconds, and the wavelength (λ), in units of nm.

(10) Selected numerical solutions for k_1 and k_2. The following table contains selected numerical solutions for k_1 and k_2.

wavelength (nm)	k_1	(t)*		k_2		
		t≤100 sec	t=300 sec	t=1,000 sec	t=3,000 sec	t≥ 10,000 sec
180	1.0					
300	1.0					
302	1.0					
303	1.32					
304	2.09					
305	3.31					
306	5.25					
307	8.32					
308	13.2					
309	20.9					
310	33.1			1.0		
311	52.5					
312	83.2					
313	132.0					
314	209.0					
315	330.0					
400	330.0					
401	1.0					
500	1.0					
600	1.0					
700	1.0					

*The variable (t) is the magnitude of the sampling interval in units of seconds (sec).

710	1.05	1	1	1.1	3.3	11.0
720	1.09	1	1	2.1	6.3	21.0
730	1.14	1	1	3.1	9.3	31.0
740	1.20	1	1.2	4.1	12.0	41.0
750	1.25	1	1.5	5.0	15.0	50.0
760	1.31	1	1.8	6.0	18.0	60.0
770	1.37	1	2.1	7.0	21.0	70.0
780	1.43	1	2.4	8.0	24.0	80.0
790	1.50	1	2.7	9.0	27.0	90.0
800	1.56	1	3.0	10.0	30.0	100.0
850	1.95	1	3.0	10.0	30.0	100.0
900	2.44	1	3.0	10.0	30.0	100.0
950	3.05	1	3.0	10.0	30.0	100.0
1000	3.82	1	3.0	10.0	30.0	100.0
1050	4.78	1	3.0	10.0	30.0	100.0
1060	5.00	1	3.0	10.0	30.0	100.0
1100	5.00	1	3.0	10.0	30.0	100.0
1400	5.00	1	3.0	10.0	30.0	100.0
1500	1.0					
1540	100.0**					
1600	1.0			1.0		
13000	1.0					
1.0×10^6	1.0					

**The factor $k_1 = 100.0$ when $t \leq 10^{-7}$ sec, and $k_1 = 1.0$ when $t > 10^{-7}$ sec.

Figure: 25 TAC §289.301(cc)(11)

Measurement	Exposure Duration, t (s)	Wavelength Range			
		Ultraviolet (0.2 - 0.4μm)	Visible and Near-Infrared (0.4 - 1.4μm)	Medium and Far-Infrared (1.4 - $10^{-2}\mu$m)	Submillimeter (0.1 - 1mm)
Eye MPE	10^{-9} - $3x10^{4}$	1 mm	7 mm**	1 mm	11 mm
Skin MPE	10^{-9} - $3x10^{4}$	1 mm	1 mm	1 mm	11 mm
Laser* Classification	10^{-9} - $3x10^{4}$	80 mm	80 mm	80 mm	80 mm

*See subsection (y) of this section.

**When the LSO determines that laser radiation may be viewed with optical instruments, the apertures listed for eye MPE and skin MPE apply to the exit beam of such devices.

Figure: 25 TAC §289.301(dd)(1)

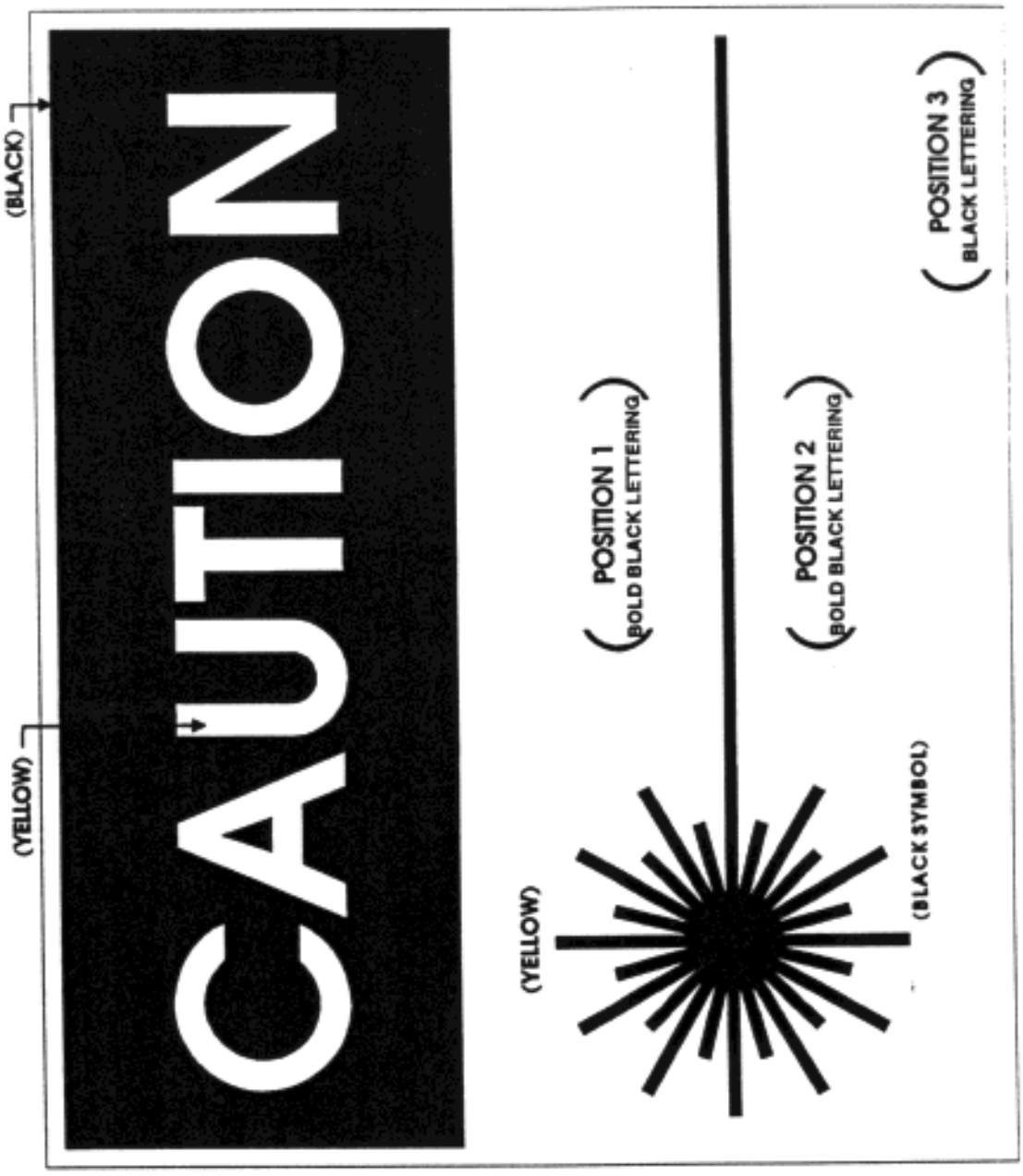

Figure: 25 TAC §289.301(dd)(2)

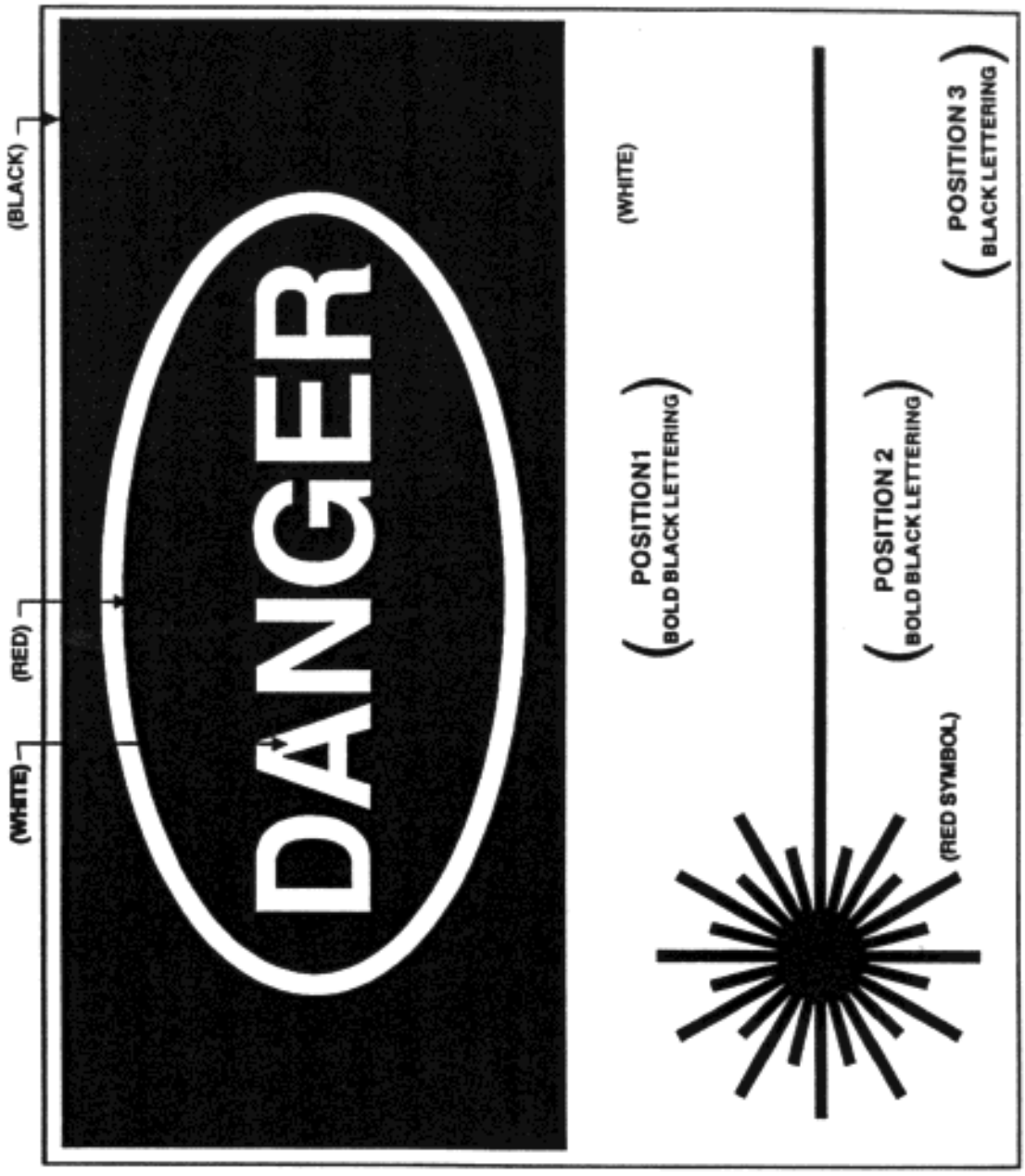

Figure: 25 TAC §289.301(dd)(3)

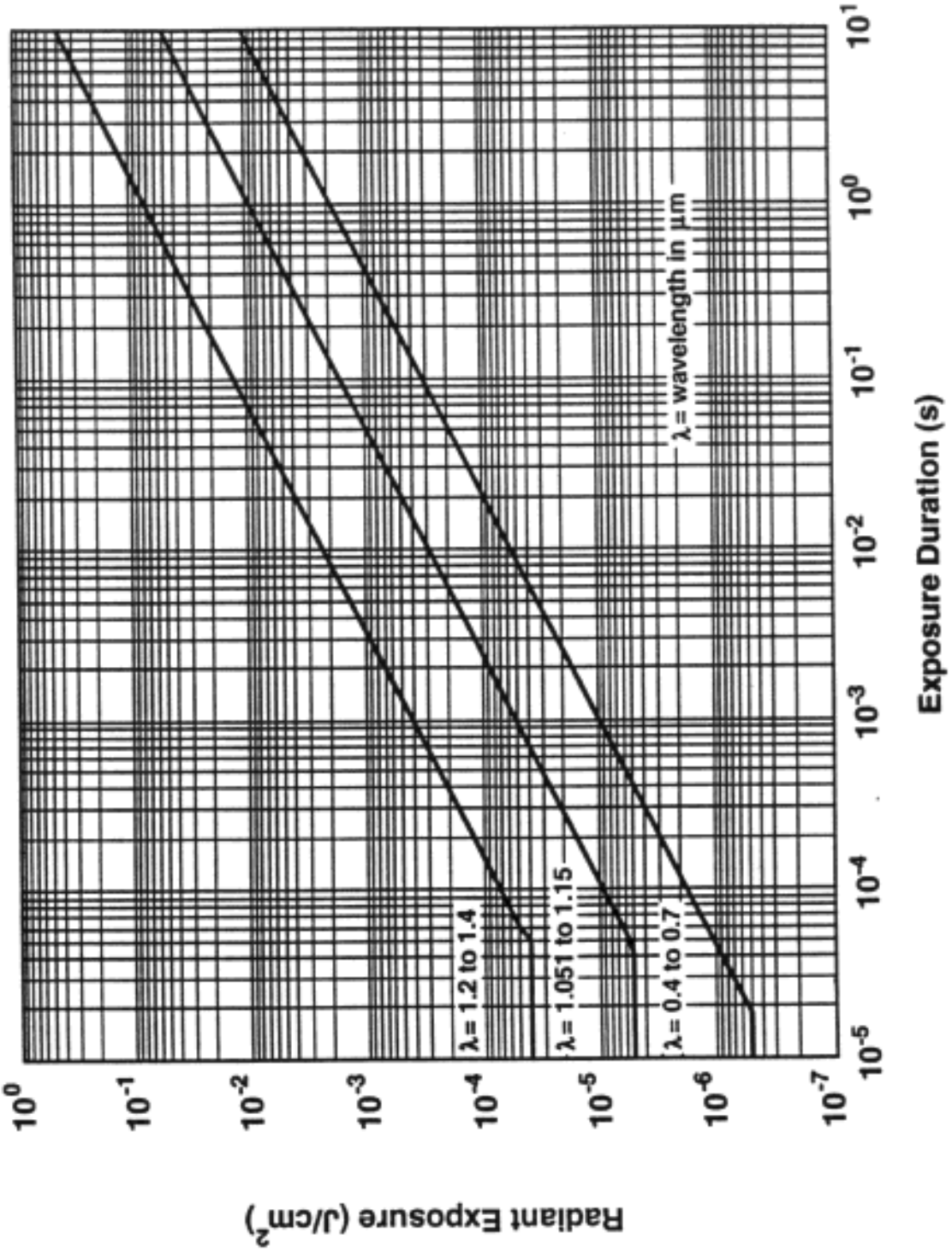

Figure: 25 TAC §289.301(dd)(4)

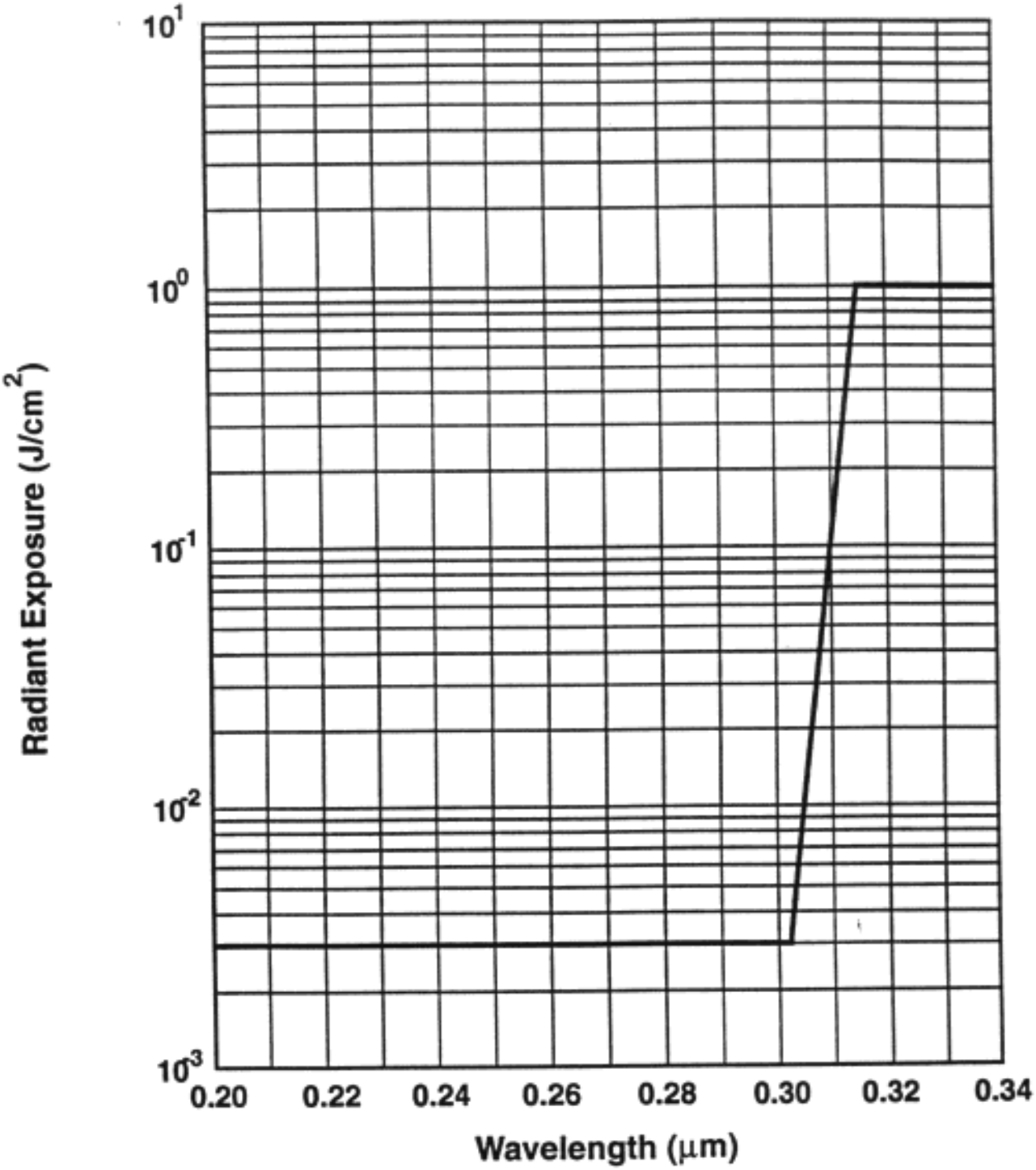

Figure: 25 TAC §289.301(dd)(5)

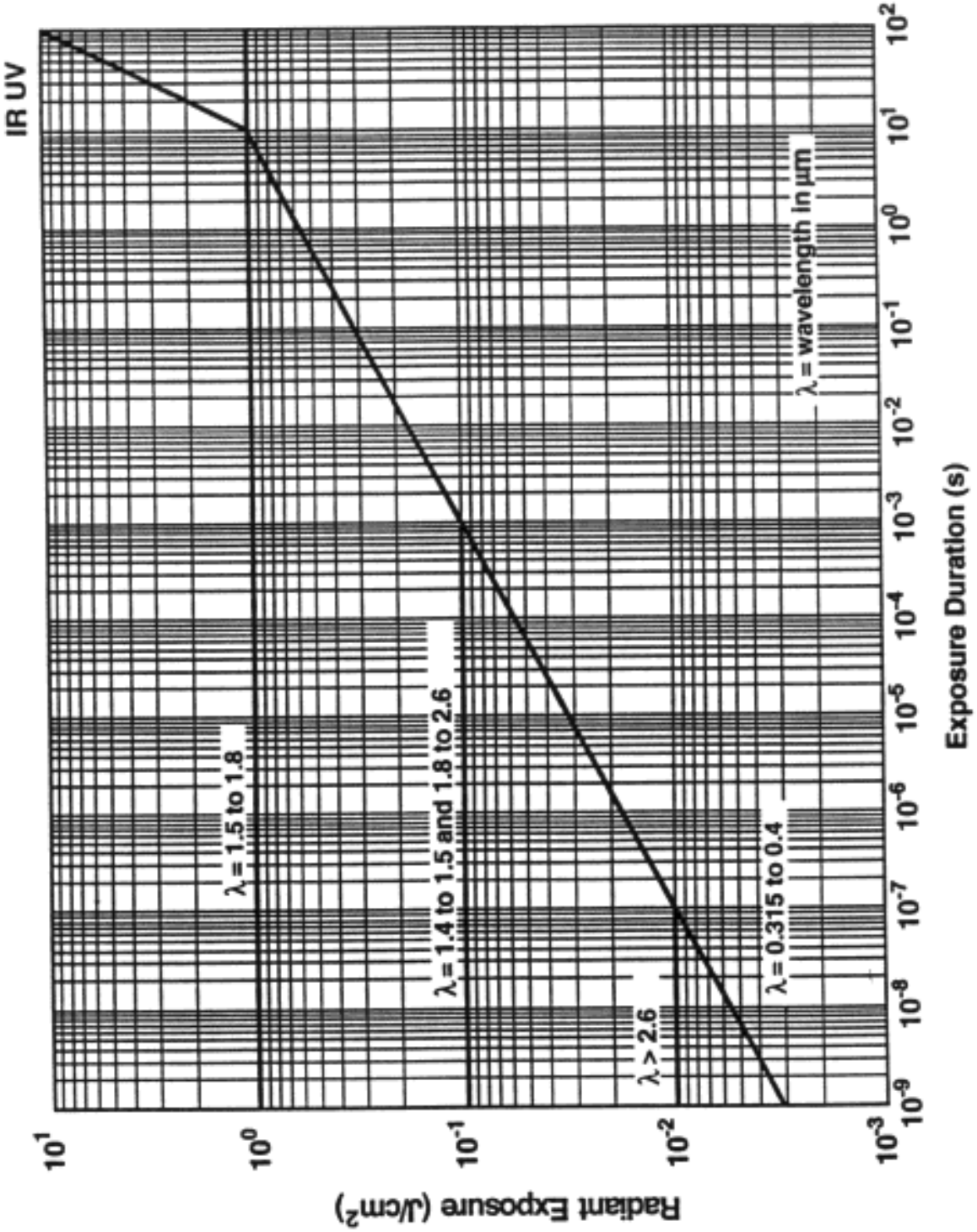

Figure: 25 TAC §289.301(dd)(6)

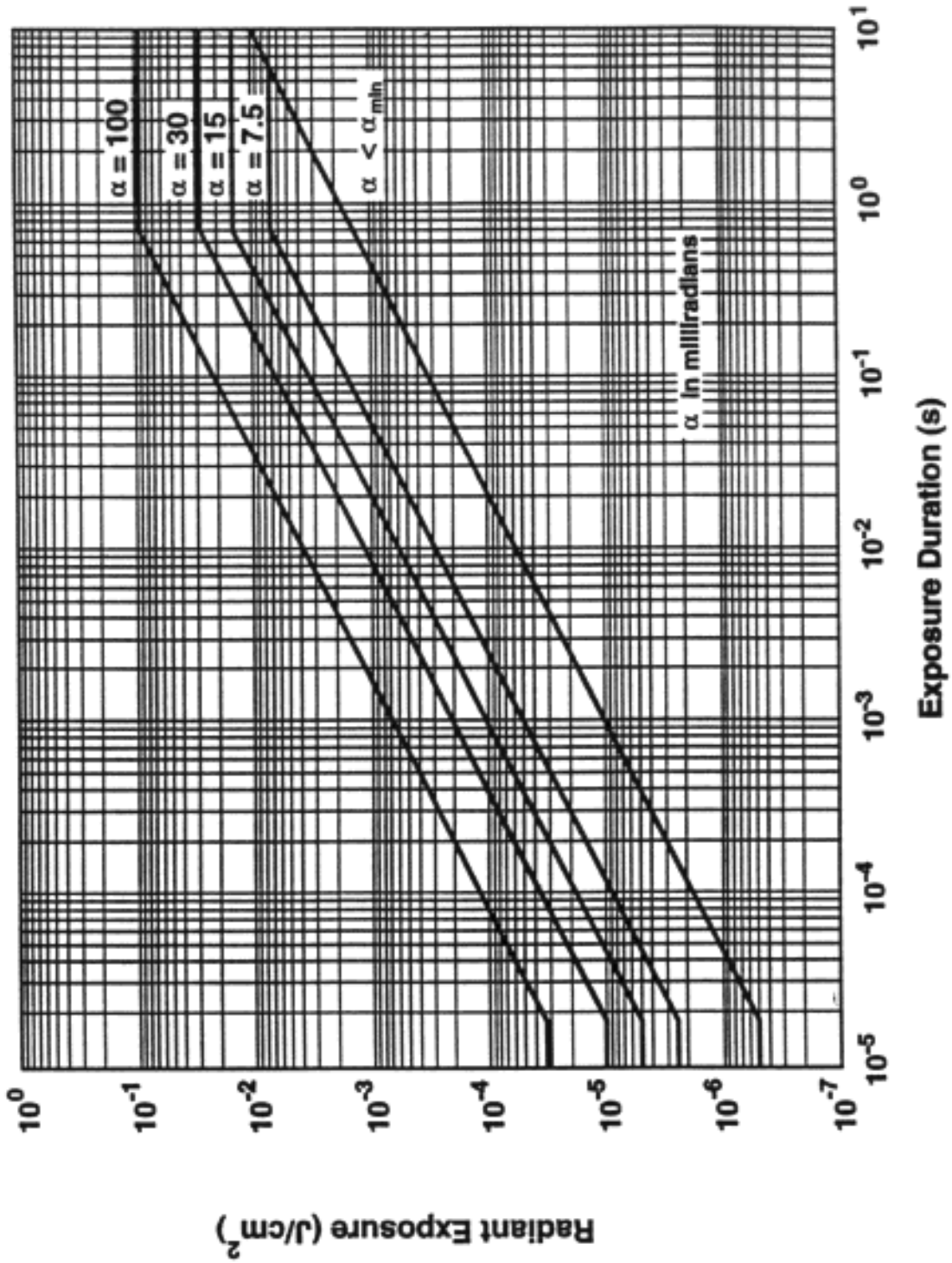

Figure: 25 TAC §289.301(dd)(7)

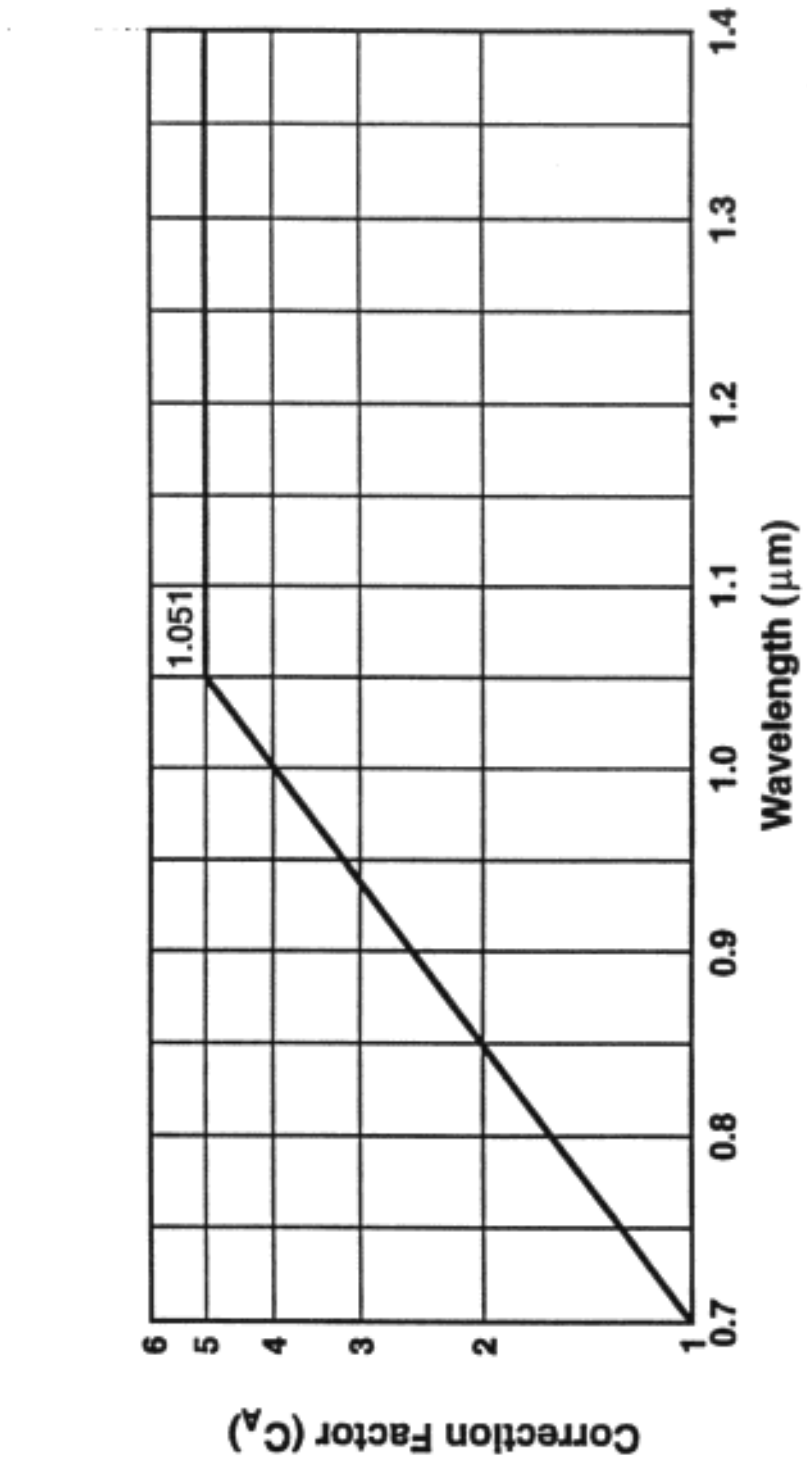

Figure: 25 TAC §289.301(dd)(8)

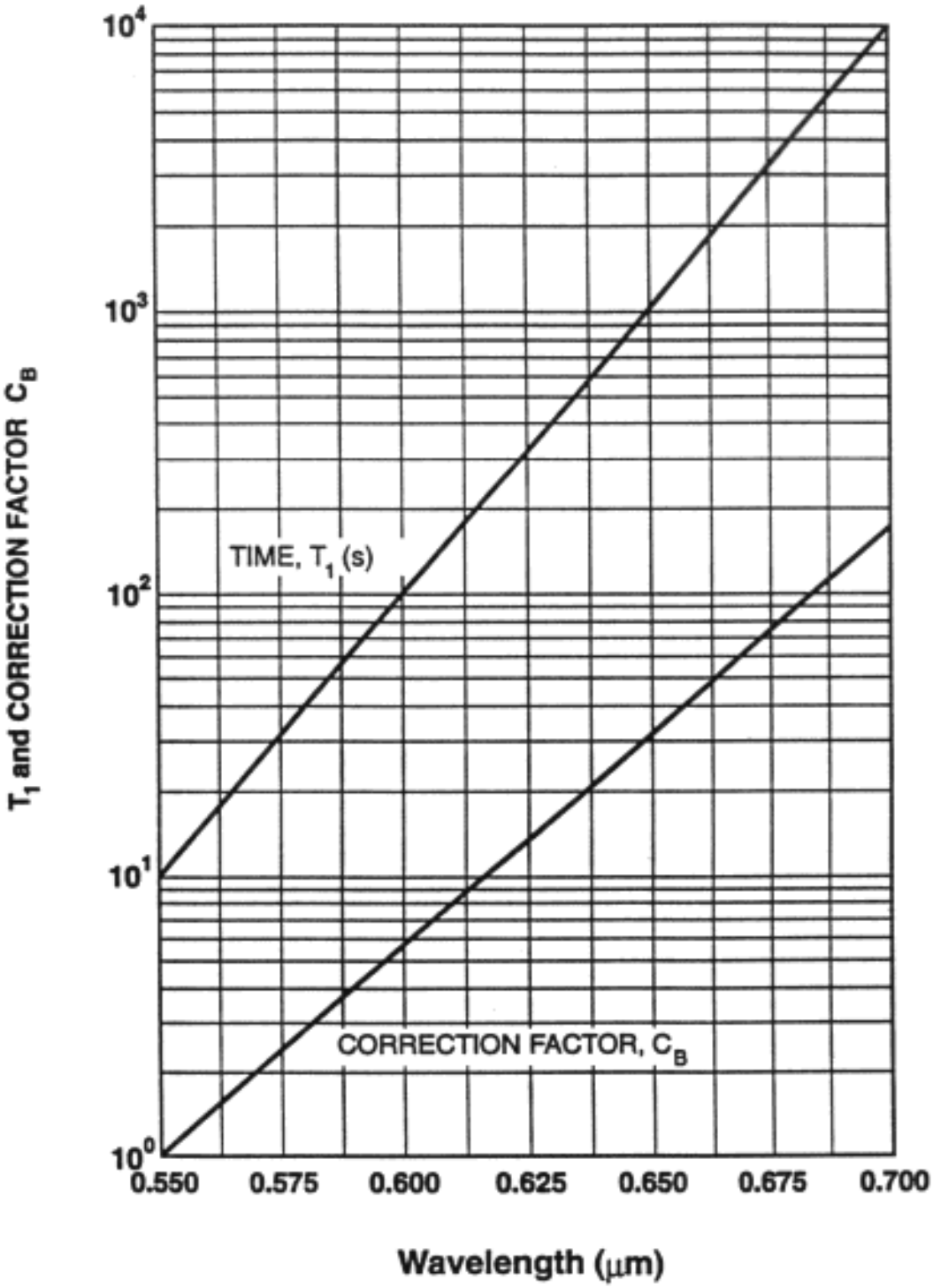

Figure: 25 TAC §289.301(dd)(9)

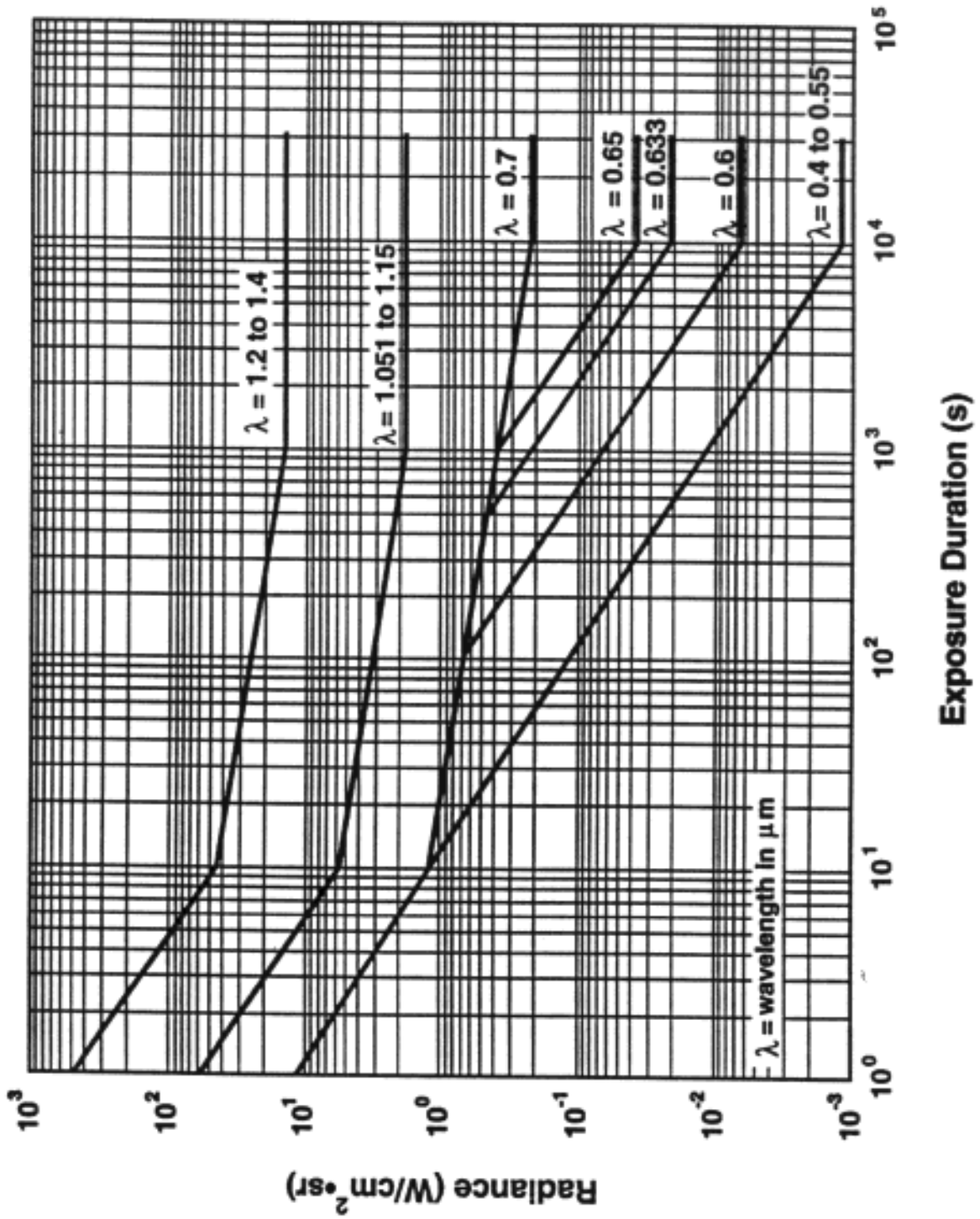

Figure: 25 TAC §289.301(dd)(10)

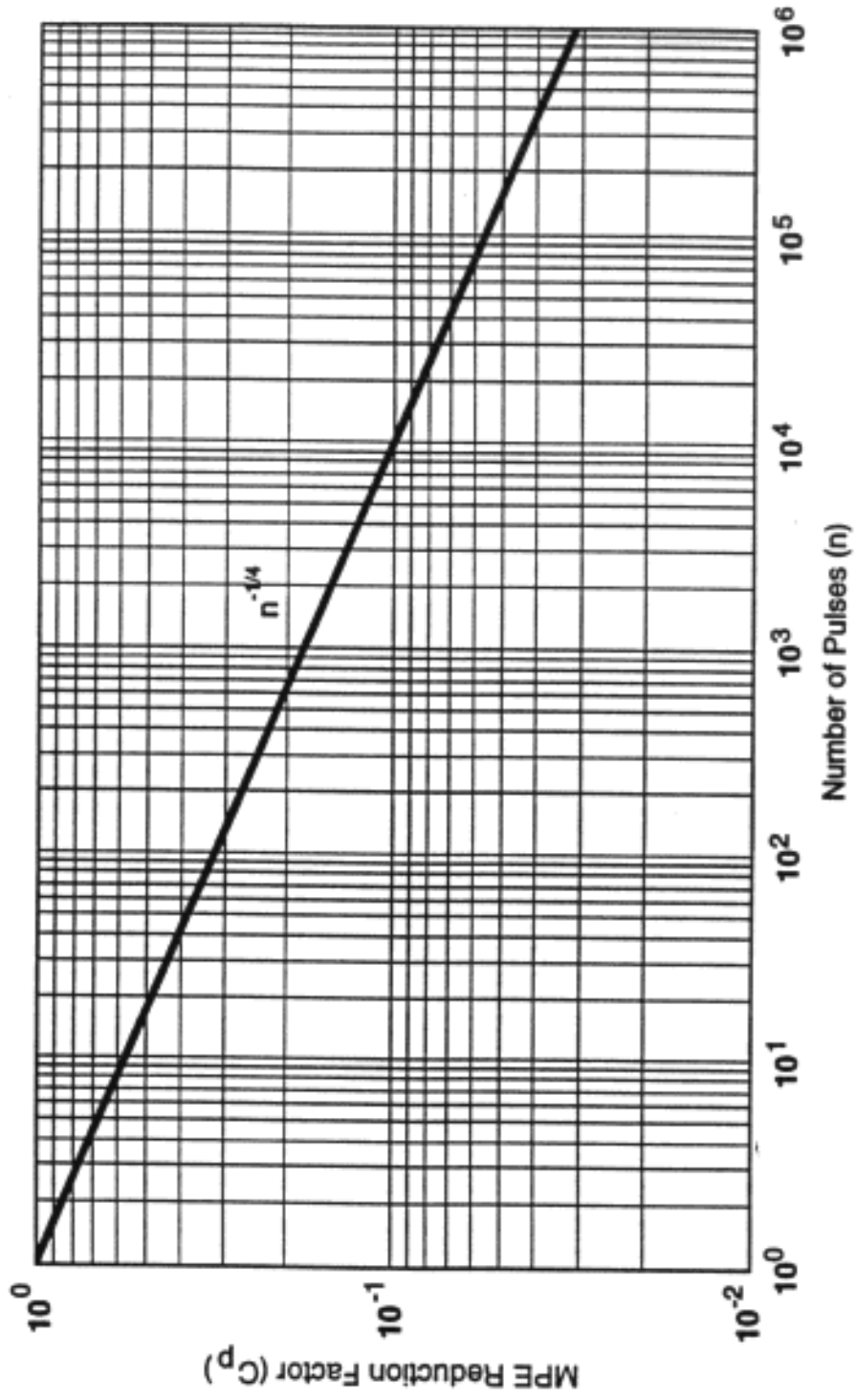

Figure: 25 TAC §289.301(ee)

Specific Subsection	Name of Record	Time Interval Required for Record Keeping
(t)(1)(E)	Eye protection	5 years
(y)	Measurements and instrumentation	5 years
(z)	Notification of injury other than a medical event	5 years
(aa)	Reports of injuries	5 years
(bb)	Medical event	5 years

IN ADDITION

The ***Texas Register*** is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

Texas Commission for the Blind

Town Hall Meetings

The Texas Commission for the Blind will hold a Town Meeting on Friday, March 5, 1999, from 6:00 p.m. until 8:00 pm., at Resource Utilization Network, 1001 West 10th, Amarillo, Texas. The purpose of this Town Meeting is to provide people the opportunity to comment on current agency services. These recommendations and suggestions will be used in agency planning, updating our State Plan, and in improving our services.

Individuals who are unable to attend are invited to send written comments by March 6, 1999, to Glenda Embree, Texas Commission for the Blind, 4800 North Lamar, Suite 220, Austin, Texas 78756. Comments by fax (512-459-2592) and e-mail (glendae@tcb.state.tx.us) are also welcome.

Persons who plan to attend the meeting and will require an interpreter for the deaf or hearing impaired should call 1-800-687-7032 at least three days prior to the meeting so that arrangements may be made.

Additional information about the meeting may be obtained from Glenda Embree, (512) 459-2583.

TRD-9900548
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Filed: January 26, 1999

♦ ♦ ♦

The Texas Commission for the Blind will hold a Town Meeting on Saturday, February 20, 1999, from 10:00 a.m. until noon, at the Criss Cole Rehabilitation Center Auditorium, 4800 North Lamar, Austin, Texas. The purpose of this Town Meeting is to provide people the opportunity to comment on current agency services. These recommendations and suggestions will be used in agency planning, updating our State Plan, and in improving our services.

Individuals who are unable to attend are invited to send written comments by March 6, 1999, to Glenda Embree, Texas Commission for the Blind, 4800 North Lamar, Suite 220, Austin, Texas 78756. Comments by fax (512-459-2592) and e-mail (glendae@tcb.state.tx.us) are also welcome.

Persons who plan to attend the meeting and will require an interpreter for the deaf or hearing impaired should notify Glenda Embree, at (512) 459-2583 at least three days prior to the meeting so that arrangements may be made. Additional information about the meeting may be obtained from Glenda Embree, (512) 459-2583.

TRD-9900547
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Filed: January 26, 1999

♦ ♦ ♦

The Texas Commission for the Blind will hold a Town Meeting on Saturday, March 6, 1999, from 10:00 a.m. until noon, in the Meeting Room of the Godeke Library, 6601 Quaker Avenue, Lubbock, Texas. The purpose of this Town Meeting is to provide people the opportunity to comment on current agency services. These recommendations and suggestions will be used in agency planning, updating our State Plan, and in improving our services.

Individuals who are unable to attend are invited to send written comments by March 6, 1999, to Glenda Embree, Texas Commission for the Blind, 4800 North Lamar, Suite 220, Austin, Texas 78756. Comments by fax (512-459-2592) and e-mail (glendae@tcb.state.tx.us) are also welcome.

Persons who plan to attend the meeting and will require an interpreter for the deaf or hearing impaired should call 1-800-687-7032 at least three days prior to the meeting so that arrangements may be made.

Additional information about the meeting may be obtained from Glenda Embree, (512) 459-2583.

TRD-9900549
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Filed: January 26, 1999

♦ ♦ ♦

State Comptroller of Public Accounts

Correction of Error

The State Comptroller of Public Accounts proposed an amendment to §5.48. The rule was published in the October 2, 1998 issue of the *Texas Register* (23 TexReg 9955).

On page 9960, §5.48(j)(2)(C)(i) contained a new cite "...subsection (c)(1)(F)(iii)...." Only the (c) was underlined as new text. The entire cite should have been underlined.

On page 9960, §5.48(k)(2)(B)(i)(I) contained a new cite "...subsection (c)(2)(C)-(D)...." Only the (c) was underlined as new text. The entire cite should have been underlined.

On page 9960, §5.48(k)(2)(B)(i)(II) contains a new cite "...subsection (c)(2)(E)...." Only the (c) was underlined as new text. The entire cite should have been underlined.

♦ ♦ ♦

Notice of Consultant Contract Award

In accordance with the provisions of Chapter 2254, Subchapter B of the Texas Government Code, the Comptroller of Public announces the notice of a consultant contract award.

The consultant proposal request was published in the October 9, 1998, issue of the *Texas Register* (23 TexReg 10556).

The consultant will assist the Comptroller in reviewing and evaluating the methodologies used in the development of the state's property value study; and will develop recommendations for improving the methodologies.

The contract is awarded to Analytical Systems, Inc., 20 Colony Park Circle, Galveston, Texas 77552. The total dollar value of the contract is not to exceed $25,000.00. The contract was executed on January 25, 1999, and extends through August 31, 1999.

TRD-9900535
David R. Brown
Legal Counsel
Comptroller of Public Accounts
Filed: January 26, 1999

♦ ♦ ♦

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Articles 1D.003, 1D.009, and 1E.003, Title 79, Revised Civil Statutes of Texas, as amended (Articles 5069-1D.003, 1D.009, and 1E.003, Vernon's Texas Civil Statutes).

The weekly ceiling as prescribed by Art. 1D.003 and 1D.009 for the period of 01/25/99 - 01/31/99 is 18% for Consumer [1]/Agricultural/ Commercial [2]/credit thru $250,000.

The weekly ceiling as prescribed by Art. 1D.003 and 1D.009 for the period of 01/25/99 - 01/31/99 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by Art. 1E.003 for the period of 02/01/99 - 02/28/99 is 10% for Consumer/Agricultural/Commercial/ credit thru $250,000.

The judgment ceiling as prescribed by Art. 1E.003 for the period of 02/01/99 - 02/28/99 is 10% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-9900385
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: January 21, 1999

♦ ♦ ♦

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Articles 1D.003, 1D.005 and 1D.009, Title 79, Revised Civil Statutes of Texas, as amended (Articles 5069-1D.003, 1D.005, and 1D.009, Vernon's Texas Civil Statutes).

The weekly ceiling as prescribed by Articles 1D.003 and 1D.009 for the period of 02/01/99 - 02/07/99 is 18% for Consumer [1]/Agricultural/ Commercial [2]/credit thru $250,000.

The weekly ceiling as prescribed by Articles 1D.003 and 1D.009 for the period of 02/01/99 - 02/07/99 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by Articles 1D.005 and 1D.009[3] for the period of 02/01/99 - 02/28/99 is 18% for Consumer/Agricultural/ Commercial/credit thru $250,000.

The monthly ceiling as prescribed by Articles 1D.005 and 1D.009 for the period of 02/01/99 - 02/28/99 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.

[3]For variable rate commercial transactions only.

TRD-9900555
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: January 27, 1999

♦ ♦ ♦

Texas Credit Union Department

Application(s) for a Merger or Consolidation

Notice is given that the following application has been filed with the Texas Credit Union Department and is under consideration:

An application was received from Telco Plus Credit Union (Longview) seeking approval to merge with Bareco Kilgore Federal Credit Union (Kilgore) with Telco Plus Credit Union being the surviving credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-9900557
Harold E. Feeney
Commissioner
Texas Credit Union Department
Filed: January 27, 1999

♦ ♦ ♦

Texas Department of Criminal Justice

Notice of Intent to Issue Request for Offer (RFO)

The Texas Department of Criminal Justice (TDCJ) announces its intent to issue a Request for Offer (RFO) for software and application development and technology implementation, integration and support services for Phase III of TDCJ's Offender Information Management Reengineering Project. TDCJ intends to contract with a single vendor or vendor-formed team to develop and implement an integrated offender information management software, hardware, and network system solution and related technology infrastructure improvements.

TDCJ is committed to a competitive procurement to select the best solution from offers submitted by qualified vendors. Vendors must be certified as a "Qualified Information Systems Vendor" (QISV) by the General Services Commission at the time of submission of an offer. TDCJ is committed to assisting Historically Underutilized Businesses (HUBs) through the contract awards process in order to support economic diversification in the State of Texas.

TDCJ anticipates that the RFO will be issued on or about February 25, 1999, and be available on the Electronic State Business Daily, which may be accessed via the internet at www.marketplace.state.tx.us.

TRD-9900514
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: January 25, 1999

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Texas Education Agency

Correction of Error

The Texas Education Agency proposed an amendment to §161.1003. The rule was published in the December 11, 1998 issue of the *Texas Register* (23 TexReg 12601).

On page 12602, §161.1003(5), the committee name "Computer Network Study Project" is new and should be underlined.

On page 12602, §161.1003 new (6), the committee name "Ed-Flex, State Panel" should not be stricken.

On page 12602, §161.1003 old (6), the committee name "SBOE Texas Essential Knowledge and Skills Review Committe" should be stricken.

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Notice of Proposed Statewide Waivers

The Texas Education Agency (TEA) is considering adoption of proposed statewide waivers under the Education Flexibility Partnership Program (Ed-Flex). The Texas Ed-Flex Committee considered the waivers at its August 31, 1998, meeting.

Pursuant to the Texas Ed-Flex Plan, the following waivers are to be published to elicit public comment. The proposed waivers are under consideration for adoption as applicable to open-enrollment public charter schools in the state that are eligible for funds covered by the commissioner's Ed-Flex waiver authority. If adopted, open-enrollment public charter schools no longer would have to apply to the commissioner of education for these waivers.

Waiver: Statewide administrative waiver for open-enrollment public charter schools for specific approval of certain items.

Provision(s) to be waived: 34 Code of Federal Regulations (CFR), §74.25(c)(6) and §74.27 or §80.22 and §80.30(b), as applicable to open-enrollment public charter schools.

Description of proposed waiver: This waiver will eliminate the need for open-enrollment public charter schools to request specific approval for certain items budgeted in specific class/object codes.

Purpose of or rationale for proposed waiver: This waiver will reduce paperwork and administrative burden associated with application for certain federal funds by open-enrollment public charter schools.

Expected results of proposed waiver: Annual gain in Texas Assessment of Academic Skills (TAAS) reading and mathematics statewide.

Implications of proposed waiver: Open-enrollment public charter schools would have the same benefits already available to other public schools.

Waiver: Statewide administrative waiver for open-enrollment public charter schools for transfer of funds for training.

Provision(s) to be waived: 34 CFR, §74.25(c)(7) or §80.30(c)(1)(iii), as applicable.

Description of proposed waiver: This waiver will eliminate the need for an amendment to transfer funds allotted for training costs as long as the program, as described in the application, remains unchanged.

Purpose of or rationale for proposed waiver: This waiver will reduce paperwork and administrative burden associated with application for certain federal funds by open-enrollment public charter schools. These benefits are already available to other public schools.

Expected results of proposed waiver: Annual gain in TAAS reading and mathematics statewide.

Implications of proposed waiver: Open-enrollment public charter schools would have the same benefits already available to other public schools.

Additional information may be obtained from Madeleine Draeger Manigold, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9077.

TRD-9900559
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: January 27, 1999

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Office of the Governor

Texas Narcotics Control Program Multi-year Statewide Strategy for Drug and Violent Crime Control, 1999 Update and Application

The Texas Narcotics Control Program, Criminal Justice Division (CJD), Office of the Governor, has made application to the United States Bureau of Justice Assistance (BJA) for $32,416,000 in federal funds from the Edward Byrne Memorial Fund for Fiscal Year 1999. This program allows for a funding allocation to Texas to enforce state and locally controlled substance laws and to improve the criminal justice system, with an emphasis on violent, drug, and other serious offenses. The application and *Multi-Year Statewide Strategy for Drug and Violent Crime Control, 1999 Update* are on file at CJD for public review and comment.

The strategy outlines the nature and extent of the current drug and violent crime problem, resource needs and gaps in services, as well as statewide priorities, goals, and objectives.

A copy of the application and strategy may be obtained by writing Robert J. Bodisch, Sr., Director, Texas Narcotics Control Program, Criminal Justice Division, P.O. Box 12428, Austin, Texas 78711, or by calling (512) 463-1806.

Comments on the application and strategy must be submitted in writing to Robert J. Bodisch, Sr., Director, Texas Narcotics Control Program, Criminal Justice Division, P.O. Box 12428, Austin, Texas 78711. Comments must be received no later than 30 days from the date of the publication of this announcement.

TRD-9900506
Stuart Bowen
Deputy General Counsel
Office of the Governor
Filed: January 25, 1999

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Texas Department of Health

Licensing Action for Radioactive Materials

The Texas Department of Health has taken actions regarding licenses for the possession and use of radioactive materials as listed in the table below. The subheading labeled “Location” indicates the city in which the radioactive material may be possessed and/or used. The location listing “Throughout Texas” indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

Licensing Actions for Radioactive Materials

NEW LICENSES ISSUED:

Location	Name	License#	City	Amendment #	Date of Action
Jasper	Numed Imaging Centers Inc	L05202	Jasper	0	01/04/99
San Antonio	Bionumerik Pharmaceuticals Inc	L05226	San Antonio	0	01/08/99
Throughout Texas	Petra Technologies Incorporated	L05233	Houston	0	12/31/98

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License#	City	Amendment #	Date of Action
Alice	Columbia Alice Physicians & Surgeons Hospital	L02390	Alice	21	01/12/99
Arlington	Arlington Cancer Center	L03211	Arlington	52	01/08/99
Arlington	Six Flags Imaging Center Inc	L05109	Arlington	8	01/11/99
Austin	Shivers Cancer Center	L01761	Austin	42	01/06/99
Austin	Robert A Laibovitz MD	L02246	Austin	9	01/13/99
Austin	South Austin Cancer Center	L05108	Austin	1	01/11/99
Brownfield	Brownfield Regional Medical	L02541	Brownfield	16	01/08/99
Dallas	Baylor University Medical Center	L01290	Dallas	46	01/04/99
Dallas	Presbyterian Hospital of Dallas	L01586	Dallas	70	01/11/99
Dallas	Texas Oncology PA-Sammons	L04878	Dallas	10	01/07/99
Denton	International Isotopes Inc.	L04994	Denton	13	01/12/99
Denton	International Isotopes Inc	L05159	Denton	3	01/12/99
El Paso	El Paso Natural Gas Company	L00308	El Paso	33	01/11/99
El Paso	Providence Memorial Hospital	L02353	El Paso	58	01/06/99
El Paso	Open MRI of El Paso	L05207	El Paso	1	01/05/99
Fort Worth	M D Anderson Cancer Network Tarrant County	L00047	Fort Worth	43	01/08/99
Houston	Sperry-Sun a Division of Dresser Industries, Inc	L02603	Houston	46	01/14/99
Houston	METCO	L03018	Houston	81	01/08/99
Houston	Lark Technologies Inc	L04387	Houston	9	01/14/99
Houston	The Womans Hospital of Texas	L04834	Houston	6	01/07/99
Kerrville	Sid Peterson Memorial Hospital	L01722	Kerrville	25	01/12/99
Lubbock	Covenant Medical Center	L00483	Lubbock	103	01/13/99
Lubbock	Covenant Medical Center-Lakeside	L01547	Lubbock	57	01/13/99

Mount Pleasant 01/11/99	Titus County Memorial Hospital	L02921	Mount Pleasant	14
Orange 01/13/99	Bayer Corporation	L00976	Orange	43
Orange 01/04/99	Raytel Nuclear Imaging	L05204	Orange	1
Paris 01/13/99	Paris Regional Cancer Center	L04664	Paris	5
Plano 01/07/99	Medical Center of Plano	L02032	Plano	43
San Antonio 01/13/99	Southwest Texas Methodist Hospital	L00594	San Antonio	135
San Antonio 01/13/99	CTRC Clinical Foundation	L01922	San Antonio	51

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location Date of Action	Name	License#	City	Amendment #
San Antonio 01/12/99	Syncor International Corporation Medical Srvs. Group	L02033	San Antonio	80
San Antonio 01/06/99	Metropolitan Methodist Hospital	L02232	San Antonio	37
San Antonio 01/04/99	Santa Rosa Health Care	L02237	San Antonio	54
South Houston 01/13/99	GCT Inspection Inc	L02378	South Houston	53
Texarkana 01/04/99	Red River Pharmacy Services	L05077	Texarkana	4
The Woodlands 01/08/99	Montgomery County Cardiovascular Association	L05151	The Woodlands	4
ThroughoutTexas 01/11/99	Raba-Kistner Consultants (SW) Inc	L02337	El Paso	19
ThroughoutTexas 01/08/99	Non-Destructive Inspection Corporation	L02712	Lake Jackson	62
ThroughoutTexas 01/11/99	Applied Standards Inspections Inc	L03072	Beaumont	59
ThroughoutTexas 01/11/99	Goolsby Testing Laboratories Inc	L03115	Humble	61
ThroughoutTexas 01/11/99	North Texas Municipal Water District	L03316	Wylie	9
ThroughoutTexas 01/13/99	Global X-ray & Testing Corp.	L03663	Aransas Pass	64
ThroughoutTexas 01/13/99	D-Arrow Inspection Inc	L03816	Houston	59
ThroughoutTexas 01/06/99	Oceaneering International Inc/Solus Schall Division	L04463	Houston	21
ThroughoutTexas 01/11/99	Wilson Inspection X-ray Services Inc	L04469	Corpus Christi	36
ThroughoutTexas 01/11/99	Pitt-Des Moines Inc	L04502	Pittsburg, PA	18
ThroughoutTexas 01/11/99	Patton, Burke & Thompson	L04900	Dallas	2
ThroughoutTexas 01/05/99	Profesional Service Industries Inc	L04947	San Antonio	5
ThroughoutTexas 01/08/99	Texas NDT Company	L05089	Pasadena	2
ThroughoutTexas 01/11/99	Superior Testing Services	L05145	Pasadena	2
Victoria 01/14/99	Hardin Tubular Sales Inc	L05224	Victoria	1
Waco 01/08/99	Providence Health Center	L01638	Waco	42
Wallisville 01/11/99	HP Consulting	L05035	Wallisville	2
Wharton 01/12/99	Wharton Hospital Corporation	L01388	Wharton	35

The Woodlands 01/11/99	Memorial Hospital The Woodlands	L03772	The Woodlands	20

RENEWALS OF EXISTING LICENSES ISSUED:

Date of Location Action	Name	License#	City	Amendment #
Childress 01/11/99	Childress Regional Medical Center	L02784	Childress	21
La Porte 01/11/99	Aristech Chemical Corporation	L02776	La Porte	11
Palestine 01/08/99	Trinity Valley Medical Center	L04157	Palestine	20
Stafford 01/11/99	Durwood Greene Construction Company	L04753	Stafford	4
ThroughoutTexas 01/08/99	TSI Laboratories	L04767	Victoria	3

TERMINATIONS OF LICENSES ISSUED:

Date of Location Action	Name	License#	City	Amendment #
Dallas 01/07/99	Texas Instruments INC	L02981	Dallas	9
El Paso 01/06/99	City of El Paso - Engineering Department	L03922	El Paso	5
Waco 01/06/99	Vantran Electric Corporation	L03477	Waco	4

EXEMPTIONS ISSUED:

Date of Location Action	Name	License#	City	Amendment #
The Woodlands 01/05/99	Geneomedicine Incorporated	L04746	The Woodlands	0

In issuing new licenses and amending and renewing existing licenses, the Texas Department of Health, Bureau of Radiation Control, has determined that the applicants are qualified by reason of training and experience to use the material in question for the purposes requested in accordance with Texas Regulations for Control of Radiation in such a manner as to minimize danger to public health and safety or property and the environment; the applicants' proposed equipment, facilities, and procedures are adequate to minimize danger to public health and safety or property and the environment; the issuance of the license(s) will not be inimical to the health and safety of the public or the environment; and the applicants satisfy any applicable special requirements in the Texas Regulations for Control of Radiation.

This notice affords the opportunity for a hearing on written request of a licensee, applicant, or "person affected" within 30 days of the date of publication of this notice. A "person affected" is defined as a person who is resident of a county, or a county adjacent to the county, in which the radioactive materials are or will be located, including any person who is doing business or who has a legal interest in land in the county or adjacent county, and any local government in the county; and who can demonstrate that he has suffered or will suffer actual injury or economic damage due to emissions of radiation. A licensee, applicant, or "person affected" may request a hearing by writing Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), 1100 West 49th Street, Austin, Texas 78756-3189.

Any request for a hearing must contain the name and address of the person who considers himself affected by Agency action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is represented by an agent, the name and address of the agent must be stated.

Copies of these documents and supporting materials are available for inspection and copying at the office of the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, from 8:00 a.m. to 5:00 p.m. Monday-Friday (except holidays).

TRD-9900399
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: January 22, 1999

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Texas Department of Housing and Community Affairs

Announcement of Public Hearing Schedule for the 1999 State of Texas Low Income Housing Plan and Annual Report

The Texas Department of Housing and Community Affairs (TDHCA) announces the public hearing schedule for the 1999 State of Texas Low Income Housing Plan and Annual Report - Draft for Public Comment . The 31-day comment period begins on January 26th, 1999, and ends at 12:00 p.m. February 25th, 1999. The 1999 State of Texas Low Income Housing Plan and Annual Report - Draft for Public Comment is submitted in compliance with Sections 2306.0721-2306.0723 of the Government Code.

The 1999 State of Texas Low Income Housing Plan and Annual Report - Draft for Public Comment is one of three comprehensive planning documents that TDHCA is required to submit annually. It is the first document of its kind among the states and offers policymakers and housing providers a comprehensive reference on statewide housing need, housing resources, and performance-based funding allocations. The 1999 State of Texas Low Income Housing Plan and Annual Report - Draft for Public Comment serves in the following capacities: provides an overview of statewide housing needs; reports on the approximately 25 programs administered by TDHCA; provides

the TDHCA's housing programs funding levels and performance measures; and reports on the distribution of TDHCA's resources in the previous fiscal year.

Public comment hearings concerning the 1999 State of Texas Low Income Housing Plan and Annual Report - Draft for Public Comment will take place at the following times and locations:

LUBBOCK February 9, 1999, 1:30 p.m., South Plains Association of Governments, 1323 58th Street;

DALLAS February 9, 1999, 6:30 p.m., Dallas Public Library, 1515 Young Street;

HOUSTON February 10, 1999, 10:30 a.m., City Hall Annex Chambers, Public Level, 900 Bagby;

SAN ANTONIO February 10, 1999, 7:00 p.m., City Council Chambers, 114 W. Commerce, Main Plaza;

HARLINGEN February 11, 1999, 6:00 p.m., Harlingen Public Library, 410 76th Drive, 956/430-6650;

TYLER February 11, 1999, 1:00 p.m., City Council Chambers, 212 North Bonner Avenue;

EL PASO February 16, 1999, 6:30 p.m., City Council Chambers, #2 Civic Center Plaza;

AUSTIN February 19, 1999, 1:30 p.m., Texas Department of Housing and Community Affairs Board Room, 507 Sabine, Suite 400.

Copies of the 1999 State of Texas Low Income Housing Plan and Annual Report - Draft for Public Comment will be available January 26, 1999, at the following locations: ABILENE Abilene Public Library, 915/677-2474; ALPINE Sul Ross State University, 915/837-8124; AMARILLO Amarillo Public Library, 806/378-3054; ARLINGTON University of Texas at Arlington, 817/273-3000; AUSTIN Legislative Reference Library, 512/463-1252, Texas State Library, 512/463-5455, University of Texas at Austin, 512/495-4515, University of Texas at Austin Tarlton Law Library, 512/471-7726; BEAUMONT Beaumont Public Library, 409/838-6606, Lamar University, 409/880-8118; BROWNSVILLE University of Texas at Brownsville, 210/544-8220; CANYON West Texas A&M University, 806/651-2205; COLLEGE STATION Texas A&M University, 409/845-8111; COMMERCE Texas A&M University - Commerce, 903/886-5716; CORPUS CHRISTI Corpus Christi Public Library, 512/880-7000; Texas A&M University - Corpus Christi, 512/994-2623; DALLAS Dallas Public Library, 214/670-1400, Southern Methodist University, 214-768-2331; DENTON Texas Woman's University, 940/898-2665, University of North Texas, 940/565-2870; EDINBURG University of Texas - Pan American, 210/381-3306; EL PASO El Paso Public Library, 915/543-5413, University of Texas at El Paso, 915/747-5683; FORT WORTH Fort Worth Public Library, 817/871-7706, Texas Christian University, 817/921-7669; HOUSTON Houston Public Library, 713/247-2700, Rice University, 713/527-4022, Texas Southern University, 713/527-7147, University of Houston, 713/743-9800, University of Houston - Clear Lake, 713/283-3930; HUNTSVILLE Sam Houston State University, 409/294-1613; KINGSVILLE Texas A&M University - Kingsville, 512/595-3416; LAREDO Texas A&M International University, 210/326-2400; LUBBOCK Texas Tech University, 806-742-2261; NACOGDOCHES Stephen F. Austin State University, 409/468-4101; ODESSA Ector County Library , 915/332-6502, University of Texas of the Permian Basin, 915/552-2371; PRAIRIE VIEW Prairie View A&M University, 409/857-2012; RICHARDSON University of Texas at Dallas, 214/883-2950; SAN ANGELO Angelo State University, 915/942-2222; SAN ANTONIO Saint Mary's University, 210/436-3441, San Antonio Central Library, 210/207-2500, Trinity University, 210/736-8121, University of Texas at San Antonio, 210/691-4570; SAN MARCOS Southwest Texas State University, 512/245-2133; STEPHENVILLE Tarleton State University, 817/968-9246; TYLER University of Texas at Tyler, 903/566-7340; VICTORIA University of Houston at Victoria, 512/572-6421: WACO Baylor University, 254/710-1268; WICHITA FALLS Midwestern State University, 817/689-4165 OUT-OF-STATELibrary of Congress, 202/707-5243.

The 1999 State of Texas Low Income Housing Plan and Annual Report - Draft for Public Comment will be available on January 26, 1999. To order, please contact the Texas Department of Housing and Community Affairs, Office of Strategic Planning/Housing Resource Center, P.O. Box 13941, Austin TX, 78711-3941, Phone: (512) 475-4595, Fax: (512) 475-3746, or email at clandry@tdhca.state.tx.us.

Both the public hearing schedule and the 1999 State of Texas Low Income Housing Plan and Annual Report - Draft for Public Comment will be available on TDHCA's website at www.tdhca.state.tx.us.

Written comment is encouraged and should be sent to the Texas Department of Housing and Community Affairs, Office of Strategic Planning/Housing Resource Center, P.O. Box 13941, Austin TX 78711-3941. For more information, please contact the Housing Resource Center at (512) 475-4595.

Individuals who require auxiliary aids or services should contact Gina Arenas, ADA Responsible Employee, at (512) 475-3943, or Relay Texas at 1-800-735-2989, at least two days before the public hearing so that appropriate arrangements can be made.

TRD-9900419
Daisy Stiner
Executive Director
Texas Department of Housing and Community Affairs
Filed: January 22, 1999

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Texas Department of Insurance

Insurer Services

The following applications have been filed with the Texas Department of Insurance and are under consideration:

Application to change the name of SEABOARD LIFE INSURANCE COMPANY (USA) to CENTRIS LIFE INSURANCE COMPANY, a foreign life company. The home office is in Indianapolis, Indiana.

Application to change the name of VASA NORTH ATLANTIC INSURANCE COMPANY to CENTRIS INSURANCE COMPANY, a foreign property and casualty company. The home office is in Indianapolis, Indiana.

Application to change the name of BUSINESS INSURANCE COMPANY to CENTRE INSURANCE COMPANY, a foreign property and casualty company. The home office is in Wilmington, Delaware.

Application to change the name of AUTOMOBILE CLUB INSURANCE COMPANY to AMERICAN COMMERCE INSURANCE COMPANY, a foreign property and casualty company. The home office is in Columbus, Ohio.

Application to change the name of TEXAS COMMUNITY CENTERS MANAGED CARE INC to TEXAS COMMUNITY SOLUTIONS, INC., and to use the assumed name in Texas of COMMUNITY SOLUTIONS, a domestic HMO. The home office is in Austin, Texas.

Application to change the name of GUIDANT LLOYDS INSURANCE COMPANY to GUIDEONE LLOYDS INSURANCE COM-

PANY, a foreign Lloyds company. The home office is in West Des Moines, Iowa.

Application to change the name of GUIDANT LIFE INSURANCE COMPANY to GUIDEONE LIFE INSURANCE COMPANY, a foreign life company. The home office is in West Des Moines, Iowa.

Application to change the name of GUIDANT ELITE INSURANCE COMPANY to GUIDEONE ELITE INSURANCE COMPANY, a foreign property and casualty company. The home office is in West Des Moines, Iowa.

Application to change the name of GUIDANT SPECIALTY MUTUAL INSURANCE COMPANY to GUIDEONE SPECIALTY MUTUAL INSURANCE COMPANY, a foreign mutual property and casualty company. The home office is in West Des Moines, Iowa.

Application to change the name of GUIDANT MUTUAL INSURANCE COMPANY to GUIDEONE MUTUAL INSURANCE COMPANY, a foreign mutual property and casualty company. The home office is in West Des Moines, Iowa.

Any objections must be filed within 20 days after this notice was filed with the Texas Department of Insurance, addressed to the attention of Kathy Wilcox, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-9900558
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: January 27, 1999

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Texas Natural Resource Conservation Commission

Additional Notice of an Application to Appropriate Public Waters of The State of Texas

Notice was issued on January 26, 1999, on Application Number 5259 (TNRCC Docket Number 95-1339-WR; SOAH Docket Number 582-95-1161). THE PUBLIC UTILITIES BOARD OF BROWNSVILLE (the applicant) is seeking a permit to construct a to construct a dam (weir) and reservoir on the Rio Grande approximately four miles southeast of Brownsville, Texas. The portion of the proposed dam in the United States will be in Cameron County , Texas. The proposed reservoir will have a normal maximum operating capacity of 6,000 acre-feet with a surface area of 545 acres. The purpose and extent of the proposed appropriation will be to impound up to 6,000 acre-feet of water for storage.

Water Use Permit Application Number 5259 is currently pending in the State Office of Administrative Hearings. The applicant has amended the application and conducted additional hydrology and environmental studies, which require public notice of the amended application.

The application was originally submitted by the Rio Grande Valley Municipal Water Authority and the Public Utilities Board of Brownsville on August 11, 1989, and was filed with the Commission on November 10, 1989. At that time, the application included a request to construct and maintain the referenced dam (weir) and reservoir on the Rio Grande and a request to divert and use not to exceed a total of 205,000 acre-feet of water per annum for municipal purposes from the proposed reservoir and from the United States's share of water in the existing Anzalduas Reservoir on the Rio Grande approximately 15.4 miles southeast of Edinburg, Texas. The amended application, for which this additional notice is issued, requests authorization to construct the dam (weir) and impound up to 6,000 acre-feet of water.

Water Use Permit Application Number 5259 has now been amended such that it no longer requests a right to divert and use water from Anzalduas Reservoir and it no longer requests a right to divert and use water from the perimeter of the proposed reservoir (Brownsville pool). However, diversion points authorized under existing water rights owned by the applicant will be in the pool created by the reservoir. In addition, the Rio Grande Valley Municipal Water Authority has been deleted as co-applicant.

Previous Public Notices from the Commission concerning this application dated December 1, 1989; December 6, 1990 and July 16, 1992 have been issued. Subsequent to these notices, the application was forwarded to the State Office of Hearings Examiners.

The pending hearing on the application at the State Office of Administrative Hearings will resume after completion of a technical assessment of the revised application by the Executive Director, but no sooner than 30 days after newspaper publication of this notice. If you are not currently a party to the hearing and would like to request party status, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the applicant and the permit number; (3) the statement "I/we request party status for the hearing for this application;" (4) a brief description of how you would be adversely affected by the granting of the application in a way not common to the general public; and (5) the location of your property relative to the applicant's operations.

Requests for party status on this application must be submitted in writing during the 30-day notice period to the Chief Clerk's Office, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. Written public comments may also be submitted to the Chief Clerk's Office during the notice period. For information concerning technical aspects of the permit, contact Kariann Sokulsky or Terry Slade, MC 160, at the same P. O. Box address above. For information concerning hearing procedures or citizen participation, contact Blas Coy, Public Interest Counsel, MC 103, at the same P. O. Box address above. Individual members of the public who wish to inquire about the information contained in this notice, or to inquire about other agency permit applications or permitting processes, should call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040.

TRD-9900570
LaDonna Castanuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: January 27, 1999

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Applications for Concentrated Animal Feeding Operation Permits

The following notices were issued during the period of January 7, 1999 through January 21, 1999. No discharge of pollutants into the waters of the state is authorized by these permits. All waste and wastewater will be beneficially used on agricultural land.

Written public comments and requests for public meetings may be submitted to the Office of the Chief Clerk, at the address provided in the information section below, within 30 days of the issue date of the notice. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will

be held if the Executive Director determines that there is a significant degree of public interest in the application.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, contact the Public Interest Counsel, MC 103, the same address. For additional information, please contact the Office of Public Assistance, Toll Free, at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

Listed are the names of the applicants, the type of application (new permit, amendment, or renewal), the permit number, the type of facility, and the location of the facility.

FABIAN ALMEIDA, Route 9, Box 170, Cleburne, Texas 76031, for an amendment to TPDES Permit Number 03337 to authorize the applicant to expand an existing dairy operation from a maximum capacity of 500 head to 990 head in Johnson County, Texas. The existing facility is located approximately one mile north on Farm-to-Market Road 2331 from its intersection with State Highway 67 in Johnson County, Texas. The facility is located in the drainage area of Lake Pat Cleburne in Segment Number 1228 of the Brazos River Basin.

DAR ANDERSON, Route 1, Box 160, Dublin, Texas 76446; for an amendment to TPDES Permit Number 03279 to authorize the applicant to expand an existing operation from a maximum capacity of 990 head to 1,500 head in Comanche County, Texas. The existing facility is located on an unnamed county road approximately four miles southwest of the intersection of Farm-to-Market Road 2823 and Farm-to-Market Road 1702. The dairy is located in Comanche and Erath Counties. The facility is located in the drainage area of Leon River in Segment Number 1221 of the Brazos River Basin.

AZTX CATTLE CO., LTD, P. O. Box 215, Farwell, Texas 79325; for an amendment to TPDES Permit Number 01665 to authorize the applicant to expand an existing beef cattle operation from a maximum capacity of 29,500 head to 50,000 head in Parmer County, Texas. The existing facility is located one and one-half miles south of Farwell on the east side of State Line Road in Parmer County, Texas. The facility is located in the drainage area of Double Mountain Fork Brazos River in Segment Number 1241 of the Brazos River Basin.

CATTLAC FEEDERS, INC., HC Route 2, Box 48, Hart, Texas 79043; for an amendment to TPDES Number 01631 to authorize the applicant to expand an existing beef cattle operation from a maximum capacity of 7,500 head to 30,000 head in Castro County, Texas. The existing facility is located on an unnamed county road approximately two miles west of the intersection of the unnamed county road and Farm-to-Market Road 1055; this intersection is approximately four miles south of the intersection of Farm-to-Market Road 1055 and State Highway 86 and approximately eight miles southwest of the City of Dimmitt in Castro County, Texas. The facility is located in the drainage area of Running Water Creek In Segment Number 1240 of the Brazos River Basin.

DUMAS CATTLE FEEDERS INC., HCR 1 Box 96A, Dumas, Texas 79029; for renewal of TPDES Permit Number 01532 to authorize the applicant to operate an existing beef cattle operation at a maximum capacity of 35,000 head in Moore County, Texas. The existing facility is located on the west side of U.S. Highway 287, at the intersection of U.S. Highway 287 and Farm-to-Market Road 119 in Moore County, Texas. The facility is located in the drainage area of South Palo Duro Creek, which flows into Palo Duro Creek, which flows in the State of Oklahoma without entering a Classified Segment. Therefore, the facility is in Segment Number 0100 of the Canadian River Basin.

FEATHER CREST FARMS, INC., P. O. Box 129, Kurten, Texas 77862; for an amendment to TPDES Permit Number 02345 to authorize the applicant to operate an existing poultry/egg layer operation at a maximum capacity of 550,000 head in Brazos County, Texas. The existing facility is located on the east side of State Highway 21, approximately one mile northeast of the intersection of State Highway 21 and Farm-to-Market Road 2038 in Brazos County, Texas, on the east side of State Highway 21, approximately one mile northeast of the intersection of State Highway 21 and Farm-to-Market Road 2038 in Brazos County, Texas. The facility is located in the drainage area of the Navasota River below Lake Limestone in Segment Number 1209 of the Brazos River Basin.

CHESTER J. KESEY, P. O. Box 718, Pecos, Texas 79772; for renewal of TPDES Permit Number 01828 to authorize the applicant to operate an existing dairy operation at a maximum capacity of 750 head in Reeves County, Texas. The existing facility is located approximately .25 mile west of Farm-to-Market Road 869 on an unnamed county road at a point approximately 4 miles northeast of the intersection of Farm-to-Market Road 869 and State Highway 17, in Reeves County, Texas. The facility is located in the drainage area of the upper Pecos River in Segment Number 2311 of the Rio Grande River Basin.

NOVICE CATTLE COMPANY, INC., DON BROOKS, AND FRANK BARRETT, Route 4, Box 101, Hereford, Texas 79045; for a new TPDES Permit Number 04016 to authorize the applicant to operate an existing beef cattle operation at a maximum capacity of 4,000 head in Deaf Smith County, Texas. The existing facility is located on the west side of U.S. Highway 385, approximately 17 miles north of the City of Hereford in Deaf Smith County, Texas. The facility is located in the drainage area of Upper Prairie Dog Town Fork Red River in Segment Number 0229 of the Red River Basin.

RAFTER O CATTLE, INC., HCR 3, Box 63, Canadian, Texas 79014; for renewal of TPDES Permit Number 03588 to authorize the applicant to operate an existing beef cattle operation at a maximum capacity of 1700 head in Lipscomb County, Texas. The existing facility is located on the north side of an unnamed county road approximately 1/8 mile east of its intersection with Farm-to-Market Road 1920. The facility is located approximately 13 miles south-southwest of the community of Lipscomb in Lipscomb County, Texas. The facility is located in the drainage area of Wolf Creek in Segment Number 0104 of the Canadian River Basin.

SOUTHERN LIVESTOCK, INC., P. O. Box 1717, Gonzales, Texas 78629; for a new TPDES Permit Number 03970 to authorize the applicant to operate an existing beef cattle operation at a maximum capacity of 4,000 head in Gonzales County, Texas. The existing facility is located on the west side of Farm-to-Market Road 2091 approximately three miles north of the intersection of Farm-to-Market Road 2091 and U.S. Highway 90A in Gonzales County. The facility is located in the drainage area of the Lower San Marcos River in Segment Number 1808 of the Guadalupe River Basin.

KLAAS TALSMA, Route 1, Box 212-B, Hico, Texas 76457; for an amendment of TPDES Permit Number 03145 to authorize the applicant to expand from a maximum capacity of 1,400 head to 1,900 head in Erath County, Texas. The existing facility is located on the south side of an unnamed county road approximately eight miles southeast of the intersection of U.S. Highway 281 and U.S. Highway 67 and four miles north of the Community of Duffau in Erath County, Texas. The facility is located in the drainage area of the North Bosque River in Segment Number 1226 of the Brazos River Basin.

PAUL VAN LEEUWEN, 698 Private Road 1012, Dublin, Texas 76446 and HARRY VAN KRANENBERG, Route 4, Box 185d, Dublin, Texas 76446; for a new Permit Number 04024 to authorize the applicant to operate an existing dairy operation at a maximum capacity of 990 head in Erath County, Texas. The existing facility is located on the west side of Farm-to-Market Road 219 approximately 3 miles south of the intersection of Farm-to-Market Road 8 and Farm-to-Market Road 219 in the community of Lingleville, Erath County, Texas. The facility is located in the drainage area of the Leon River below Proctor Lake in Segment Number 1223 of the Brazos River Basin.

CLAYTON WILLIAMS, JR., P. O. Box 1668, Fort Stockton, Texas 79735; For a renewal of TPDES Permit Number 03534 to authorize the applicant to operate an existing beef cattle operation at a maximum capacity of 6,000 head in Pecos County, Texas. The existing facility is located 3.7 miles south of the intersection of Interstate Highway 10 and Ranch Road 1037 and 3.2 miles west of Ranch Road 2037 on an unnamed county road. The facility is approximately 11 miles west-southwest of the City of Fort Stockton in Pecos County, Texas. The facility is located in the drainage area of Upper Pecos River in Segment Number 2311 of the Rio Grande River Basin.

The following require the applicants to publish notice in the newspaper. The public comment period and/or requests for public meetings may be submitted to the Office of the Chief Clerk, at the address provided in the information section below, within 30 days after newspaper publication of the notice.

CROW HOLLOW, L.L.C., formerly Hedley Cattle Feeders, Route 2, Box 94, Hedley, Texas 79237; for an amendment to TPDES Permit Number 03621 to authorize the applicant to expand an existing beef cattle operation from a maximum capacity of 15,500 to 25,000 head in Donley County, Texas. The existing facility is located on a county road just south of U.S. Highway 287, approximately 2.1 miles west of Hedley and approximately 12 miles southeast of Clarendon, in Donley County, Texas. The facility is located in the drainage area of Salt Fork Creek in Segment Number 0222 of the Red River Basin.

CODY RAY ELLIOTT AND SHARON SUE JONES, AND COMSTOCK CATTLE CORP, P. O. Box 33352, Amarillo, Texas 79129; for renewal of TPDES Permit Number 03509 to authorize the applicant to operate an existing beef cattle operation at a maximum capacity of 2,600 head in Potter County, Texas. The existing facility is located on the south side of Farm-to-Market Road 1912 approximately one mile east of the intersection of Farm-to-Market Road 1912 and State Highway 136 in Potter County, Texas. The facility is located in the drainage area of the North Fork of the Red River in Segment Number 0224 of the Red River Basin.

DANNY SCHENK, P.O. Box 129, Scotland, Texas 76379; for a new Permit Number 04047 to authorize the applicant to operate an existing dairy operation at a maximum capacity of 600 head in Archer County, Texas. The existing facility is located one mile east on Farm-to-Market Road 172 from its intersection with U.S. Highway 281 in Scotland, Texas. Then, 0.75 miles north on Old Windthorst Road in Archer County, Texas. The facility is located in the drainage area of Lake Arrowhead in Segment Number 0212 of the Red River Basin.

TAMMINGA FAMILY PARTNERSHIP, LTD, and FRI-TEX DAIRY, INC, P. O. Box 1069, Waxachie, Texas 75168; For an amendment to TPDES Permit Number 02714 to authorize the applicants to expand an existing dairy operation from a maximum capacity of the current 850 head to 1,530 head in Ellis County, Texas. The existing facility is located on Hoyt Road approximately one mile north of its intersection with FM 1446, which is located 5 miles west of the intersection of IH-35e and FM 1446. The facility is located approximately 6 miles west of Waxahachie off FM 1446 in Ellis County, Texas. The facility is located in the drainage area of Lake Waxahachie in Segment Number 0816 of the Trinity River Basin.

TRD-9900567
LaDonna Castanuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: January 27, 1999

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Applications for Industrial Hazardous Waste Permits/Compliance Plans and Underground Injection Control Permits

Attached are Notices of Applications issued during the period of December 14, 1998 thru January 21, 1998.

The Executive Director will issue these permits unless one or more persons file written protests and/or a request for a hearing within 45 days (unless otherwise noted) after newspaper publication of the notice.

To request a hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the applicant and the permit number; (3) the statement "I/we request a public hearing;" (4) a brief description of how you would be adversely affected by the granting of the application in a way not common to the general public; (5) the location of your property relative to the applicant's operations; and (6) your proposed adjustments to the application/permit which would satisfy your concerns and cause you to withdraw your request for hearing.

Information concerning any aspect of these applications may be obtained by contacting the Texas Natural Resource Conservation Commission, Chief Clerks Office-MC105, P.O. Box 13087, Austin, Texas 78711. Individual members of the public who wish to inquire about the information contained in this notice, or to inquire about other agency permit applications or permitting processes, should call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040.

Listed are the name of the applicant and the city in which the facility is located, type of facility, location of the facility, type of application (new permit, amendment, renewal) and permit number.

SOUTHWESTERN REFINING COMPANY, INC., 123 Robert S. Kerr Avenue, Oklahoma City, Oklahoma 73125, a closed Land Treatment Facility, has applied for a renewal/major amendment of the hazardous waste Permit Number HW-50075-001 which authorizes closure and post-closure care. The facility is located at the intersection of Nueces County Roads 61 and 28 near Robstown, Nueces County, Texas.

NID, L.P. (NID), 26462 Wilber Road, Winnie, Texas 77565, a commercial facility processing, storing and disposing of nonhazardous industrial wastes, has applied for proposed nonhazardous waste permit no. SW-39098 and proposed waste disposal well permit nos. WDW-344, WDW-345, WDW-346, WDW-347, WDW-348, WDW-349, WDW-350 to store and process non hazardous waste and to dispose of the waste via waste disposal well injection. The NID facility is located at 26462 Wilber Road, Winnie, Texas 77565 and the waste disposal wells are located in the Stephen Eaton A-22 survey, in Jefferson County, Texas (30 days from date of newpaper publication).

DIAMOND SHAMROCK REFINING COMPANY, L.P., (Three Rivers Refinery), 301 Leroy Street, Three Rivers, Live Oak County,

Texas 78071, an oil refinery that produces gasoline, has applied for renewal of hazardous waste permit HW-50100 which authorizes post-closure care for the South Equalization Pond, and renewal/major amendment of compliance plan CP-50100. The renewal requires continued corrective action and groundwater monitoring at the North Equalization Basin. The major amendment would add compliance monitoring at four out-of-service wastewater impoundments (Ponds 1-4), corrective action at the closed South Equalization Pond and stabilization/interim corrective measures at two sumps, to the existing compliance plan.

UNION CARBIDE CORPORATION, 3301 Fifth Avenue South, Texas City, Galveston County, Texas 77592, a chemical manufacturing facility, has applied for a major amendment to Compliance Plan CP-50242 which would authorize a modification to the ground-water recovery and monitoring systems at the In-Plant Disposal Area and the Lake Rosie Waste Management Unit.

ASARCO Incorporated, P.O. Box 30200, Amarillo, Texas 79120-0200 has filed for renewal and major amendment to an Underground Injection Control (UIC) Well Permit No. WDW-273. The ASARCO facility is located 8 miles northeast of Amarillo on Highway 136 in Potter County. The applicant currently operates an electrolytic refinery for the production of copper and associated by-products. The disposal well is used to dispose of treated hazardous and nonhazardous wastes generated on-site.

TICONA POLYMERS, INC., P.O. Box 428, Texas 78343, a chemical manufacturing facility, has applied for a major amendment to Compliance Plan CP-50123 which would authorize changes to the ground-water protection standards and monitoring frequency and parameters under a Compliance Monitoring Program. The facility is located on 1,379 acre tract of land in Nueces County, one mile south of Bishop on Highway 77.

TRD-9900565
LaDonna Castanuela
Acting Chief Clerk
Texas Natural Resource Conservation Commission
Filed: January 27, 1999

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Texas Natural Resource Conservation Commission

Extension of Deadline for Written Comments

In the January 1, 1999, issue of the *Texas Register*, the Texas Natural Resource Conservation Commission (commission) published proposed revisions to Chapter 114, concerning cleaner gasoline rules and to Chapter 115, concerning Stage I vapor recovery rules along with a notice of public hearings to be held regarding these revisions. The preambles to the rules and the hearing notice stated that hearings were scheduled for January 25 and 26, 1999 with the comment period for written comments ending on February 1, 1999.

After considering requests from the public for an extension, the commission has decided to extend the deadline for receipt of written comments until 5:00 p.m., February 15, 1999.

Comments should be submitted to Heather Evans, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 98028-115-AI and 98058-114-AI. For further information, please contact Bill Jordan, Air Policy and Regulations Division, (512) 239-2583, or Eddie Mack, Air Policy and Regulations Division, (512) 239-1488.

All comments at the hearings, as well as written comments received by 5:00 p.m. February 15, 1999 will be considered by the commission prior to any final decision on the proposal.

TRD-9900560
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: January 27, 1999

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Notice of Application and Notice of Administrative Completeness on the Application for Standby Fees, Impact Fees, District Conversions, or District Creations

The following notice was issued on January 19, 1999:

LILLY GROVE WATER SUPPLY CORPORATION has petitioned for conversion to a Special Utility District and transfer of Certificate of Convenience and Necessity Number 11010 from Lilly Grove Water Supply Corporation to Lilly Grove Special Utility District, pursuant to Article XVI, Section 59, of the Texas Constitution, Chapter 65 of the Texas Water Code, and 30 Texas Administrative Code, Chapter 293. The proposed District is located within the corporate city limits of the city of Nacogdoches, and wholly within Nacogdoches County, Texas, and would encompass approximately 23,000 acres.

If a written hearing request is not filed during the 30-day comment period, which extends from the day after the date of the second newspaper publication, the Executive Director may approve the above application. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the applicant and the TNRCC Internal Control Number; (3) the statement "I/we request a public hearing"; and (4) a brief description of how you would be adversely affected by the granting of the request in a way not common to the general public. You may also submit your proposed adjustments to the application which would satisfy your concerns.

If a hearing request is filed, the Executive Director will not approve the application and may forward the application and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, contact the Public Interest Counsel, MC-103, at the same above PO Box address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-9900569
LaDonna Castanuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: January 27, 1999

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Notice Of Application For Municipal Solid Waste Management Facility Permit

For The Period of January 15, 1999 to January 22, 1999

The City of Lamesa, 601 South 1st Street, Lamesa, Texas, 79331, has applied to amend existing Permit No. MSW-517 (Proposed Permit No. MSW-517A) to store, process, and dispose of municipal solid waste, brush & construction demolition waste, and rubbish in a Type I portion and a Type IVAE portion of the site. The site is a 107.01 acre site which contains 45.07 acres that are presently filled and closed, 2.01 acres that are presently filled and will be closed, and 59.93 acres that are to be used for the disposal operations. This amendment will upgrade the Type I operation from an arid exempt landfill operation to a Subtitle "D" landfill operation and will designate a Type IVAE (arid exempt) area to the site. There is no lateral expansion or vertical expansion proposed with this application. The site is approximately one mile south of the intersection of FM-827 and US-87 on Court C Street in Lamesa, Dawson County, Texas. If granted, the applicant would be authorized to dispose of: (1) municipal solid waste resulting from or incidental to residential, community, commercial, institutional, agricultural, and recreational activities, including garbage, rubbish, brush, and street cleanings; (2) municipal solid waste resulting from construction or demolition projects; and (3) and special wastes that are properly identified. The facility would be authorized to operate from 7:00 am to 7:00 pm on any day of the week.

If you wish to request a public hearing, you must submit your request in writing. You must state (1) your name, mailing address and daytime phone number; (2) the application number, TNRCC docket number or other recognizable reference to the application; (3) the statement I/we request an evidentiary public hearing; (4) a brief description of how you, or the persons you represent, would be adversely affected by the granting of the application; and (5) a description of the location of your property relative to the applicant's operations.

Requests for a public hearing or questions concerning procedures should be submitted in writing to the Chief Clerk's Office, Park 35 TNRCC Complex, Building F, Room 1101, Texas Natural Resource Conservation Commission, Mail Code 105, P.O. Box 13087, Austin, Texas 78711. Individual members of the public who wish to inquire about the information contained in this notice, or to inquire about other agency permit applications or permitting processes, should call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040.

TRD-9900566
LaDonna Castanuela
Acting Chief Clerk
Texas Natural Resource Conservation Commission
Filed: January 27, 1999

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Default Orders. The TNRCC Staff proposes a Default Order 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 EDPR. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the TNRCC pursuant to the Texas Water Code, §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 **March 7, 1999**. The TNRCC will consider any written comments received and the TNRCC may withdraw or withhold approval of a Default Order if a comment discloses facts or considerations that indicate that the proposed Default Orders is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's jurisdiction, or the TNRCC's orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed Default Order is not required to be published if those changes are made in response to written comments.

A copy of the proposed Default Orders is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Written comments about the Default Order should be sent to the attorney designated for the Default Order at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on March 7, 1999.** Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the Default Orders and/or the comment procedure at the listed phone number; however, comments on the Default Order should be submitted to the TNRCC in **writing.**

(1)COMPANY: Charlie Palmer; DOCKET NUMBER: 97-0419-LII-E; ENFORCEMENT ID NUMBER: 12717; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: landscaping business; RULES VIOLATED: 30 TAC §344.70 by failing to comply with an El Paso local ordinance which prohibits persons from installing landscape irrigation systems unless they are licensed; Texas Water Code, §34.007(a) by acting as a licensed irrigator or installer without holding a certificate of registration issued by the TNRCC; 30 TAC §344.75(a) by failing to properly install a required backflow prevention device on a low hazard irrigation system; PENALTY: $2,620; STAFF ATTORNEY: Cecily Small Gooch, Litigation Division, MC R-4, (817) 469-6750; REGIONAL OFFICE: 7500 Viscount Boulevard, Suite 147, El Paso, Texas 79925-5633, (915) 778-9634.

(2)COMPANY: Douglas Bowser dba Bowser's Auto Body; DOCKET NUMBER: 98-0008-AIR- E; TNRCC ID NUMBER: TA-3554-T; LOCATION: River Oaks, Tarrant County, Texas; TYPE OF FACILITY: automotive repair and refinishing shop; RULES VIOLATED: 30 TAC §116.110(a) by operating without a permit or satisfying the conditions for standard exceptions; 30 TAC §115.422(1)(A) by failing to utilize an approved equipment cleaner; PENALTY: $750; STAFF ATTORNEY: Lisa Z. Hernandez, Litigation Division, MC 175, (512) 239-0612; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas, 76010-6499, (817) 469-6750.

(3)COMPANY: Robert Webb; DOCKET NUMBER: 96-0266-AGR-E; ENFORCEMENT ID NUMBER: 9556; LOCATION: Dallas County, Texas; TYPE OF FACILITY: concentrated animal feeding operation; RULES VIOLATED: 30 TAC §§321.33(e), 321.35, 321.36, 321.37, and Texas Water Code, §26.121 by failing to locate, construct, and manage waste control facilities to protect surface and ground waters; PENALTY: $2,240; STAFF ATTORNEY: Lisa Z. Hernandez, Litigation Division, MC 175, (512) 239-0612; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas, 76010-6499, (817) 469-6750.

(4)COMPANY: Ernest Romo; DOCKET NUMBER: 97-0423 LII-E; ENFORCEMENT ID NUMBER: 12480; LOCATION: Cypress, Harris County, Texas; TYPE OF FACILITY: landscape irrigation op-

eration, and installed a landscape irrigation system; RULES VIOLATED: Texas Water Code, §34.007 by soliciting business, preparing a proposal for a landscape irrigation system, and finalizing the sale of the system and corresponding equipment without holding a license to install such system; PENALTY: $1,250; STAFF ATTORNEY: Kara Salmanson, Litigation Division, MC 175, (512) 239-1738; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5)COMPANY: David Ray dba D and R Design; DOCKET NUMBER: 98-0266-AIR-E; TNRCC ID NUMBER: FG-0551-I; LOCATION: 2638 5th Street #10, Stafford, Fort Bend County; TYPE OF FACILITY: automotive repair and refinishing shop; RULES VIOLATED: 30 TAC §116.110(a) and Texas Health and Safety Code, §382.085(b) and §382.0518(a) by operating an automotive repair and refinishing shop without first obtaining permit authorization or satisfying the conditions of an exemption; PENALTY: $3,000; STAFF ATTORNEY: William Puplampu, Litigation Division, MC 175, (512) 239-0677; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(6)COMPANY: Willis Reed Distributing Company, Incorporated; DOCKET NUMBER: 98- 0915-PST-E; ENFORCEMENT ID NUMBER: 12639; LOCATION: Nacogdoches County, Texas; TYPE OF FACILITY: underground storage tanks; RULES VIOLATED: 30 TAC §334.54(d)(1)(B) by failing to remove from service the two underground storage tanks at Facility ID Number 5887 which had temporarily been removed from service in 1995; 30 TAC §334.22(a) by failing to pay facility fees for underground storage Facility ID Numbers 5881, 5883, 5884, 5887, 5888 and 5889, due annually from 1987 through 1997; 30 TAC §334.7(d)(1)(B) and §334.7(d)(3) by failing to provide a written update to the commission for Facility ID Number 5881 and Facility ID Number 5888 (regarding update of underground storage tank status and name of facility) and for Facility ID Number 5887 (regarding update of change of status from commercial to residential status); 30 TAC §334.55(a)(9) by failing to properly remove from service underground storage tanks abandoned in place prior the effective date of the regulation (September 29, 1989) as follows: one underground storage tank at Facility ID Number 5880; two underground storage tanks at Facility ID Number 5885, PENALTY: $3,000; STAFF ATTORNEY: William Puplampu, Litigation Division, MC 175, (512) 239-0677; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110 Beaumont, Texas 77703-1892, (409) 898-3838.

(7)COMPANY: Victor Simek; DOCKET NUMBER: 1998-0373-OSI-E; ENFORCEMENT ID NUMBER: 12217; LOCATION: Falls County, Texas; TYPE OF FACILITY: on-site sewage facility installer; RULES VIOLATED: 30 TAC §285.58(a)(3) and Texas Health and Safety Code, §366.054 by beginning construction of an on-site sewage facility without a permit; Texas Health and Safety Code, § 366.054, by beginning construction of an on-site sewage facility without first notifying the TNRCC of the construction start date; 30 TAC §285.32(a)(1)(A) and Texas Health and Safety Code, §366.004, by installing an on-site sewage facility which does not meet the minimum state standards; 30 TAC §285.30 by failing to perform a site evaluation prior to construction of an on-site sewage facility; 30 TAC §285.58(a)(11) by installing an on-site sewage facility without calling to obtain an inspection from the TNRCC; PENALTY: $1,375; STAFF ATTORNEY: Tracy L. Harrison, Litigation Division, MC 175, (512) 239-1736; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

TRD-9900550

Paul C. Sarahan

Director, Litigation Division

Texas Natural Resource Conservation Commission

Filed: January 27, 1999

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to the Texas Water Code, §7.075. Section 7.705 requires that before the TNRCC may approve the AOs, the TNRCC 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* not later than the 30th day before the date on which the public comment period closes, which in this case is **March 7, 1999**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withdraw or hold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's Orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed AOs is not required to be published if those changes are made in response to written comments.

A copy of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Written comments about the AOs should be sent to the attorney designated for the AO at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on March 7, 1999.** Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the AOs and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing**.

(1)COMPANY: Odell Geer Construction Company, Incorporated; DOCKET NUMBER: 98- 0078-AIR-E; TNRCC ID NUMBER: BF-0057-I; LOCATION: Belton, Bell County, Texas; TYPE OF FACILITY: hot mix asphalt plant; RULES VIOLATED: 30 TAC §116.115(a), Permit Number 5645, Special Condition Number 1 and the Texas Health and Safety Code, §382.085(b) by exceeding the Plant's permitted production rate of 80,000 tons per year; PENALTY: $4,500; STAFF ATTORNEY: Lisa Z. Hernandez, Litigation Division, MC 175, (512) 239-0612; REGIONAL OFFICE: 6801 Sanger Avenue Suite 2500, Waco, Texas 76710-7807, (254) 751-0335.

(2)COMPANY: Joseph Endari; DOCKET NUMBERS: 98-0773-PST-E and 98-0774-PST-E; TNRCC ID NUMBERS: 0026694 and 006513; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: retail sale of gasoline; RULES VIOLATED: 30 TAC §115.242(9) and Texas Health and Safety Code, §382.085(b) by failing to post operating instructions conspicuously on the front of each dispenser equipped with a Stage II vapor recovery system, as documented during TNRCC inspections conducted on March 27, 1998 and April 30, 1998; 30 TAC §115.244, §115.246(6), and Texas Health and Safety Code, §382.085(b) by failing to conduct daily inspections and to maintain a daily inspection log, as documented during TNRCC inspections conducted on January 5, 1996, March 27, 1998, and April 30, 1998; 30 TAC §115.245(2), §115.246(5), and Texas Health and Safety Code, §382.085(b) by failing to conduct the required annual pressure decay test and to provide the TNRCC with a record of the results of such test, as documented during TNRCC inspections conducted on January 5, 1996, March 27, 1998, and April

30, 1998; 30 TAC §334.54(d)(1)(B) by failing to properly upgrade or permanently remove from service two underground storage tanks which have been temporarily out of service for longer than 12 months, as documented during TNRCC inspections conducted on March 20, 1995, August 13, 1997, and March 11, 1998; PENALTY: $8,125; STAFF ATTORNEY: Cecily Small Gooch, Litigation Division, MC R-4, (817) 469-6750; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(3)COMPANY: The City of Port Arthur; DOCKET NUMBER: 98-0261-MWD-E; TNRCC ID NUMBERS: 10364-001 and 10364-002; LOCATION: Jefferson County, Texas; TYPE OF FACILITY: main wastewater treatment plant; RULES VIOLATED: Texas Water Code, §26.121 by failing to repair or replace deteriorating lines in its collection system; Texas Water Code, §26.121 by exceeding its daily average flow limitation for the Facilities; TNRCC Permit Number 10364-001 by exceeding its daily average copper loading limit of 0.770 pounds/day; Texas Health and Safety Code, §341.041 by failing to pay public health service fees; PENALTY: $56,250; STAFF ATTORNEY: Booker Harrison, Litigation Division, MC 175, (512) 239-4113; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(4)COMPANY: North Hunt Water Supply Corporation; DOCKET NUMBER: 98-0500-PWS-E; TNRCC ID NUMBER: 1160039; LOCATION: near the City of Commerce, Hunt County, Texas; TYPE OF FACILITY: public drinking water system; RULE VIOLATED: 30 TAC §290.41(c)(1)(F) by failing to secure a sanitary easement for its well; 30 TAC §290.42(e)(7) by failing to properly ventilate its chlorination facilities; 30 TAC §290.45(f)(5) by failing to secure a sufficient purchase water contract with the City of Commerce; 30 TAC§290.45(b)(1)(D)(v) by failing to install an emergency power source; 30 TAC §290.45(b)(1)(F) by failing to provide proper service pump capacity; 30 TAC §290.45(b)(1)(D)(iv) by failing to provide proper pressure tank capacity; in violation of 30 TAC §290.41(c)(3)(M) by failing to provide a suitable sampling tap on the well discharge line; 30 TAC §290.43(c)(2) by failing to provide a proper roof hatch on the ground storage tank; PENALTY: $6,845; STAFF ATTORNEY: John Peeler, Litigation Division, MC 175, (512) 239-3506; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas, 76010- 6499, (817) 469-6750.

(5)COMPANY: Arthur Hernandez dba Central Texas Utility Services and Consulting; DOCKET NUMBER: 98-0314-UCR-E; ENF ID NUMBER: 12334; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: certified operator; RULES VIOLATED: 30 TAC §325.9(a) by failing to submit a report to the executive director within one year and 30 days after the issuance or renewal of his certificate, listing every wastewater treatment facility he operated during the calendar year as well as the present year as documented on February 17, 1998; PENALTY: $1,000; STAFF ATTORNEY: William Puplampu, Litigation Division, MC 175, (512) 239-0677; REGIONAL OFFICE: 1921 Cedar Bend, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(6)COMPANY: Mahard Egg Farm, Incorporated; DOCKET NUMBER: 98-0115-AGR-E; TNRCC ID NUMBER: 12123; LOCATION: Denton County, Texas; TYPE OF FACILITY: commercial caged egg laying; RULES VIOLATED: 30 TAC Chapter 321, Subchapter B, §321.33(d)(6) by operating a caged layer facility, confining more than 30,000 chickens and using a liquid waste handling system, without a permit; PENALTY: $7,000; STAFF ATTORNEY: Hodgson Eckel, Litigation Division, MC 175, (512) 239-2195; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(7)COMPANY: Jerry Daviss; DOCKET NUMBER: 96-0856-LII-E; TNRCC ID NUMBER: 5867; LOCATION: Midland, Midland County, Texas; TYPE OF FACILITY: landscape irrigation operation; RULES VIOLATED: Texas Water Code, §34.007 by installing a landscape irrigation system without obtaining a valid certificate of registration; 30 TAC §344.301 by failing to comply with local inspection requirements, and by failing to obtain a permit, as required by local regulations; 30 TAC §344.306(a) by failing to connect the irrigation system to the water supply with a proper backflow prevention device; PENALTY: $2,000; STAFF ATTORNEY: Ali Abazari, Litigation Division, MC 175, (512) 239-5915; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5421, (915) 570-1359.

TRD-9900551
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: January 27, 1999

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Notice of Water Quality Applications

The following notices were issued during the period of January 7, 1999 through January 22, 1999:

Written comments and requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section below, within 30 days of the date issue date of the notice. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application.

Written comments and requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information below. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application. Written comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, Texas 78711-3087. For additional information, please contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

Listed are the names of the applicants, the type of application (new permit, amendment, or renewal), the permit number, the type of facility, and the location of the facility.

TOWN OF BAYSIDE, P. O. Box 194, Bayside, Texas 78340-0194, for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 13892-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 64,200 gallons per day. The plant site is located between Autry Road and Vega Road approximately 1.1 miles southwest of the intersection of 3rd Street and State Route 136 in Refugio County, Texas.

CITY OF BLANCO, P.O. Box 750, Blanco, Texas 78606; for a major amendment to Permit Number 10549-002 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 147,000 gallons per day to a daily average flow not to exceed 225,000 gallons per day. The proposed amendment requests to add 24 acres to the effluent land application site. The current permit also authorizes the disposal of treated domestic wastewater

via irrigation of 44 acres. Issuance of the proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 10549-002 will replace the existing NPDES Permit Number TX0054623 issued on April 9, 1993 and TNRCC Permit Number 10549-002 issued on January 08, 1996. The plant site is located approximately 0.8 mile northeast of the intersection of U.S. Highway 281 and Farm-to-Market Road 1623 in Blanco County, Texas.

BRUNI RURAL WATER SUPPLY CORPORATION, P.O. Box 97, Bruni, Texas 78344; for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 13924-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 62,500 gallons per day. The proposed permit would also authorize a portion of the treated domestic wastewater to be directed to a single 8.2-acre ballfield/playground for disposal by subsurface drip irrigation. The plant site is located at the east end of 16th Street, approximately one mile northeast of the intersection of State Highway 359 and Farm-to-Market Road 2050 in the community of Bruni in Webb County, Texas.

HAMSHIRE-FANNETT INDEPENDENT SCHOOL DISTRICT, P.O. Box 223, Hamshire, Texas 77622-0223; for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 12098-003, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 56,000 gallons per day. The plant site is located approximately 0.6 miles north of Hamshire High School; 6,200 feet southeast of Interstate Highway 10 crossing of South Fork of Taylor Bayou; 7,500 feet east-southeast of the intersection of Interstate Highway 10 and W. Hamshire Road in Jefferson County, Texas.

KOPPERL INDEPENDENT SCHOOL DISTRICT, P.O. Box 67, Kopperl, Texas 76652; for a new permit, Proposed Permit Number 13982-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 12,000 gallons per day. The plant site is located at 101 Fifth Street approximately 1800 feet east-northeast of the intersection of Farm-to-Market Road 56 and the Burlington Northern/Santa Fe Railroad in the Town of Kopperl, Bosque County, Texas.

LAKEWAY MUNICIPAL UTILITY DISTRICT, 1097 Lohmans Crossing, Austin, Texas 78734; for a major amendment to TNRCC Permit Number 11495-003 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 105,000 gallons per day to a daily average flow not to exceed 170,000 gallons per day. The applicant requests a change in the method of disposal of wastewater from a discharge into waters in the state to disposal by irrigation. The applicant also requests authorization to increase the acreage irrigated with treated domestic wastewater from 105 acres to 117 acres and to have less stringent effluent limitations for the no-discharge final phase. Issuance of the proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 11495-003 will replace the existing NPDES Permit Number TX0053724 issued on and TNRCC Permit Number 11495-003 issued on October 22, 1993. The plant site is located approximately 2.0 miles northwest of the intersection of Ranch Road 620 and Lohmans Crossing Road in Travis County, Texas.

City of Nome, P.O. Box D, Nome, Texas 77629; for a Major Amendment to Permit Number 11564-001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 100,000 gallons per day to daily average flow not to exceed 150,000 gallons per day. The plant site is located adjacent to Cotton Creek and at the intersection of 3rd Street and Cotton Creek, and approximately 0.5 mile north of the City of Nome in Jefferson County, Texas.

WALTER JOSEPH SAUDER, SAN MIGUEL SPRINGS WATER CO., 128 H.M. Roundtree, San Antonio, Texas 78233; for a new permit, Proposed Permit Number 13923-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 80,000 gallons per day. The plant site is located approximately one and one-half (1.5) miles south of the intersection of Farm-to-Market Road 758 and State Highway 46 in Guadalupe County, Texas.

SILVERLEAF RESORTS, INC., 1221 Riverbend Drive, Suite 120, Dallas, Texas 75221; for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 13915-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 160,000 gallons per day. The plant site is located approximately 450 feet south and 550 feet east of the intersection of State Highway 306 and North Lake Drive in Comal County, Texas.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, P.O. Box 4011, Huntsville, Texas 77342, for a major amendment to TNRCC Permit Number 10878-001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 540,000 gallons per day to a daily average flow not to exceed 900,000 gallons per day. The current permit authorizes the land application of sewage sludge for beneficial use on 40 acres. The proposed amendment also requests the removal of the authorization for the permittee to land apply sludge on property owned, leased or under the direct control of the permittee. Issuance of the proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 10878-001 will replace the existing NPDES Permit Number TX0031569 issued on April 17, 1987 and TNRCC Permit Number 10878-001 issued on February 19, 1993. The plant site is located outside the northwest corner of the security compound of the Clemens Unit, approximately 0.5 mile north of the intersection of State Highway 36 and Farm-to-Market Road 2004, and approximately 5.0 miles southeast of the City of Brazoria in Brazoria County, Texas.

CITY OF TOMBALL, 401 W. Market, Tomball, Texas 77373; for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 10616-002, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 1,500,000 gallons per day. The plant site is located south of Holderrieth Road approximately 2,100 feet north of Willow Creek and approximately 4,300 feet east of the intersection of State Highway 249 and Holderrieth Road in Harris County, Texas.

TRINITY RURAL WATER SUPPLY CORPORATION, P.O. Box 709, Trinity, Texas 75862; for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 13950-001, to authorize the discharge of treated water treatment plant filter backwash wastewater at a daily average flow not to exceed 900 gallons per day. The plant site is located on the east side of Farm-to-Market Road 355, approximately 4.5 miles south of the City of Groveton in Trinity County, Texas.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, at the address provided in the information section below, *WITHIN 30 DAYS AFTER NEWSPAPER PUBLICATION OF THE NOTICE*.

CITY OF FATE, P.O. Box 31, Fate, Texas 75132-0031; for a new permit, Proposed Permit Number 11077-002, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The plant site is located

approximately 1,000 feet east of the intersection of State Highway 66 and Farm-to-Market Road 55 in Rockwall County, Texas.

FIGURE FOUR PARTNERS, LTD., P.O. Box 34306, Houston, Texas 77234; for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 13951-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day. The plant site is located approximately 4200 feet west of Harlem Road and 7200 feet south of Mortin Road in Fort Bend County, Texas.

CITY OF GUNTER, P.O. Box 349, Gunter, Texas 75058; for a major amendment to TNRCC Permit Number 10569-001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 154,000 gallons per day to a daily average flow not to exceed 240,000 gallons per day. Issuance of the proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 10569-001 will replace the existing NPDES Permit Number TX0027227 issued on March 3, 1995 and TNRCC Permit Number 10569-001 issued on December 5, 1994. The plant site is located adjacent to the St. Louis-San Francisco and Texas Railway, approximately 2,300 feet west of State Highway 289 and approximately 1,400 feet north of Farm-to-Market Road 121 in the City of Gunter in Grayson County, Texas.

TAMMI SUZANNE LOCKHART, 731 Dell Dale, Channelview, Texas 77530; for a new Texas Pollutant Discharge Elimination System (TPDES) permit (TPDES Permit Number 04039) to authorize the discharge of barge cleaning wastewater at a daily average flow not to exceed 10,000 gallons per day via Outfall 001. The applicant proposes to operate Eastside Marine Services, a facility which cleans and repairs barges. The plant site is located at 17848 Woodleigh, at the intersection of Market Street and Woodleigh, approximately 0.5 miles east of the intersection of Monmouth Drive and Interstate Highway 10, Harris County, Texas.

CITY OF MARQUEZ, P.O. Box 85, Marquez, Texas 77865; for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 13980-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The plant site is located approximately 3,900 feet southeast of the intersection of U.S. Highway 79 and State Highway 7 in Leon County, Texas.

NATURAL GAS ODORIZING, INC., P.O. Box 1429, Baytown, Texas 77522-1429; for a major amendment with renewal to TNRCC Permit Number 01385 to authorize an increase in the discharge of treated domestic wastewater, cooling tower blowdown, boiler blowdown, demineralizer blowdown, storm water runoff, and once-through cooling water from a daily average flow not to exceed 25,000 gallons per day to a daily average flow not to exceed 29,000 gallons per day via Outfall 001 and to remove all requirements associated with the Storm Water Diversion Project, including items 4 and 5 in the Other Requirements section of the existing TNRCC permit. The current permit authorizes the discharge of treated domestic wastewater, cooling tower blowdown, boiler blowdown, demineralizer blowdown, storm water runoff, and once-through cooling water which will remain the same. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit Number TX0007790 issued on May 24, 1979 and TNRCC Permit Number 01385. The applicant operates a chemical manufacturing plant. The plant site is located at 3601 Decker Drive in the City of Baytown, Harris County, Texas.

PORT ISABEL - SAN BENITO NAVIGATION DISTRICT, 250 Industrial Drive, Port Isabel, Texas 78578; for a new permit, Proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 03942, to authorize the discharge of treated bilge water at a daily average flow not to exceed 500 gallons per day via Outfall 001 The applicant proposes to operate a bilge water reclamation facility. The plant site is located adjacent to Industrial Drive at the intersection of Industrial Drive and South Point Road at the port of Port Isabel, Cameron County, Texas.

CITY OF PYOTE, P.O. Box 137, Pyote, Texas 79777-0137; for a new permit, Proposed Permit Number 13986-001, to authorize the disposal of treated domestic wastewater at an interim phase daily average flow not to exceed 11,000 gallons per day via irrigation of 6.52 acres of land and a final phase daily average flow not to exceed 22,000 gallons per day via irrigation of 13.04 acres of land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facilities and disposal site are located between South. Highway 80 (Business Interstate Route 20) and Interstate Highway 20, approximately 500 feet east of the intersection of Rogers Street (State Highway 115) and U.S. Highway 80 (Business Interstate Route 20) in Ward County, Texas.

CITY OF RHOME, P. O. Box 228, Rhome, Texas 76078, for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 10701-002, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day. The plant site is located approximately 150 feet east of the intersection of County Road 4651 and Oates Branch in Wise County, Texas.

TRAMMELL CROW HOUSTON, LTD., 1310 Post Oak Blvd., Suite 1800, Houston, Texas 77056-3022; for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 13996-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 49,800 gallons per day. The plant site is located approximately 0.2 mile northwest of the intersection of Fairbanks-North Houston Road and West Little York Road and approximately 0.65 mile northwest of the intersection of U.S. Highway 290 and Fairbanks-North Houston Road in Harris County, Texas.

TRD-9900568
LaDonna Castanuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: January 27, 1999

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Provisionally-Issued Temporary Permits to Appropriate State Water

Listed below are permits issued January 22, 1999.

Temporary Permit Number TP-8059 by Hunter Industries, Inc for diversion of 3 acre-foot in a 1 year period for industrial (road construction) use. Water may be diverted from Doe Run Creek a Tributary of the Brazos River, Brazos River Basin, approximately 17 miles northeast of Brenham and 4 mile southeasterly of Washington, Washington County, Texas where Doe Run Creek crosses the right-of-way of County Road 1155.

Temporary Permit Number TP-8060 by CCE, Inc for diversion of 8 acre-foot in a 1 year period for industrial (road construction) use. Water may be diverted from Chinquapin Creek a Tributary of Ayish Bayou, a Tributary of the Angelina River, a Tributary of the Neches River, Neches River Basin, approximately 6 miles southerly of San Augustine and 3 miles southwesterly of Rosevine, San Augustine County, Texas where Chinquapin Creek crosses the right-of-way of FARM-TO-MARKET ROAD 1751.

Temporary Permit Number TP-8061 by CCE, Inc for diversion of 8 acre-foot in a 1 year period for industrial (road construction) use. Water may be diverted from Chiamon Creek, a Tributary of Ayish Bayou, a Tributary of the Angelina River, a Tributary of the Neches River, Neches River Basin, approximately 10 miles southerly from San Augustine and 7 miles southwesterly from Rosevine, San Augustine County, Texas where Chiamon Creek crosses the right-of-way of FARM-TO-MARKET ROAD 1751.

Temporary Permit Number TP-8062 by CCE, Inc for diversion of 8 acre-foot in a 1 year period for industrial (road construction) use. Water may be diverted from Bobbitt Creek, a Tributary of Ayish Bayou, a Tributary of the Angelina River, a Tributary of the Neches River, Neches River Basin, approximately 10 miles southerly from San Augustine and 7 miles southwesterly from Rosevine, San Augustine County, Texas where Bobbitt Creek crosses the right-of-way of FARM-TO-MARKET ROAD 1751.

The Executive Director of the TNRCC has reviewed each application for the permits listed and determined that sufficient water is available at the proposed point of diversion to satisfy the requirements of the application as well as all existing water rights. Any person or persons who own water rights or who are lawful users of water on a stream affected by the temporary permits listed above and who believe that the diversion of water under the temporary permit will impair their rights may file a complaint with the TNRCC. The complaint can be filed at any point after the application has been filed with the TNRCC and the time the permit expires. The Executive Director shall make an immediate investigation to determine whether there is a reasonable basis for such a complaint. If a preliminary investigation determines that diversion under the temporary permit will cause injury to the complainant the commission shall notify the holder that the permit shall be canceled without notice and hearing. No further diversions may be made pending a full hearing as provided in Section 295.174. Complaints should be addressed to Water Rights Permitting Section, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711, Telephone (512) 239-4433. Information concerning these applications may be obtained by contacting the Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711, Telephone (512) 239-3300.

TRD-9900564
LaDonna Castanuela
Acting Chief Clerk
Texas Natural Resource Conservation Commission
Filed: January 27, 1999

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Permian Basin Workforce Development Board

Request for Proposals

The Permian Basin Workforce Development Board/School-to-Career Initiative is seeking Request for Proposals (RFP). The purpose of this RFP is to obtain information from interested and qualified individuals who desire to provide school-based, work-based and connecting learning activities. These activities should facilitate informed decision making for youth as they move from school to careers in the 17 county area served by the PBWDB/StC Partnership. The overall purpose of the initiative is to support the development and initial stages of implementation of region-wide StC systems.

A Bidder's Conference will be held Tuesday, January 26, 1999, from 10:00 a.m.-12:00 p.m. at the Texas Workforce Center, located at 2408 North Big Spring, in Midland.

For more information or to request an RFP packet, please contact: Ann Bradford, StC Initiative, 2408 North Big Spring, Midland, Texas, 79705, or call 915/687-3003 ext. 318, or fax 915/683-4719.

TRD-9900381
Willie Taylor
Executive Director
Permian Basin Workforce Development Board
Filed: January 20, 1999

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Public Utility Commission of Texas

Application to Introduce New or Modified Rates or Terms Pursuant to P.U.C. Substantive Rule §23.25

Notice is given to the public of an application filed with the Public Utility Commission of Texas on January 25, 1999 to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25, *Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs).*

Tariff Title and Number: Application of Southwestern Bell Telephone Company to Modify its Existing Optional Calling Plan Tariff Pursuant to P.U.C. Substantive Rule §23.25. Tariff Control Number 20369.

The Application: Southwestern Bell Telephone Company (SWBT) has notified the Public Utility Commission that it is changing an existing Optional Calling Plan tariff. With this change, SWBT will allow customers the option for reducing or better managing their intraLATA toll services. Rural customers today use toll services for many business and personal reasons due to the large geographical areas that these rural LATA's encompass. Customers may have to call a different town for their medical needs or schedule a plumber to make repairs at their home or business or to talk to a relative. Many of these types of calls would be local in a more metropolitan area due to density. Access to internet services for many of these customers is a more expensive proposition because the internet service provider is located within the LATA but only accessible through toll. This tariff option will provide a customer a means to place unlimited intraLATA toll calls to a specific number with a predictable and reasonable rate.

Both residence and business customers will have the option to purchase unlimited, one-way originating flat-rate toll calls to a single designated number within the customer's LATA. The service can be purchased for multiple numbers. The residential rate for each designated number is $19.95. The business rate for each number is $29.95. The proposed effective date of this tariff is March 15, 1999.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512)936-7120 by February 26, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9900545
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 26, 1999

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Notices of Applications for Amendment to Service Provider Certificate of Operating Authority

On January 21, 1999, Reitz Rentals, Inc., d/b/a Texas Teleconnect filed an application with the Public Utility Commission of Texas (PUC) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60058. Applicant intends to change its name.

The Application: Application of Reitz Rentals, Inc., d/b/a Texas Teleconnect for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 20308.

Persons with questions about this docket, or who wish to intervene or otherwise participate in these proceedings should make appropriate filings or comments to the commission at the Public Utility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326 no later than February 10, 1999. You may contact the PUC Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20308.

TRD-9900534
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 25, 1999

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On January 25, 1999, NHS Communications Group, Inc., d/b/a ATS filed an application with the Public Utility Commission of Texas (PUC) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60102. Applicant intends to reflect a completed merger with a non-certificated entity changing its name to ATS Telecommunications Systems, Inc., d/b/a ATS.

The Application: Application of NHS Communications Group, Inc., d/b/a ATS for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 20327.

Persons with questions about this docket, or who wish to intervene or otherwise participate in these proceedings should make appropriate filings or comments to the commission at the Public tility Commission of Texas, at PO Box 13326, Austin, Texas 78711-3326 no later than February 10, 1999. You may contact the PUC Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20327.

TRD-9900544
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 26, 1999

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Notices of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on January 15, 1999, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.154 - 54.159 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of United Communications Systems, Inc., d/b/a UCS Texas for a Service Provider Certificate of Operating Authority, Docket Number 20331 before the Public Utility Commission of Texas.

Applicant intends to resell long distance and local inter-exchange and intra-exchange telecommunications services, including local exchange and exchange access using customer premise equipment to direct calls to their called location or to terminate calls at their premise via existing principal provider or local exchange networks.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than February 10, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9900382
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 20, 1999

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Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on January 15, 1999, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.154 - 54.159 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Trinity Valley Services, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 20335 before the Public Utility Commission of Texas.

Applicant intends to provide local exchange telecommunications services through a fiber optic network.

Applicant's requested SPCOA geographic area comprises the City of Athens in the state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than February 10, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9900383
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 21, 1999

♦ ♦ ♦

Notices of Application to Amend Certificate of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on December 28, 1998, for a certificate of convenience and necessity pursuant to §§14.001, 32.001, 36.001, 37.051, 37.053, and 37.054, 37.056, 37.057, 37.058 of the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998) (PURA). A summary of the application follows.

Docket Title and Number: Application of Hino Electric Power Company for a Certificate of Convenience and Necessity, Docket Number 20281 before the Public Utility Commission of Texas.

The Application: In Docket Number 20281, Hino Electric Power Company (Hino Electric) seeks to bring competitive retail access to those unincorporated areas of Cameron and Hidalgo Counties currently served by Central Power and Light Company. Hino electric contemplates minimal construction of new facilities to serve load. Hino Electric would plan to build facilities to serve new customers previously without electric service or expanded requirements of any existing Hino Electric customer. Hino Electric will seek to work with Central Power and Light Company either to purchase unbundled distribution and related support services or to participate in a joint construction program to meet service area needs.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P. O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 within 15 days of this notice. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9900393
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 21, 1999

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on December 31, 1998, for a certificate of convenience and necessity pursuant to §§14.001, 32.001, 36.001, 37.051, 37.053, and 37.054, 37.056, 37.057, 37.058 of the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998) (PURA). A summary of the application follows.

Docket Title and Number: Application of Sharyland Utilities, L. P. for a Certificate of Convenience and Necessity, Docket Number 20292 before the Public Utility Commission of Texas.

The Application: In Docket Number 20292, Sharyland Utilities, L. P. seeks to become an electric utility in order to provide retail electric service to consumers within a 6,000 acre major new planned community to be developed along the border between the United States and Mexico, known as Sharyland Plantation. Sharyland Utilities, L. P. plans to construct and operate a technologically advanced underground distribution system within the boundaries of Sharyland. The 6,000 acre tract is currently certificated to both Magic Valley Electric Cooperative, Inc. and Central Power and Light Company.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P. O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 within 15 days of this notice. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9900394
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 21, 1999

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on January 8, 1999, to amend a certificate of convenience and necessity pursuant to §§14.001, 32.001, 36.001, 37.051, and 37.054, 37.056, 37.057, 37.058 of the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998) (PURA). A summary of the application follows.

Docket Title and Number: Application of Lower Colorado River Authority to Amend a Certificate of Convenience and Necessity to Construct a Proposed Transmission Line within Kimble County, Docket Number 20313 before the Public Utility Commission of Texas.

The Application: In Docket Number 20313, the Lower Colorado River Authority (LCRA) requests approval to construct 9.69 miles of a 69-kV transmission line, to be known as Junction Tap - Segovia, and the proposed Segovia substation in Kimble County. The proposed transmission line will improve voltage, line losses and system reliability in the Segovia area. The proposed substation will provide the system capacity necessary to support the high load growth area's short-term load requirements, and will also offer flexibility to meet the area's long- term load growth.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P. O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 within 15 days of this notice. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9900395
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 21, 1999

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on January 19, 1999, to amend a certificate of convenience and necessity pursuant to §§14.001, 32.001, 36.001, 37.051, and 37.054, 37.056, 37.057, 37.058 of the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998) (PURA). A summary of the application follows.

Docket Title and Number: Application of Texas Utilities Electric Company to Amend a Certificate of Convenience and Necessity to Construct a Proposed Transmission Line within Denton and Tarrant Counties, Docket Number 20345 before the Public Utility Commission of Texas.

The Application: In Docket Number 20345, Texas Utilities Electric Company (TUEC) requests approval to construct 4.6 miles of new 138-kV transmission line, to be known as McKamy 138-kV transmission line, into the McKamy substation within the incorporated areas of Flower Mound, Texas and Grapevine, Texas within Denton and Tarrant counties. This proposed line will provide a second source of power to the Flower Mound area. The proposed line will connect to the Coppell Switching Station - Euless Switching Station 138-kV Line and will be separated as much as reasonably possible from the existing McKamy transmission line to reduce the chances of a single event affecting both lines. The proposed line will also permit load transfers between the TUEC and Brazos Electric Power Cooperative, Inc. transmission systems in order to reduce transmission line loading during normal and abnormal system conditions.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P. O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer

Protection at (512) 936-7120 within 15 days of this notice. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9900396
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 21, 1999

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Public Notices of Amendment to Interconnection Agreement

On January 15, 1999, Southwestern Bell Telephone Company and Metro Connections, Inc., collectively referred to as applicants, filed a joint application for approval of an amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 20333. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 20333. 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 noon, February 18, 1999, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20333.

TRD-9900390
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 21, 1999

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On January 19, 1999, Southwestern Bell Telephone Company and Birch Telecom of Texas, LTD., L.L.P., collectively referred to as applicants, filed a joint application for approval of an amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 20349. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 20349. 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 February 18, 1999, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may

conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20349.

TRD-9900391
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 21, 1999

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On January 19, 1999, Southwestern Bell Telephone Company and InterMedia Communications, Inc., collectively referred to as applicants, filed a joint application for approval of an amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 20350. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 20350. 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 February 18, 1999, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20350.

TRD-9900392
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 21, 1999

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Railroad Commission of Texas

Correction of Error

The Railroad Commission of Texas Office of General Counsel adopted an amendment to §7.4. The rule was published in the January 1, 1999 issue of the *Texas Register* (24 TexReg 132).

On page 135, §7.4(b)(1)(H), due to error on the part of the *Texas Register* text was dropped, it should read as follows.

"(H) the terms of any agreements with, or offers, including qualifying offers, to, directly affected customers by the gas utility for the conversion of customers' appliances to enable the use of alternative energy sources;".

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Sam Houston State University

Consultant Contract Award

Sam Houston State University (SHSU), in accordance with provisions of Texas Civil Statutes, Article 6252-11c, announces the awarding of a consultant contract to a consulting firm based in Washington, D.C. The solicitation for proposals was published in the October 31, 1998, issue of the *Texas Register* (23 TexReg 11251).

The consultant will represent and assist the university in developing projects deemed important to the university, assist the university in obtaining funding for university projects, and provide consulting and representation as directed by Sam Houston State University. One proposal was received in response to this solicitation for proposals. The proposal was from Mr. Bobby Mills/The Advocacy Group, 1350 I Street, NW, Suite 680, Washington, D. C. 20005.

The consultant awarded the contract to: Mr. Bobby Mills/The Advocacy Group, 1350 I Street, NW, Suite 680, Washington, D. C. 20005.

The consultant contract begins January 1, 1999, and ends December 31, 1999, with the option to renew. The fee estimate is $44,400, excluding expenses.

Reports and documents will be submitted as required.

TRD-9900440
B.K. Marks
President
Sam Houston State University

Filed: January 22, 1999

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Texas Department of Transportation

Public Notice

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §30.209, the Texas Department of Transportation will conduct a public hearing to receive comments from interested parties concerning proposed approval of: construction services at Mt. Pleasant Municipal Airport, Lamesa Municipal Airport, Curtis Field in Brady, Denton Municipal Airport, Olney Municipal Airport, Eastland Municipal Airport, Mexia-Limestone County Airport, and Cochran County Airport in Morton; design and construction services at Shamrock Municipal Airport; and cancellation of the Livingston Airport and Fabens Airport projects.

The public hearing will be held at 9:00 a.m. on Tuesday, February 16, 1999, at 150 East Riverside, South Tower, 5th Floor Conference Room, Austin, Texas 78704. Any interested person may appear and offer comments, either orally or in writing, however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views, and same or similar comments, through a representative member where possible. Persons with disabilities who have special communication or accommodation needs and who plan to attend the hearing and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or braille, are requested to contact Eloise Lundgren, Director, Public Information Office, 125 E. 11th St., Austin, Texas 78701-2483, (512) 463-8588 at least two working days prior to the hearing so that appropriate arrangements can be made.

For additional information please contact Suetta Murray, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4504.

TRD-9900543
Richard Monroe
General Counsel
Texas Department of Transportation
Filed: January 26, 1999

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Request for Qualifications

The Airport Sponsor listed below, through their agent, the Texas Department of Transportation (TxDOT), intend to engage Aviation Professional Engineering Services pursuant to Chapter 2254, Subchapter A, of the Government Code. TxDOT, Aviation Division will solicit and receive qualifications for professional engineering design services as described in the project scope listed below:

Airport Sponsor: City of Mineola Quitman; Mineola Quitman Airport; TxDOT Project Number: 9910MNOLA Project Scope: Update the Airport Layout Plan and provide engineering/design services to: extend, overlay and mark Runway 18-36; upgrade runway lighting; rehabilitate airport pavement; construct taxiway; install REILs and PAPI-II; and relocate lighted windcone and segmented circle at the Mineola-Quitman Airport. Project Manager: Alan Schmidt.

Interested firms which do not already have a copy of the Form 439, entitled "Aviation Consultant Services Questionnaire", (August 1995 version) may request one from TxDOT, Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form is also available on high density 3 1/2" diskette in Microsoft Excel 5.0, and may be ordered from the above address with remittance of $2.50 to cover costs. The form may also be downloaded from the TxDOT web site, URL address http://www.dot.state.tx.us./insdtdot/orgchart/avn/avninfo/avninfo.htm. Download the file from the selection "Consultant Services Questionnaire Packet". The form may not be altered in any way, and all printing must be in black. QUALIFICATIONS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

Two completed, unfolded copies of Form 439 (August 1995 version), must be postmarked by U. S. Mail by midnight February 17, 1999 (CDST). Mailing address: TxDOT, Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483. Overnight delivery must be received by 4:00 p.m. (CDST) on February 19, 1999; overnight address: TxDOT, Aviation Division, 200 East Riverside Drive, Austin, Texas, 78704. Hand delivery must be received by 4:00 p.m. February 19, 1999 (CDST); hand delivery address: 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704. The three pages of instructions should not be forwarded with the completed questionnaires. Electronic facsimiles will not be accepted.

The airport sponsor's duly appointed committee will review all professional qualifications and select three to five firms to submit proposals. Those firms selected will be required to provide more detailed, project-specific proposals which address the project team, technical approach, Historically Underutilized Business (HUB) participation, design schedule, and other project matters, prior to the final selection process. The final consultant selection by the sponsor's committee will generally be made following the completion of review of proposals and/or consultant interviews. The airport sponsor reserves the right to reject any or all statements of qualifications, and to conduct new professional services selection procedures.

If there are any procedural questions, please contact Karon Wiedemann, Director, Grant Management, or Alan Schmidt, P. E., Project Manager for technical questions at 1-800-68-PILOT (74568).

TRD-9900554
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: January 27, 1999

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