# TEXAS REGISTER

*Volume 35 Number 42* *October 15, 2010* *Pages 9167 – 9436*

*Devin McQueen*
*10th Grade*

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

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

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# Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/open/index.shtml

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

# THE GOVERNOR

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

## Appointments

**Appointments for October 4, 2010**

Appointed to the Governor's Committee on People with Disabilities for a term to expire February 1, 2012, Margaret M. Larsen of Austin (replacing Judy Scott of Dallas whose term expired).

Designating Joseph Bontke as presiding officer of the Governor's Committee on People with Disabilities for a term at the pleasure of the Governor. Mr. Bontke is replacing Judy Scott of Dallas as presiding officer.

Rick Perry, Governor

TRD-201005729

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# THE ATTORNEY GENERAL

**The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.**

**An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.**

**An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)**

## Request for Opinions

**RQ-0919-GA**

**Requestor:**

The Honorable Ricardo Ramos

Maverick County Attorney

208 Converse Street

Eagle Pass, Texas 78852

Re: Municipality's selection of a local newspaper for the purpose of publication of official notices (RQ-0919-GA)

**Briefs requested by November 1, 2010**

**RQ-0920-GA**

**Requestor:**

The Honorable Gail Lowe

Chair, State Board of Education

Texas Education Agency

1701 North Congress Avenue

Austin, Texas 78701-1494

Re: Whether the State Board of Education may, in the absence of an appropriation, pay attorney's fees out of the corpus of the Permanent School Fund (RQ-0920-GA)

**Briefs requested by November 3, 2010**

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

TRD-201005725
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: October 6, 2010

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## Opinions

**Opinion No. GA-0804**

The Honorable Edmund Kuempel

Chair, Committee on Licensing and Administrative Procedures

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether a particular activity constitutes an offense under chapter 47 of the Penal Code, which proscribes certain forms of gambling (RQ-0852-GA)

**S U M M A R Y**

A participant paying an amount of money to purchase a square in the game activity you describe does not make a bet under chapter 47 of the Texas Penal Code. Absent a bet, we cannot conclude that the activity you describe implicates sections 47.02 and 47.03 of the Penal Code

**Opinion No. GA-0805**

The Honorable Kurt Sistrunk

Galveston County Criminal District Attorney

600 59th Street, Suite 1001

Galveston, Texas 77551-4137

Re: Proper method of appraising the value of residence homesteads damaged by Hurricane Ike in 2008 (RQ-0851-GA)

**S U M M A R Y**

Calculation of the 2010 appraised value of a residence homestead damaged by Hurricane Ike in 2008 and renovated to its pre-storm status is determined by section 23.23(f) of the Tax Code so long as the structure was "rendered uninhabitable or unusable." If the structure was not rendered uninhabitable or unusable, calculation of the 2010 appraised value is dependent upon whether the renovations may reasonably be said to constitute a mere "repair" or a "new improvement" under section 23.23(e). If the structure was rendered uninhabitable or unusable, calculation of the 2010 appraised value is dependent upon the appraised value the property would have had in 2009 *but for* the storm damage, together with the market value of all new improvements to the property as described by subdivision (f)(2).

**Opinion No. GA-0806**

Mr. Robert Scott

Commissioner of Education

Texas Education Agency

1701 North Congress Avenue

Austin, Texas 78701-1494

Re: Whether section 11.059 of the Education Code prohibits an independent school district from changing the length of terms of its board of trustees after it changes the election date pursuant to section 41.0052(a-1) of the Election Code (RQ-0864-GA)

**S U M M A R Y**

We believe that a court would likely conclude that pursuant to Election Code section 41.0052, a school district may change the date on which it holds its general election for officers to the November uniform election date and adjust the terms of office to conform to the new election date on or before December 31, 2010.

**Opinion No. GA-0807**

The Honorable Rob Eissler

Chair, Committee on Public Education

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Meaning of "normal course load" as used in section 42.159 of the Education Code for the purposes of determining whether electronic courses provided by school districts fall under the funding method of section 42.159(b) or section 42.159(d) (RQ-0866-GA)

**S U M M A R Y**

Section 42.159 of the Education Code provides allotments to school districts or open-enrollment charter schools for successfully completed courses offered through the State Virtual School Network. The Texas Education Agency (the "TEA") is the administrative agency expressly charged with administering Education Code section 42.159. The TEA's definition of the term "normal course load" in section 42.159 as seven credit hours per year does not appear unreasonable and is not inconsistent with the term's statutory definition. Accordingly, this office cannot say that the definition of "normal course load" should or must be based on a four-hour course load.

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

TRD-201005713
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: October 5, 2010

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

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

# TITLE 16. ECONOMIC REGULATION

## PART 1. RAILROAD COMMISSION OF TEXAS

### CHAPTER 5. CARBON DIOXIDE (CO2)

The Railroad Commission of Texas (Commission) proposes new Chapter 5, relating to Carbon Dioxide ($CO_2$), to implement Senate Bill (SB) 1387, 81st Legislature (Regular Session, 2009), which was effective September 1, 2009. SB 1387 amended the Texas Water Code and the Texas Natural Resources Code to provide for the implementation of projects involving the capture, injection, sequestration, or geologic storage of carbon dioxide ($CO_2$). The purpose of the proposed rules is to protect underground sources of drinking water while promoting the capture and storage of anthropogenic $CO_2$. In a prior rulemaking proceeding, the Commission proposed new Chapter 5, relating to Carbon Dioxide, which was published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2446). The Commission received numerous and extensive comments on that proposal. Because of the changes that the Commission made to the rules as originally proposed, the Commission has withdrawn the prior proposal and is publishing the revised rules for public comment.

SB 1387 delegates to the Commission jurisdiction over the injection of anthropogenic $CO_2$ into productive formations and saline formations directly above and below the productive formations for the purpose of geological storage. The bill establishes an Anthropogenic Carbon Dioxide Storage Trust Fund to include fees established by the Commission for implementation. The bill also authorizes the Commission to issue a permit if the Commission finds that injection and geologic storage of anthropogenic $CO_2$ will not endanger or injure any oil, gas, or other mineral formation; that with proper safeguards, both ground and surface fresh water can be adequately protected from $CO_2$ migration or displaced formation fluids; that the injection of $CO_2$ will not endanger or injure human health and safety; that the reservoir into which the $CO_2$ is injected is suitable for or capable of being made suitable for protecting against the escape or migration of $CO_2$ from the reservoir; and that the permit applicant meets all of the other statutory and regulatory requirements for the issuance of the permit.

SB 1387 requires the Commission to adopt rules and procedures, including rules for geologic site characterization; area of review and corrective action; well construction; operation; mechanical integrity testing; plugging; monitoring; post-injection site care and site closure; long-term stewardship of the geologic storage; enforcement; and the collection and administration of fees and penalties to cover the cost of permitting, monitoring, inspection, enforcement, and implementation associated with the program. SB 1387 requires coordination between the Commission and the Texas Commission on Environmental Quality (TCEQ) to ensure the regulation of $CO_2$ storage in Texas is being performed in an economically and environmentally sound manner. SB 1387 also requires that the permit applicant obtain and submit to the Commission a letter from the Executive Director of the TCEQ certifying that underground fresh water supplies will not be injured by the permitted activity.

SB 1387 also requires the Commission, TCEQ, and the University of Texas Bureau of Economic Geology (BEG) to conduct a study of, and report back to the legislature on, the appropriate agency to regulate the long-term storage of $CO_2$ into non-oil, gas, or geothermal producing geologic formations. SB 1387 further requires the Texas General Land Office (GLO), in conjunction with the Commission, TCEQ, and BEG, to develop recommendations for managing geologic storage of $CO_2$ on state-owned lands, including an assessment of storage capacity and new legal and regulatory frameworks that might be necessary. SB 1387 clearly states that the storage operator owns the anthropogenic $CO_2$ in a geologic storage facility and authorizes the Commission to regulate the withdrawal of any stored $CO_2$. Finally, SB 1387 requires the Commission's rules to be consistent with the regulations of the United States Environmental Protection Agency (EPA) and requires the Commission to seek enforcement primacy from the EPA for the program.

PROPOSED EPA REGULATIONS

On July 25, 2008, EPA proposed requirements for underground injection of $CO_2$ for geologic storage under the authority of the federal Safe Drinking Water Act (SDWA). The goal of the proposed regulations is to protect underground sources of drinking water (USDWs) while promoting carbon capture and storage. EPA proposed to create a new Class VI injection well class. EPA used as the beginning framework the program for Class I hazardous injection wells, then added requirements to address the unique nature of $CO_2$ injection for geologic storage, relative buoyancy of $CO_2$, corrosivity in the presence of water, potential presence of impurities in the $CO_2$ stream, mobility within subsurface formations, and large injection volumes expected. EPA's proposed rules would establish technical criteria for geologic site characterization; area of review and corrective action; well construction and operation; mechanical integrity testing and monitoring; monitoring of the $CO_2$ plume and pressure front; groundwater monitoring; well plugging; extended post-injection site care; long-term financial assurance to ensure proper site care and closure; and site closure. The Commission understands that EPA plans to make its rules final in September 2010.

As noted above, SB 1387 requires the Commission to seek enforcement authority (primacy) for the Underground Injection Control (UIC) program for geologic storage of anthropogenic $CO_2$ and the associated injection wells. Section 1425 of the federal SDWA allows states seeking primacy for Class II wells

to demonstrate that their existing standards are effective in preventing endangerment of USDWs. These programs must include requirements for permitting, enforcement, inspection, monitoring, record-keeping, and reporting that demonstrate the effectiveness of their requirements. However, under Section 1422 of the federal SDWA, states applying to EPA for primary enforcement responsibility to administer the UIC program (primacy) must show that the state programs meet EPA's minimum federal requirements for UIC programs, including construction, operating, monitoring and testing, reporting, and closure requirements for well owners or operators.

Absent some action from Congress, states will be required to apply for primacy for the UIC program for geologic storage of $CO_2$ under Section 1422 of the federal SDWA. Therefore, the state's program must be at least as stringent as EPA's program. Where states do not seek this responsibility or fail to demonstrate that they meet EPA's minimum requirements, EPA is required to implement a UIC program for the state.

BACKGROUND

Increases in the demand for energy have contributed to increases in the levels of atmospheric $CO_2$. One of the promising ways to reduce the amount of $CO_2$ in the atmosphere is to sequester, or store, it by injecting it into underground reservoirs. Geologic storage technology has been proven through successful pilot projects and over 35 years of experience in injecting $CO_2$ for enhanced oil recovery (EOR).

Carbon dioxide can be sequestered at the same time it is being used for enhanced recovery of oil or natural gas. Today approximately 90 percent of the $CO_2$ used in enhanced recovery operations is produced from naturally occurring geologic accumulations, primarily geologic domes in New Mexico, Colorado, and Mississippi. In the future, rather than using this naturally occurring $CO_2$, operators will be using anthropogenic $CO_2$. Sources of large volumes of anthropogenic--or man-made--$CO_2$ include power generation, iron and steel manufacturing, natural gas processing, cement manufacture, ammonia production, hydrogen production, helium plants, and ethanol manufacturing plants.

The Commission has regulated the injection of $CO_2$ since the early 1970s, when the Commission permitted a $CO_2$ enhanced recovery project (SACROC Unit, Kelly-Snyder Field, Scurry County). Prior to that, the first three projects (immiscible) were in Osage County, Oklahoma from 1958 to 1962; the fourth project (miscible) was a pilot project in the Means-Strawn Field near Abilene, Texas, begun in 1964; and the fifth project (immiscible) was in Hungary, begun in 1966. These projects appear to have been relatively limited or experimental in scope, at least at the time they were initiated. SACROC appears to be the first project according to the United States Department of Energy. This project is mentioned in an article at http://www.fossil.energy.gov/programs/oilgas/eor/index.html. The article states, in part, "First tried in 1972 in Scurry County, Texas, $CO_2$ injection has been used successfully throughout the Permian Basin of West Texas and eastern New Mexico, and is now being pursued to a limited extent in Kansas, Mississippi, Wyoming, Oklahoma, Colorado, Utah, Montana, Alaska, and Pennsylvania." It seems likely that SACROC was the first commercial scale miscible $CO_2$ enhanced recovery project in the world.

Half of all the $CO_2$ enhanced recovery projects in the entire world are in the Permian Basin of Texas. The Commission has permitted over 10,000 wells for $CO_2$ injection, of which over 5,000 are currently active. Half of the production of Oxy Permian, Texas' top oil producer, comes from $CO_2$ EOR projects. Oxy Permian injects over one billion cubic feet per day (Bcf/day) of $CO_2$ in its EOR projects. This accounts for over 70 thousand barrels per day, which is about seven percent of the State's daily total crude oil production. Texas also has an outstanding safety record related to the much more toxic hydrogen sulfide operations and has a long and successful history of regulating the storage of natural gas in geologic formations.

In the course of a typical enhanced recovery operation, even where there is no intent to sequester, 30 to 50 percent of the injected $CO_2$ will remain in the reservoir after production operations cease. (All of the $CO_2$ injected in an enhanced recovery project remains sequestered upon the day the project ends, unless it is removed for use in another field or reservoir; any injected $CO_2$ that is not recovered from an enhanced recovery project and that remains confined is sequestered.) The balance is either dissolved within the produced oil or recycled for use in other reservoirs; it is not emitted to the atmosphere. Oil and gas reservoirs have proved capable of containing water-buoyant fluids and gases for millions of years. These reservoirs are well studied and offer the best opportunity to begin large-scale geologic storage of $CO_2$. Accordingly, enhanced recovery operations using the same procedures now in place would result in sequestering anthropogenic $CO_2$. Enhanced recovery operations that include $CO_2$ injection for the purpose of sequestration will remain regulated as Class II wells under 16 TAC §3.46, relating to Fluid Injection into Productive Reservoirs. Existing injection regulations require that injected fluids be confined to the authorized injection interval--the same goal as that of $CO_2$ storage. Many of the functions of geologic storage are effectively the same as those for the $CO_2$ enhanced recovery activities the Commission has historically regulated.

There is a wealth of information and experience in the industry and regulations, regulatory experience, and industrial best practices related to the injection of $CO_2$. In areas where there are unknowns, however, extra care must be taken during initial stages of excursions into large-scale commercial storage. Because of the intense study of oil and gas reservoirs in Texas, there is much information regarding the characteristics of oil and gas reservoirs, but because of the intense development of these reservoirs, there are many more potential penetrations into the confining zones--in the form of oil and gas wells--which must be closely examined to prevent them from becoming conduits for the escape of the $CO_2$ from the storage reservoir. Generally there is a dearth of information about non-oil and gas reservoirs, but those may have fewer penetrations that could act as conduits for the escape of the $CO_2$. In addition, because oil and gas and formation fluids have been produced from the oil and gas reservoirs, the pressure is reduced; in a non-oil and gas reservoir, such a pressure decrease has not occurred.

PROPOSAL

The Commission proposes new Chapter 5, relating to Carbon Dioxide ($CO_2$).

The Commission proposes new Subchapter A, relating to General Provisions, and §5.101, relating to Purpose. The purpose of the new chapter is to implement the portion of the state program for geologic storage of anthropogenic $CO_2$ over which the Commission has jurisdiction consistent with state and federal law related to protection of underground sources of drinking water (USDWs) and sequestration of $CO_2$.

The Commission proposes new §5.102, relating to Definitions. Many of the terms defined in this new section are the same as or consistent with definitions of the same terms that are ubiquitous in the underground injection control program. These include definitions of "area of review," "confining zone," "corrective action," "enhanced recovery operation," "fracture pressure," "injection zone," "mechanical integrity," "pressure front," "transmissive fault or fracture," "well stimulation," and "workover." The Commission has modified a few of these definitions as necessary for geologic sequestration. In particular, the proposed definition for the term "mechanical integrity" includes the word "significant" with respect to leaks and fluid movement to be consistent with the EPA's existing definition at 40 CFR §146.8(a). The federal UIC regulations for both Class I and Class II injection wells and EPA's proposed $CO_2$ geologic sequestration rules include the word "significant" before the words "leak" and "fluid movement." In addition, the Commission will consider any deviations during testing that cannot be explained by the margin of error for the test used to determine mechanical integrity, or other factors, such as temperature fluctuations, to be an indication of the possibility of a significant leak and/or the possibility of significant fluid movement into a stratum containing an underground source of drinking water through channels adjacent to the injection wellbore.

The Commission proposes to define the term "underground source of drinking water," a term used in the federal UIC program. Heretofore, the Commission has used the terms "fresh water" and "usable quality water" because they are used in the Texas statutes relating to underground injection. However, as noted before, use of the term "underground sources of drinking water" in the Commission's rules will make it easier for the EPA to approve the Commission's request for enforcement primacy. The Commission proposes to define "underground source of drinking water" as an aquifer or its portion which is not an exempt aquifer as defined in 40 Code of Federal Regulations §146.4 and which supplies any public water system; or contains a sufficient quantity of ground water to supply a public water system and currently supplies drinking water for human consumption or contains fewer than 10,000 mg/l total dissolved solids.

The Commission proposes to define other terms necessary to the regulation of geologic storage of anthropogenic $CO_2$. The Commission defines the term "anthropogenic $CO_2$," slightly differently from the definition in Texas Water Code, §27.002, as added by SB 1387 to clarify that naturally occurring $CO_2$ is not included in the term. The Commission proposes to define the terms "geologic storage," "geologic storage facility or storage facility," and "reservoir" as those terms are defined in Texas Water Code, §27.002, as added by SB 1387. Proposed definitions for the terms "$CO_2$ plume," "$CO_2$ stream," "post-injection facility care," and "facility closure" are modifications of the definitions of those terms as proposed by EPA.

The Commission proposes new Subchapter B, relating to Geologic Storage and Associated Injection of Anthropogenic Carbon Dioxide ($CO_2$). The Commission proposes new §5.201, relating to Applicability and Compliance, which states that Subchapter B applies to the geologic storage of anthropogenic $CO_2$ in, and the injection of anthropogenic $CO_2$ into, a reservoir that is initially or may be productive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir. A reservoir that may be productive means an identifiable geologic unit that has had production in the past, which is similar to productive or previously productive reservoirs along the same or a similar trend, or potentially contains oil, gas, or geothermal resources based on analysis of geophysical and/or seismic data.

In accordance with SB 1387, the Commission proposes new §5.201(b) to state that Subchapter B does not apply to the injection of fluid through the use of an injection well regulated under §3.46 of this title for the primary purpose of enhanced recovery operations from which there is reasonable expectation of more than insignificant future production volumes of oil, gas, or geothermal energy and operating pressures are no higher than reasonably necessary to produce such volumes or rates. However, the operator of an enhanced recovery project may propose simultaneously to permit the enhanced recovery project as a $CO_2$ geologic storage facility. There may not be much difference between injection pressures used for enhanced recovery and those for geologic storage; however, this may depend on the geology and hydrology of the storage facility and whether the operator proposes to allow the reservoir pressure to increase above the hydrostatic pressure on a long-term basis. As proposed, subsection (b) further states that, if the director determines that an injection well regulated under §3.46 should be regulated under this subchapter because the injection well is no longer being used for the primary purpose of enhanced recovery operations, the director must notify the operator of his determination and allow the operator at least 30 days to respond to the determination and to file an application under this subchapter or cease operation of the well. Additionally, this subchapter does not preclude an enhanced oil recovery project operator from opting into any other regulatory program that provides credit for anthropogenic $CO_2$ sequestered through the enhanced recovery project.

The Commission proposes new §5.201(c) to state that, if a well is authorized as or converted to an anthropogenic $CO_2$ injection well for geologic storage, this subchapter would apply to the well.

The Commission proposes new §5.201(d) to state that, if a provision of this subchapter conflicts with any provision or term of a Commission order or permit, the provision of such order or permit controls.

The Commission proposes new §5.201(e) which requires the operator of a geologic storage facility to comply with all other applicable Commission rules and orders and states that, if a provision of Subchapter B conflicts with any provision or term of a Commission order or permit, the provision of the order or permit controls.

The Commission proposes new §5.202, relating to Permit Required. Proposed new subsection (a) prohibits a person from beginning to drill or to operate an anthropogenic $CO_2$ injection well for geologic storage or constructing or operating a geologic storage facility regulated under this subchapter without first obtaining the necessary permit(s) from the Commission. Proposed new subsection (b) outlines the requirements for amendment of an existing geologic storage facility permit. Proposed new subsection (c) sets forth the requirements for transfer of a permit for a geologic storage facility permit from one operator to another operator. This provision of the rule concerns permit transfers and not market transactions. The time limits in the rule are necessary to allow sufficient time for the Commission to evaluate permit applications from potential new operators and respond to the applications in a timely and orderly manner. The Commission has modified the time from the 60 days in the original proposal to 45 days, and has added language regarding potential U. S. Securities and Exchange Commission issues. The rule provides operators an element of certainty that will assist with the transaction process. In addition, the Commission added language to

clarify that the notice to the Commission is related to operating the facility and not necessarily to the date a transaction closes.

The Commission proposes new §5.202(d) to state that the Commission has the authority to modify, cancel, or suspend a geologic storage facility permit after notice and opportunity for hearing under specific circumstances, listed in the subsection. Subsection (d) further provides that in the event of an emergency that threatens endangerment to USDWs or to life or property, or an imminent threat of uncontrolled escape of $CO_2$, the director may immediately order suspension of the operation of a geologic storage facility until a final order is issued pursuant to a hearing, if any.

The Commission proposes new §5.203, relating to Application Requirements. Proposed new §5.203(a) establishes the general requirements for the form of a permit application, the filing requirements, and providing general information. This subsection also states that the Commission may not issue a permit before receiving a complete application. The subsection further states that all reports must be prepared by a qualified and knowledgeable person. In addition, if otherwise required by the Texas Geoscientist Practice Act or the Texas Engineering Practices Act, a professional geoscientist or professional engineer must conduct the logging, sampling, and testing, and affix the appropriate seal on the resulting reports required under this subchapter. Proposed new §5.203(b) establishes the requirements for surface map and information. Proposed new §5.203(c) establishes the geologic, geochemical, and hydrologic information required with an application. These requirements are consistent with EPA's proposed requirements.

The Commission proposes new §5.203(d) to establish the application requirements for the area of review and corrective action. Paragraph (1) establishes the permit application requirements for the initial delineation of the area of review and the initial corrective action. Permit applicants must perform the initial delineation of the area of review using computational modeling to predict the lateral and vertical migration of the $CO_2$ plume, the formation fluids, and the pressure differentials required to cause movement of injected fluids or formation fluids into a USDW in the subsurface for three periods after initiation of injection: (1) five years after initiation of injection; (2) from initiation of injection to the end of the injection period proposed by the applicant; and (3) from initiation of injection to 10 years after the end of the injection period proposed by the applicant. The Commission has determined that delineation of the probable area of review after five years from commencement of injection will provide the operator and the Commission with useful information to verify the adequacy of the methods and programs used to delineate the areas of review throughout the life of the storage facility and to make any necessary adjustments shortly after the first five years of operation.

Proposed new §5.203(d) also establishes the application requirements for identification of penetrations and table of wells and establishes the application requirements for any necessary corrective action. The applicant must include in the table of wells all penetrations that are known or reasonably discoverable through specialized knowledge or experience. Examples of such specialized knowledge or experience may include reviews of federal, state and local government records, interviews with past and present owners, operators and occupants, reviews of historical information (including aerial photographs, chain of title documents, and land use records), and visual inspections of the facility and adjoining properties. Proposed new subsection (d) further requires that the applicant submit an area of review and corrective action plan, and details what that plan must include. The requirements in this subsection are consistent with those in EPA's proposed regulation.

The Commission proposes new §5.203(e) to establish the requirements for construction of anthropogenic $CO_2$ injection wells. These requirements are consistent with the requirements for Class II injection wells, with the addition of one requirement included in EPA's proposed rules, *i.e.,* verification of the integrity and location of the cement using technology capable of radial evaluation of cement quality and identification of the location of channels to ensure that underground sources of drinking water will not be endangered. Existing wells that have been associated with injection of $CO_2$ for the purpose of enhanced recovery may be exempt from provisions of these casing and cementing requirements if the applicant demonstrates that the well construction meets the general performance criteria. Proposed new subsection (e) also establishes the requirements for the well construction information that must be submitted with a permit application, including a well construction plan and a well stimulation plan. Such information is necessary to allow the director to determine whether the wells will be constructed to prevent endangerment of USDWs and will isolate the injected fluids to the storage reservoir.

The Commission proposes new §5.203(f), relating to logging, sampling, and testing, which establishes the logging, sampling and testing results to be submitted with the application sufficient to determine the depth, thickness, porosity, permeability, and lithology of, and the geochemistry of any formation fluids in, all relevant geologic formations. Proposed new subsection (f) also requires the applicant to submit a plan for logging, sampling, and testing the injection well(s), after permitting but prior to injection well operation. The plan must describe the logs, surveys, and tests to be conducted to verify the depth, thickness, porosity, permeability, and lithology of, and the salinity of any formation fluids in, the formations that are to be used for monitoring, storage, and confinement to assure conformance with the injection well construction requirements, and to establish accurate baseline data against which future measurements may be compared. This proposed new subsection further requires the applicant to submit a sampling plan. The subsection establishes the criteria and information for both plans. These requirements are a modification of the requirements in EPA's proposed rule §146.87 for Class VI wells, except that the Commission has included more performance requirements and fewer mandates that operators perform specific tests to allow the operator to use whatever tests provide the necessary demonstration and to allow for technological advancements in testing methods.

The Commission proposes new §5.203(g), relating to compatibility determination, to require an applicant to submit a determination of the compatibility of the $CO_2$ stream with the materials to be used to construct the well; fluids in the injection zone; and minerals in both the injection and the confining zone, based on the results of the formation testing program.

The Commission proposes new §5.203(h), relating to mechanical integrity testing information, sets forth the criteria and information to be submitted in a mechanical integrity testing plan. These requirements are a modification of the requirements in EPA's proposed rule §146.89. The requirements include an initial annulus pressure test; continuous monitoring of the injection pressure, rate, injected volumes, and pressure on the annulus between tubing and long string casing; an annual confirmation

that the injected fluids are confined to the injection zone using a method approved by the director *(e.g.,* diagnostic surveys, such as oxygen-activation logging or temperature or noise logs); and injection well testing after any workover that disturbs the seal between the tubing, packer, and casing, and at least once every five years to determine if leaks exist in the tubing, packer, or casing. The subsection further requires that the applicant submit a mechanical integrity testing plan and outlines the requirements of the plan.

The Commission proposes new §5.203(i), relating to operating information, which establishes the maximum injection pressure and the requirement for an operating plan. This requirement is consistent with EPA's proposed rules, but does not set the limit to 90 percent of the fracture pressure of the injection zone, as in EPA's proposed regulations. Rather, the Commission proposes to set the maximum injection pressure to one that takes into account the risks of tensile failure and, where appropriate, geomechanical or other studies that assess the risk of tensile failure and shear failure; that with a reasonable degree of certainty will avoid initiation or propagation of fractures in the confining zone or cause otherwise non-transmissive faults transecting the confining zone to become transmissive; and that in no case may cause the movement of injection or formation fluids in a manner that endangers USDWs.

The Commission proposes new §5.203(j), relating to monitoring, sampling, and testing plan, requires the applicant to prepare and submit a plan to verify that the geologic storage facility is operating as permitted and that the injected fluids are confined to the injection zone. The subsection establishes the requirements of the plan, which are consistent with EPA's proposed rules.

The Commission proposes new §5.203(k), relating to well plugging plan, sets forth the requirements for plugging injection and monitor wells. In accordance with §3.14 of this title, operators must plug monitor wells that penetrate the base of usable quality water and, upon abandonment, all injection wells. Operators must plug all monitoring wells that do not penetrate the base of usable quality water, in accordance with 16 TAC Chapter 76 (relating to Water Well Drillers and Water Well Plump Installers).

The Commission proposes new §5.203(l), relating to emergency and remedial response plan, to require that the applicant submit an emergency and remedial response plan that describes actions to be taken to address escape from the permitted injection interval or movement of the injection or formation fluids that may cause an endangerment to USDWs during construction, operation, closure and post-closure periods; includes a safety plan that includes emergency response procedures, provisions to provide security against unauthorized activity, and $CO_2$ release detection and prevention measures; and includes a description of the training and testing that will be provided to each employee at the storage facility on operational safety and emergency response procedures to the extent applicable to the employee's duties and responsibilities.

The Commission proposes new §5.203(m), relating to post-injection facility care and facility closure plan, to require that an applicant submit a plan that includes the pressure differential between pre-injection and predicted post-injection pressures in the injection zone; the predicted position of the $CO_2$ plume and associated pressure front at closure as demonstrated in the area of review evaluation; a description of post-injection monitoring location, methods, and proposed frequency; a proposed schedule for submitting post-injection storage facility care monitoring results to the Commission; and the estimated cost of proposed post-injection care and closure.

The Commission proposes new §5.203(n), relating to financial responsibility, which requires that an applicant demonstrate that the applicant has met the financial responsibility requirements under proposed new §5.205 (relating to Fees, Financial Responsibility, and Financial Assurance). Such requirements are consistent with Texas Water Code, §27.050, and EPA's proposed rule §146.85. Although the Commission is proposing new §5.205 without including additional forms of financial assurance, the Commission will work with interested persons to develop proposed amendments to the rule that would allow for other forms of financial assurance mechanisms, including insurance coverage, trust funds, and corporate guarantees that satisfy certain financial requirements, and solicits comments specifically on this issue.

The Commission proposes new §5.203(o), relating to letter from the TCEQ, to implement the requirement in Texas Water Code, §27.046, that an applicant submit a letter from the Executive Director of the TCEQ stating that drilling and operating the anthropogenic $CO_2$ injection well for geologic storage or operating the geologic storage facility will not injure any freshwater strata in that area and that the formation or stratum to be used for the geologic storage facility is not a freshwater formation or stratum.

The Commission proposes new §5.203(p), relating to other information, which requires that an applicant submit any other information requested by the director as necessary to discharge the Commission's duties under Texas Water Code, Chapter 27, Subchapter B-1, or deemed necessary by the director to clarify, explain, and support the required attachments, consistent with Texas Water Code, §27.044, as amended by SB 1387.

The Commission proposes new §5.204, relating to Notice and Hearing. Proposed new subsection (a) requires the applicant to make a complete copy of the permit application available for the public to inspect and copy by filing a copy of the application with the County Clerk at the courthouse of the county or counties where the storage facility is to be located, or if approved by the director, at another equivalent public office. In addition, the subsection requires the applicant to provide an electronic copy of the complete application to be posted on the Commission's website. The applicant must file any subsequent revision of an application with each County Clerk or other approved public office and must file at the Commission an electronic copy of the updated application at the same time the applicant files the revision at the Commission.

The Commission proposes new §5.204(b), relating to notice requirements, which establishes the notice requirements for a permit application under this subchapter. Such notice is similar to the notice requirements for a gas storage facility under §3.96 of this title, relating to Underground Storage of Gas in Productive or Depleted Reservoirs, except that here the Commission proposes additional notice to surface owners, as well as to mineral leaseholders and surface lease holders adjoining the outermost boundary of the area of review.

The Commission proposes new §5.204(c), relating to hearing requirements, which is similar to the hearing requirements for an enhanced recovery injection well under §3.46 of this title. If the Commission receives a protest regarding an application for a new, or amendment of a permitted, geologic storage facility permit from a person who was notified pursuant to subsection (b) or from any other affected person within 30 days of the date

of receipt of the application by the division, receipt of individual notice, or last publication of notice, whichever is later, then the applicant will be notified that the application cannot be administratively approved. The director will schedule a hearing on the application upon request of the applicant. The Commission must give notice of the hearing to all affected persons, local governments, and other persons who express, in writing, an interest in the application. After hearing, the examiner will recommend a final action by the Commission. If the Commission receives no protest regarding an application for a new, or amendment of a permitted, geologic storage facility permit from a person notified pursuant to subsection (a), or from any other affected person, the director may administratively approve the application. If the permit application for a new, or amendment of a permitted, geologic storage facility is administratively denied, a hearing will be scheduled upon written request of the applicant. After hearing, the examiner will recommend a final action by the Commission.

The Commission proposes new §5.205, relating to Fees, Financial Responsibility, and Financial Assurance. Proposed new subsection (a) establishes three non-refundable fees: a base fee for each application to cover the Commission's costs for processing the application; an annual fee based on the number of metric tons injected into the geologic storage facility; and an annual post-injection care fee to be paid each year the operator does not inject into the geologic storage facility until the director has authorized storage facility closure. These fees are in addition to the fee required for each injection well by §3.78 of this title (relating to Fees and Financial Security Requirements). Proposed new subsection (b), relating to financial responsibility, is consistent with of the Texas Water Code, §27.050, as added by SB 1387.

The Commission proposes new §5.205(c), which establishes financial assurance requirements as required by Texas Water Code, §27.073, as added by SB 1387. The operator must comply with the requirements of §3.78 of this title, for all monitoring wells that penetrate the base of usable quality water and all injection wells. In addition, an applicant for a geologic storage facility must file a bond or letter of credit that is in an amount approved by the director under this subsection and that meets the requirements of this subsection as to form and issuer. The Commission must approve the bond or letter of credit before issuing a permit.

The Commission proposes new §5.205(d), relating to notice of adverse financial conditions, to require an operator notify the Commission of adverse financial conditions that may affect the operator's ability to carry out injection well plugging, post-injection storage facility care, and storage facility closure. The subsection requires that notice of bankruptcy be filed in accordance with §3.1 of this title (relating to Organization Report; Retention of Records; Notice Requirements). The bond must provide a mechanism for the bond or surety company to give prompt notice to the Commission and the operator of any action filed alleging insolvency or bankruptcy of the surety company or the bank or alleging any violation that would result in suspension or revocation of the surety or bank's charter or license to do business. Upon the incapacity of a bank or surety company by reason of bankruptcy, insolvency, or suspension, or of revocation of its charter or license, the operator will be deemed to be without bond coverage. The Commission must issue a notice to any operator who is without bond coverage and specify a reasonable period to replace bond coverage, not to exceed 90 days.

The Commission proposes new §5.206, relating to Permit Standards. Subsection (a) establishes the general criteria for issuance of a permit. The language is consistent with Texas Water Code, §27.051(b-1), as added by SB 1387. The Commission adds requirements, such as the applicant's submission of the letter from the Executive Director of the TCEQ required by Texas Water Code, §27.046; the applicant's demonstration that the applicant has a good faith claim to the necessary and sufficient property rights for construction and operation of the geologic storage facility; the applicant's payment of the fee required in §5.205(a) of this subchapter; the director's determination that the applicant has sufficiently demonstrated financial responsibility; and the applicant submitted to the director the required financial security.

The Commission proposes new §5.206(b) to require that construction of anthropogenic $CO_2$ injection wells meet the criteria in §5.203(e) of this subchapter; that within 30 days after the completion or conversion of an injection well, the operator file a complete record of the well on the Commission's approved form showing the current completion; and that an operator of a geologic storage facility must notify the director and obtain the director's approval prior to conducting any well workover.

The Commission proposes new §5.206(c), which establishes the requirements for operating a geologic storage facility. The subsection requires the operator to maintain and comply with the approved operating plan and adhere to certain operating criteria relating to metering, injection pressure, annulus fluid, recording devices, alarms, and automatic shut-off systems.

The Commission proposes new §5.206(d) to require that the operator maintain and comply with the approved monitoring, sampling, and testing plan to verify that the geologic storage facility is operating as permitted and that the injected fluids are confined to the injection zone.

The Commission proposes new §5.206(e), which requires that the operator maintain and comply with the approved mechanical integrity testing plan submitted in accordance with §5.203(j) of this subchapter, and maintain mechanical integrity of the injection well at all times, except during periods of well workover.

The Commission proposes new §5.206(f) to require that, at the frequency specified in the approved area of review and corrective action plan or permit, or when monitoring and operational conditions warrant, the operator of a geologic storage facility: (1) re-evaluate the area of review through computational modeling; (2) identify all wells in the re-evaluated area of review that require corrective action; (3) perform corrective action on wells requiring corrective action in the re-evaluated area of review; and (4) submit an amended area of review and corrective action plan or demonstrate to the director through monitoring data and modeling results that no change to the area of review and corrective action plan is needed.

The Commission proposes new §5.206(g) to require that the operator maintain, update as necessary, and comply with the approved emergency and remedial response plan required by §5.203(l). The subsection also states the action an operator must take if the operator obtains evidence that the injected $CO_2$ stream and associated pressure front may cause an endangerment to USDWs and states that the director may allow the operator to resume injection prior to remediation if the operator demonstrates that the injection operation will not endanger underground sources of drinking water. These requirements are consistent with the requirements in EPA's proposed regulations at §146.94.

Proposed new §5.206(h) requires the operator to give the division the opportunity to witness all testing and logging.

The Commission proposes new §5.206(i), which requires the operator to maintain and comply with the approved well plugging plan required by §5.203(k).

The Commission proposes new §5.206(j) to require the operator of an injection well to maintain and comply with the approved post-injection storage facility care and closure plan required under proposed new §5.203(m). Prior to authorization for storage facility closure, the operator must submit to the director a demonstration, based on monitoring and other site-specific data, that the $CO_2$ plume and pressure front have stabilized and that no additional monitoring is needed to assure that the geologic storage facility will not endanger USDWs. Subsection (j) establishes the requirements necessary for the Commission to authorize closure. These requirements are generally consistent with EPA's proposed regulation §146.93.

The Commission proposes new §5.206(k), which requires the operator of a geologic storage facility to record specific information in a notation on the deed to the facility property or any other document to put any potential purchaser of the property on notice of certain facts, including the fact that the land has been used to geologically store $CO_2$.

Proposed new §5.206(l) requires that the operator retain for three years following storage facility closure certain records collected during the post-injection storage facility care period. The proposed new subsection further requires that the operator deliver those records to the director at the conclusion of the retention period and that the records be retained at the Austin Headquarters of the Commission.

The Commission proposes new §5.206(m) to require identification of each location at which geologic storage activities take place, including each injection well, by a sign that meets the requirements specified in §3.3 of this title (relating to Identification of Properties, Wells, and Tanks). In addition, each sign must include a telephone number at which the operator, or a representative of the operator, can be reached in the event of an emergency.

Proposed new §5.206(n) states that, in any permit for a geologic storage facility, the director will impose terms and conditions reasonably necessary to protect USDWs, including the necessary casing. The proposed new subsection further states that the permits issued under this subchapter continue in effect until revoked, modified, or suspended by the Commission. Operators must comply with each requirement set forth in this subchapter as a condition of the permit unless specifically modified by the terms of the permit.

The Commission proposes new §5.207, relating to Reporting and Record-Keeping, which establishes reporting and record-keeping requirements. The operator must file a complete record of all tests in duplicate with the district office within 30 days after the testing. In reporting the results of mechanical integrity tests to the director, the operator must include a description of the test(s) and the method(s) used. Various operating reports are due within 24 hours, within 30 days, semi-annually, annually, or on a cumulative basis. The operator must report to the district office orally as soon as practicable upon the discovery of any pressure changes or other monitoring data that indicate the presence of leaks in the well or the lack of confinement of the injected $CO_2$ stream to the geologic storage reservoir, and must confirm the report in writing within five working days.

Proposed new §5.207 requires that within 30 days, the operator must report the results of periodic tests for mechanical integrity; the results of any other test of the injection well conducted by the operator if required by the director; and a description of any well workover. These reports must include summary cumulative tables of the required information.

Proposed new §5.207 also requires that semi-annually, the operator must report a summary of well head pressure monitoring; changes to the physical, chemical and other relevant characteristics of the $CO_2$ stream from the proposed operating data; monthly average, maximum, and minimum values for injection pressure, flow rate and volume, and annular pressure; a description of any event that significantly exceeds operating parameters for annulus pressure or injection pressure as specified in the permit; a description of any event that triggers a shutdown device and the response taken; and the results of monitoring prescribed under §5.206(d).

Proposed new §5.207 also provides that other information that may be obtained annually includes but is not limited to reports of corrective action performed; new wells installed and the type, location, number and information required in §5.203(e); re-calculated area of review; tons of $CO_2$ injected; and other information that may be required by a particular permit. Proposed new §5.207 also prescribes the reporting formats and record retention requirements.

The Commission proposes new §5.208, relating to Penalties, which states that violations of this subchapter may subject the operator to penalties and remedies specified in the Texas Natural Resources Code, Title 3, Texas Water Code, Chapter 27, and other statutes administered by Commission, and that the certificate of compliance for any oil, gas, or geothermal resource well may be revoked in the manner provided in §3.73 of this title (relating to Pipeline Connection; Cancellation of Certificate of Compliance; Severance) for violation of this subchapter.

Leslie Savage, Planning and Administration, Oil and Gas Division, has determined that for each year of the first five years that the proposed new rules will be in effect there will be negative fiscal implications for state government, as described in the following paragraphs. Ms. Savage has determined that for each year of the first five years that the proposed new rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to cost or revenues of local governments.

SB 1387 provided the Commission with a method for funding this new program by establishing the Anthropogenic Carbon Dioxide Storage Trust Fund through Texas Natural Resources Code, §120.003, and allowing the Commission to charge fees under Texas Water Code, §27.045. However, the Commission cannot collect any fees to fund the program until it receives applications. Therefore, for the first two years, the Commission will bear the costs of rulemaking, preparation of the EPA primacy application, and initial implementation without any offsetting revenue.

EPA estimates that the cost to the Commission of preparing its primacy application for oversight of Class VI wells will be approximately $43,852. EPA further estimates that the annual burden of its proposed rules to primacy agencies such as the Railroad Commission is approximately $12,228, based on oversight of four Class VI facilities. The Commission finds that this estimate is low and has estimated that its total annual cost will be closer to $250,000, which is the basis for the Commission's proposed fees. *See* "Information Collection Request for the Federal Requirements Under the Underground Injection

Control Program for Carbon Dioxide Geologic Sequestration Wells--Proposed Rule," OMB Control No. 2040-NEW, EPA ICR No. 2309.01, July 2008.

Ms. Savage estimates that the program will require at least one Engineering Specialist VII and an attorney for the first two fiscal years to help draft rules, coordinate with TCEQ and BEG, and prepare the Commission's package for primacy of the federal program for injection wells for the purpose of geologic storage of $CO_2$. She also estimates that the Engineering Specialist VII and an Administrative Assistant II, as well as some assistance from an attorney, will be needed in subsequent fiscal years to administer the program. In addition, the Commission will need to perform computer programming to add a new Underground Injection Control (UIC) type code and a new Drilling Permit purpose of filing code to both the mainframe and open system applications. This change affects 24 mainframe programs totaling 768 hours and open system programs totaling 380 hours for a total cost of $32,718 in fiscal year 2011. Commission personnel would perform these modifications.

Ms. Savage estimates the costs to the State to be approximately $250,000, for fiscal years 2010 and 2011, and approximately $235,404 in subsequent fiscal years.

Texas Government Code, §2006.002, relating to Adoption of Rules with Adverse Economic Effect, directs that, as part of the rulemaking process, a state agency prepare an Economic Impact Statement that assesses the potential impact of a proposed rule on small businesses and micro-businesses, and a Regulatory Flexibility Analysis that considers alternative methods of achieving the purpose of the rule if the proposed rule will have an adverse economic effect on small businesses or micro-businesses.

The Commission's proposed new rules in Chapter 5 are anticipated to have a potential cost impact on those persons performing geologic storage of anthropogenic $CO_2$ in depleted oil and gas reservoirs in this state, but because the Commission has issued no permits for geologic storage of $CO_2$, the Commission has no historic information on which to base its analysis of the cost of compliance. Further, companies performing activities under the jurisdiction of the Commission are not required to make filings with the Commission reporting the number of employees or annual gross receipts, which are elements of the definitions of "micro-business" and "small business" in Texas Government Code, §2006.001; therefore, the Commission has no factual bases for determining whether any persons that will be engaged in geologic storage of $CO_2$ will be classified as small businesses or micro-businesses, as those terms are defined.

Specifically, Texas Government Code, §2006.001(2), defines a "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has fewer than 100 employees or less than $6 million in annual gross receipts. Texas Government Code, §2006.001(1), defines "micro-business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has not more than 20 employees. The Commission expects that the companies that will operate large-scale commercial facilities for the geologic storage of $CO_2$ in Texas are large companies having at least 500 employees or companies under common control of large companies, such as Denbury Resources, Tenaska, Summit Power Group, Occidental Petroleum, and SandRidge Energy; those companies do not meet two of the three elements of either definition.

Based on the information the Commission has received regarding the companies that are likely to pursue permits for facilities for the geologic storage of anthropogenic $CO_2$, the Commission concludes that it is extremely unlikely that any company that potentially could be affected by the proposed rules would be classified as a small business or micro-business, as those terms are defined in Texas Government Code, §2006.001. However, for purposes of performing the analysis mandated by Texas Government Code, §2006.002(c), the Commission assumes that at least one small business or micro-business will apply for a permit to operate a $CO_2$ geologic storage facility in Texas.

The North American Industrial Classification System (NAICS) sets forth categories of business types. There is no category for geologic storage of $CO_2$. This category is not listed on the Texas Comptroller of Public Accounts website page entitled "HB 3430 Reporting Requirements-Determining Potential Effects on Small Businesses." The most suitable category on that website is business type 2212 (Natural Gas Distribution), for which there are listed 144 companies in Texas. This source further indicates that 119 companies (82 percent) are small businesses or micro-businesses as defined in Texas Government Code, §2006.002.

The Commission used information provided by EPA as support documentation for its proposed rules to estimate the cost of compliance with the Commission's proposed rules. EPA estimated an overall cost of approximately $2.20 per ton of $CO_2$ stored over the lifetime of a commercial geologic storage project. See *Federal Register,* Vol. 73, No. 144, July 25, 2008, pages 43528-43529.

EPA estimated the cost of performing the necessary work for and preparing the application at approximately $1,481,775 per application, with which the Commission agrees. The Commission proposes to require a base application fee of $50,000 for a total estimated initial application cost of $1,531,775. EPA also estimated that the recurring costs for a facility that has been permitted and is operating will be $1,705,294 a year; the cost of post-injection monitoring and reporting at $216,092 a year; and the cost for a site closure report at $3,154. The Commission also agrees with these estimates. *See* "Information Collection Request for the Federal Requirements Under the Underground Injection Control Program for Carbon Dioxide Geologic Sequestration Wells--Proposed Rule," OMB Control No. 2040-NEW, EPA ICR No. 2309.01, July 2008. The Commission proposes an application fee of $25,000 for each application to amend a permit for a geologic storage facility; an annual fee of $0.025 per metric ton of $CO_2$ injected into the geologic storage facility; and an annual fee of $50,000 each year the operator does not inject into the geologic storage facility until the director has authorized storage facility closure. Finally, the Commission proposes that the anthropogenic $CO_2$ storage trust fund be capped at $5,000,000.

The Commission's proposed fee structure for applications and for monitoring during the post-injection care period is based in part on the estimated cost to the Commission of reviewing applications and monitoring geologic storage facilities. Because the Commission's proposed annual fee, intended to provide revenue to the Trust Fund, is based on the volume of $CO_2$ injected, the fee generally will be proportional to the size of the facility. That does not necessarily mean, however, that the fee will be proportional to the size of the entity operating the facility, although it could tend to reduce the likely actual annual costs for smaller businesses and modestly increase the actual annual costs for

the larger businesses. Other factors that might affect the distribution of the economic burden of regulating geologic storage of anthropogenic $CO_2$, such as net value of $CO_2$ as established by the federal government in a carbon credit program, cannot be calculated because Congress has not yet established such a program. Further, the Commission should not set fees at a level that creates a disincentive for the development of geologic storage facilities. There is potential benefit in setting the fees at a level that allows Texas to be competitive with other states for such projects. Recognizing that establishing any fee structure in the absence of experience is, at best, inexact, the Commission nevertheless finds that it is necessary to move forward with some regulatory framework in place, including a fee structure.

The Commission has determined that the economic impact of the proposed new rules will be the same for small businesses and micro-businesses as for larger businesses. The Commission has also determined that consideration of the use of regulatory methods that will achieve the purpose of the proposed rules while minimizing the adverse impacts on small businesses is not consistent with the health, safety, and environmental and economic welfare of the state, and therefore has not prepared a regulatory flexibility analysis. The primary reason for this is that absent some action from Congress, states will be required to apply for primacy for the UIC program for geologic storage of $CO_2$ under Section 1422 of the federal SDWA. Under that section, states must show that the state programs meet EPA's minimum federal requirements for UIC programs, including construction, operating, monitoring and testing, reporting, and closure requirements for well owners or operators. The state's program must be at least as stringent as EPA's program.

The Commission anticipates that the creation of a facility for the geologic storage of $CO_2$ would likely affect a local economy; however, because the Commission has not issued any permits for such activities, the Commission has no historic information on which to base an analysis of the impact on a local economy. The Commission recognizes that some geologic storage facilities might be large enough to create new jobs in a local economy, but the Commission does not have any information regarding where such facilities might be located, how large the operations might be, or when such facilities might begin operations; therefore, the Commission has no factual bases on which to estimate the impact on any particular local economy. The Commission anticipates that the effect on any local economy would be similar to that of the oil and gas industry as a whole. Therefore, the Commission has not prepared a local employment impact statement pursuant to Texas Government Code, §2002.022.

The Commission has determined that the proposed new rules in Chapter 5 are not major environmental rules, because the rules do not meet the requirements set forth in Texas Government Code, §2001.0225(a).

Ms. Savage has determined that for each year of the first five years that the new rules will be in effect the public benefit will be a reduction in the amount of anthropogenic $CO_2$ released to the atmosphere and an enhanced ability of Texas industries to comply with future federal climate regulations.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.php; or by electronic mail to rulescoordinator@rrc.state.tx.us. Comments should refer to O&G Docket No. 20-0264802, and will be accepted until 12:00 p.m. (noon) on Monday, November 1, 2010, which is 17 days after expected publication in the *Texas Register* on October 15, 2010. The Commission finds that this comment period is reasonable because the original proposal was published on March 26, 2010, and the version proposed here is not radically different. In addition, the revised proposal and an online comment form will be available on the Commission's web site at least 14 days prior to *Texas Register* publication of the proposal, giving interested persons an additional two weeks to review, analyze, draft, and submit comments. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Ms. Savage at (512) 463-7308. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.php.

## SUBCHAPTER A. GENERAL PROVISIONS

### 16 TAC §5.101, §5.102

The Commission proposes the rules in new Chapter 5 pursuant to Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission; Texas Natural Resources Code, Chapter 91, Subchapter R, as enacted by SB 1387, relating to authorization for multiple or alternative uses of wells; Texas Water Code, Chapter 27, Subchapter C-1, as enacted by SB 1387, which gives the Commission jurisdiction over the geologic storage of $CO_2$ in, and the injection of $CO_2$ into, a reservoir that is initially or may be productive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir; and Texas Water Code, Chapter 120, as enacted by SB 1387, which establishes the Anthropogenic Carbon Dioxide Storage Trust Fund, a special interest-bearing fund in the state treasury, to consist of fees collected by the Commission and penalties imposed under Texas Water Code, Chapter 27, Subchapter C-1, and to be used by the Commission for only certain specified activities associated with geologic storage facilities and associated anthropogenic $CO_2$ injection wells.

Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120, are affected by the proposed new rules.

Statutory authority: Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120.

Cross-reference to statute: Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120.

Issued in Austin, Texas on September 29, 2010.

*§5.101. Purpose.*

The purpose of this chapter is to implement the portion of the state program for geologic storage of anthropogenic $CO_2$ over which the Railroad Commission has jurisdiction consistent with state and federal law related to protection of underground sources of drinking water.

*§5.102. Definitions.*

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

(1) Affected person--A person who, as a result of actions proposed by an application for a geologic storage facility permit or an amendment or modification of an existing geologic storage facility permit, has suffered or may suffer actual injury or economic damage other than as a member of the general public.

(2) Anthropogenic carbon dioxide ($CO_2$)--

(A) $CO_2$ that would otherwise have been released into the atmosphere that has been:

*(i)* separated from any other fluid stream; or

*(ii)* captured from an emissions source, including:

*(I)* an advanced clean energy project as defined by Health and Safety Code, §382.003, or another type of electric generation facility; or

*(II)* an industrial source of emissions; and

*(iii)* any incidental associated substance derived from the source material for, or from the process of capturing, $CO_2$ described by clause (i) of this subparagraph; and

*(iv)* any substance added to $CO_2$ described by clause (i) of this subparagraph to enable or improve the process of injecting the $CO_2$; and

(B) does not include naturally occurring $CO_2$ that is produced, acquired, recaptured, recycled, and reinjected as part of enhanced recovery operations.

(3) Anthropogenic $CO_2$ injection well--An injection well used to inject or transmit anthropogenic $CO_2$ into a reservoir.

(4) Aquifer--A geologic formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

(5) Area of review--The subsurface three-dimensional extent of the $CO_2$ stream plume and the associated pressure front, as well as the overlying formations, any underground sources of drinking water overlying an injection zone along with any intervening formations, and the surface area above that delineated region.

(6) Carbon dioxide ($CO_2$) plume--The underground extent, in three dimensions, of an injected $CO_2$ stream.

(7) Carbon dioxide ($CO_2$) stream--$CO_2$ that has been captured from an emission source, incidental associated substances derived from the source materials and the capture process, and any substances added to the stream to enable or improve the injection process. The term does not include any $CO_2$ stream that meets the definition of a hazardous waste under 40 Code of Federal Regulations Part 261.

(8) Commission--A quorum of the members of the Railroad Commission of Texas convening as a body in open meeting.

(9) Confining zone--A geologic formation, group of formations, or part of a formation that is capable of limiting fluid movement from an injection zone.

(10) Corrective action--Methods to assure that wells within the area of review do not serve as conduits for the movement of fluids into or between underground sources of drinking water, including the use of corrosion resistant materials, where appropriate.

(11) Delegate--The person authorized by the director to take action on behalf of the Railroad Commission of Texas under this chapter.

(12) Director--The director of the Oil and Gas Division of the Railroad Commission of Texas or the director's delegate.

(13) Division--The Oil and Gas Division of the Railroad Commission of Texas.

(14) Enhanced recovery operation--Using any process to displace hydrocarbons from a reservoir other than by primary recovery, including using any physical, chemical, thermal, or biological process and any co-production project. This term does not include pressure maintenance or disposal projects.

(15) Facility closure--The point at which the operator of a geologic storage facility is released from post-injection storage facility care responsibilities.

(16) Formation fluid--Fluid present in a formation under natural conditions.

(17) Fracture pressure--The pressure that, if applied to a subsurface formation, would cause that formation to physically fracture.

(18) Geologic storage--The long-term containment of anthropogenic $CO_2$ in a reservoir.

(19) Geologic storage facility or storage facility--The underground reservoir, underground equipment, injection wells, and surface buildings and equipment used or to be used for the geologic storage of anthropogenic $CO_2$ and all surface and subsurface rights and appurtenances necessary to the operation of a facility for the geologic storage of anthropogenic $CO_2$. The term includes any reasonable and necessary areal buffer, subsurface monitoring zones, and pressure fronts. The term does not include a pipeline used to transport $CO_2$ from the facility at which the $CO_2$ is captured to the geologic storage facility. The storage of $CO_2$ incidental to or as part of enhanced recovery operations does not in itself automatically render a facility a geologic storage facility.

(20) Injection zone--A geologic formation, group of formations, or part of a formation that is of sufficient areal extent, thickness, porosity, and permeability to receive $CO_2$ through a well or wells associated with a geologic storage facility.

(21) Mechanical integrity--

(A) An anthropogenic $CO_2$ injection well has mechanical integrity if:

*(i)* there is no significant leak in the casing, tubing, or packer; and

*(ii)* there is no significant fluid movement into a stratum containing an underground source of drinking water through channels adjacent to the injection well bore as a result of operation of the injection well.

(B) The Commission will consider any deviations during testing that cannot be explained by the margin of error for the test used to determine mechanical integrity, or other factors, such as temperature fluctuations, to be an indication of the possibility of a significant leak and/or the possibility of significant fluid movement into a stratum containing an underground source of drinking water through channels adjacent to the injection wellbore.

(22) Monitoring well--A well either completed or re-completed to observe subsurface phenomena, including the presence of anthropogenic $CO_2$, pressure fluctuations, fluid levels and flow, temperature, and/or in situ water chemistry.

(23) Operator--A person, acting for himself or as an agent for others, designated to the Railroad Commission of Texas as the person with responsibility for complying with the rules and regulations regarding the permitting, physical operation, closure, and post-closure

care of a geologic storage facility, or such person's authorized representative.

(24) Person--A natural person, corporation, organization, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity.

(25) Post-injection facility care--Monitoring and other actions (including corrective action) needed following cessation of injection to assure that underground sources of drinking water are not endangered and that the anthropogenic $CO_2$ remains confined to the permitted injection interval.

(26) Pressure front--The zone of elevated pressure that is created by the injection of the $CO_2$ stream into the subsurface where there is a pressure differential sufficient to cause movement of the $CO_2$ stream or formation fluids from the injection zone into an underground source of drinking water.

(27) Reservoir--A natural or artificially created subsurface sedimentary stratum, formation, aquifer, cavity, void, or coal seam.

(28) Transmissive fault or fracture--A fault or fracture that has sufficient permeability and vertical extent to allow fluids to move beyond the confining zone.

(29) Underground source of drinking water--An aquifer or its portion which is not an exempt aquifer as defined in 40 Code of Federal Regulations §146.4 and which:

(A) supplies any public water system; or

(B) contains a sufficient quantity of ground water to supply a public water system; and

*(i)* currently supplies drinking water for human consumption; or

*(ii)* contains fewer than 10,000 mg/l total dissolved solids.

(30) Well stimulation--Any of several processes used to clean the well bore, enlarge channels, and increase pore space in the interval to be injected thus making it possible for fluid to move more readily into the formation including, but not limited to, surging, jetting, blasting, acidizing, and hydraulic fracturing.

(31) Workover--An operation in which a down-hole component of a well is repaired or the engineering design of the well is changed. Workovers include operations such as sidetracking, the addition of perforations within the permitted injection interval, and the addition of liners or patches. For the purposes of this chapter, workovers do not include well stimulation operations.

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 September 29, 2010.

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

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# SUBCHAPTER B. GEOLOGIC STORAGE AND ASSOCIATED INJECTION OF ANTHROPOGENIC CARBON DIOXIDE (CO2)

**16 TAC §§5.201 - 5.208**

The Commission proposes the rules in new Chapter 5 pursuant to Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission; Texas Natural Resources Code, Chapter 91, Subchapter R, as enacted by SB 1387, relating to authorization for multiple or alternative uses of wells; Texas Water Code, Chapter 27, Subchapter C-1, as enacted by SB 1387, which gives the Commission jurisdiction over the geologic storage of $CO_2$ in, and the injection of $CO_2$ into, a reservoir that is initially or may be productive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir; and Texas Water Code, Chapter 120, as enacted by SB 1387, which establishes the Anthropogenic Carbon Dioxide Storage Trust Fund, a special interest-bearing fund in the state treasury, to consist of fees collected by the Commission and penalties imposed under Texas Water Code, Chapter 27, Subchapter C-1, and to be used by the Commission for only certain specified activities associated with geologic storage facilities and associated anthropogenic $CO_2$ injection wells.

Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120, are affected by the proposed new rules.

Statutory authority: Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120.

Cross-reference to statute: Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120.

Issued in Austin, Texas on September 29, 2010.

*§5.201. Applicability and Compliance.*

(a) This subchapter applies to the geologic storage of anthropogenic $CO_2$ in, and the injection of anthropogenic $CO_2$ into, a reservoir that is initially or may be productive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir. A reservoir that may be productive means an identifiable geologic unit that has had production in the past, which is similar to productive or previously productive reservoirs along the same or a similar trend, or potentially contains oil, gas, or geothermal resources based on analysis of geophysical and/or seismic data.

(b) This subchapter does not apply to the injection of fluid through the use of an injection well regulated under §3.46 of this title (relating to Fluid Injection into Productive Reservoirs) for the primary purpose of enhanced recovery operations from which there is reasonable expectation of more than insignificant future production volumes of oil, gas, or geothermal energy and operating pressures are no higher than reasonably necessary to produce such volumes or rates. However, the operator of an enhanced recovery project may propose to also permit the enhanced recovery project as a $CO_2$ geologic storage facility simultaneously. If the director determines that an injection well regulated under §3.46 of this title should be regulated under this subchap-

ter because the injection well is no longer being used for the primary purpose of enhanced recovery operations, the director must notify the operator of such determination and allow the operator at least 30 days to respond to the determination and to file an application under this subchapter or cease operation of the well. Additionally, this subchapter does not preclude an enhanced oil recovery project operator from opting into a regulatory program that provides carbon credit for anthropogenic $CO_2$ sequestered through the enhanced recovery project.

(c) This subchapter applies to a well that is authorized as or converted to an anthropogenic $CO_2$ injection well for geologic storage.

(d) If a provision of this subchapter conflicts with any provision or term of a Commission order or permit, the provision of such order or permit controls.

(e) The operator of a geologic storage facility must comply with the requirements of this subchapter as well as with all other applicable Commission rules and orders, including the requirements of Chapter 8 of this title (relating to Pipeline Safety Regulations) for pipelines and associated facilities.

*§5.202. Permit Required.*

(a) Permit required. A person may not begin drilling or operating an anthropogenic $CO_2$ injection well for geologic storage or constructing or operating a geologic storage facility regulated under this subchapter without first obtaining the necessary permit(s) from the Commission.

(b) Permit amendment.

(1) An operator must file an application to amend an existing geologic storage facility permit with the director:

(A) prior to expanding the areal extent of the storage reservoir;

(B) prior to increasing the permitted injection pressure;

(C) prior to adding injection wells; or

(D) at any time that conditions at the geologic storage facility materially deviate from the conditions specified in the permit or permit application.

(2) Compliance with plan amendments required by this subchapter does not necessarily constitute a material deviation in conditions requiring an amendment of the permit.

(c) Permit transfer. An operator may transfer its geologic storage facility permit to another operator if the requirements of this subsection are met. A new operator may not assume operation of the geologic storage facility without a valid permit.

(1) Notice. An applicant must submit written notice of an intended permit transfer to the director at least 45 days prior to the date the transfer is proposed to take place, unless such action could trigger U. S. Securities and Exchange Commission fiduciary and insider trading restrictions and/or rules.

(A) The applicant's notice to the director must contain:

*(i)* the name and address of the person to whom the geologic storage facility will be sold, assigned, transferred, leased, conveyed, exchanged, or otherwise disposed;

*(ii)* the name and location of the geologic storage facility and a legal description of the land upon which the storage facility is situated;

*(iii)* the date that the sale, assignment, transfer, lease conveyance, exchange, or other disposition is proposed to become final; and

*(iv)* the date that the transferring operator will relinquish possession as a result of the sale, assignment, transfer, lease conveyance, exchange, or other disposition.

(B) The person acquiring a geologic storage facility, whether by purchase, transfer, assignment, lease, conveyance, exchange, or other disposition, must notify the director in writing of the acquisition as soon as it is reasonably possible but not later than five business days after the date that the acquisition of the geologic storage facility becomes final. The director may not approve the transfer of a geologic storage facility permit until the new operator provides all of the following:

*(i)* the name and address of the operator from which the geologic storage facility was acquired;

*(ii)* the name and location of the geologic storage facility and a description of the land upon which the geologic storage facility is situated;

*(iii)* the date that the acquisition became or will become final;

*(iv)* the date that possession was or will be acquired; and

*(v)* the financial assurance required by this subchapter.

(2) Evidence of financial responsibility. The operator acquiring the permit must provide the director with evidence of financial responsibility satisfactory to the director in accordance with §5.205 of this title (relating to Fees, Financial Responsibility, and Financial Assurance).

(3) Transfer of responsibility. An operator remains responsible for the geologic storage facility until the director approves in writing the sale, assignment, transfer, lease, conveyance, exchange, or other disposition and the person acquiring the storage facility complies with all applicable requirements.

(d) Modification, cancellation, or suspension of a geologic storage facility permit.

(1) General. The director may modify, suspend, or cancel a geologic storage facility permit after notice and opportunity for hearing under any of the following circumstances:

(A) There is a material change in conditions in the operation of the geologic storage facility, or there are material deviations from the information originally furnished to the director. A change in conditions at a facility that does not affect the ability of the facility to operate without causing an unauthorized release of $CO_2$ and/or formation fluids is not considered to be material;

(B) Underground sources of drinking water are likely to be endangered as a result of the continued operation of the geologic storage facility;

(C) There are substantial violations of the terms and provisions of the permit or of applicable Commission orders or regulations;

(D) The operator misrepresented material facts during the permit application or issuance process; or

(E) Fluids are escaping or are likely to escape from the injection zone.

(2) Emergency shutdown. Notwithstanding the provisions of paragraph (1) of this subsection, in the event of an emergency that threatens endangerment to underground sources of drinking water or

to life or property, or an imminent threat of uncontrolled release of $CO_2$, the director may immediately order suspension of the operation of the geologic storage facility until a final order is issued pursuant to a hearing, if any.

*§5.203. Application Requirements.*

(a) General.

(1) Form and filing. Each applicant for a permit to construct and operate a geologic storage facility must file an application with the division in Austin on a form prescribed by the Commission. The applicant must file one copy of the application and all attachments with the division in an electronic format. On the same date, the applicant must file one copy with the appropriate district office(s) and one copy with the Executive Director of the Texas Commission on Environmental Quality. An applicant must ensure that the application is executed by a party having knowledge of the facts entered on the form and included in the required attachments. If otherwise required under Occupations Code, Chapter 1001, relating to Texas Engineering Practices Act, or Chapter 1002, relating to Texas Geoscientists Practices Act, respectively, a licensed professional engineer or geoscientist must conduct the geologic and hydrologic evaluations required under this section and must affix the appropriate seal on the resulting reports of such evaluations.

(2) General information. On the application, the applicant must include the name, mailing address, and location of the facility for which the application is being submitted and the operator's name, address, telephone number, Commission Organization Report number, and ownership of the facility.

(3) Application completeness. The Commission may not issue a permit before receiving a complete application. A permit application is complete when the director determines that the application contains information addressing each application requirement of the regulatory program and all information necessary to initiate the final review by the director.

(4) Reports. An applicant must ensure that all descriptive reports are prepared by a qualified and knowledgeable person and include an interpretation of the results of all logs, surveys, sampling, and tests required in this subchapter. The applicant must include in the application a quality assurance and surveillance plan for all testing and monitoring, which includes, at a minimum, validation of the analytical laboratory data, calibration of field instruments, and an explanation of the sampling and data acquisition techniques.

(b) Surface map and information. Only information of public record is required to be included on this map.

(1) The applicant must file with the director a surface map delineating the proposed location(s) of injection well(s) and the boundary of the geologic storage facility for which a permit is sought and the applicable area of review.

(2) The applicant must show within the area of review on the map the number or name and the location of:

(A) all known artificial penetrations through the confining zone, including injection wells, producing wells, inactive wells, plugged wells, or dry holes;

(B) the locations of cathodic protection holes, subsurface cleanup sites, bodies of surface water, springs, surface and subsurface mines, quarries, and water wells; and

(C) other pertinent surface features, including pipelines, roads, and structures intended for human occupancy.

(3) The applicant must identify on the map any known or suspected faults expressed at the surface.

(c) Geologic, geochemical, and hydrologic information.

(1) The applicant must submit a descriptive report prepared by a knowledgeable person that includes an interpretation of the results of appropriate logs, surveys, sampling, and testing sufficient to determine the depth, thickness, porosity, permeability, and lithology of, and the geochemistry of any formation fluids in, all relevant geologic formations.

(2) The applicant must submit information on the geologic structure and reservoir properties of the proposed storage reservoir and overlying formations, including the following information:

(A) geologic and topographic maps and cross sections illustrating regional geology, hydrogeology, and the geologic structure of the area from the ground surface to the base of the injection zone within the area of review that indicate the general vertical and lateral limits of all underground sources of drinking water within the area of review, their positions relative to the storage reservoir and the direction of water movement, where known;

(B) the depth, areal extent, thickness, mineralogy, porosity, permeability, and capillary pressure of, and the geochemistry of any formation fluids in, the storage reservoir and confining zone and any other relevant geologic formations, including geology/facies changes based on field data, which may include geologic cores, outcrop data, seismic surveys, well logs, and lithologic descriptions, and the analyses of logging, sampling, and testing results used to make such determinations;

(C) the location, orientation, and properties of known or suspected transmissive faults or fractures that may transect the confining zone within the area of review and a determination that such faults or fractures would not compromise containment;

(D) the seismic history, including the presence and depth of seismic sources, and a determination that the seismicity would not compromise containment;

(E) geomechanical information on fractures, stress, ductility, rock strength, and in situ fluid pressures within the confining zone;

(F) a description of the formation testing program and the analytical results to determine the chemical and physical characteristics, including the fracture pressures, of the injection zone and the confining zone; and

(G) baseline geochemical data for subsurface formations that will be used for monitoring purposes, including all formations containing underground sources of drinking water within the area of review.

(d) Area of review and corrective action. This subsection describes the standards for the information regarding the delineation of the area of review, the identification of penetrations, and corrective action that an applicant must include in an application.

(1) Initial delineation of the area of review and initial corrective action. The applicant must delineate the area of review, identify all wells that require corrective action, and perform corrective action on those wells. Corrective action may be phased.

(A) Delineation of area of review.

*(i)* Using computational modeling that considers the volumes and the physical and chemical properties of the injected $CO_2$ stream, the physical properties of the formation into which the $CO_2$

stream is to be injected, and available data including data available from logging, testing, or operation of wells, the applicant must predict the lateral and vertical extent of migration for the $CO_2$ plume and formation fluids and the pressure differentials required to cause movement of injected fluids or formation fluids into an underground source of drinking water in the subsurface for the following time periods:

*(I)* five years after initiation of injection;

*(II)* from initiation of injection to the end of the injection period proposed by the applicant; and

*(III)* from initiation of injection to 10 years after the end of the injection period proposed by the applicant.

*(ii)* The applicant must use a computational model that:

*(I)* is based on geologic and reservoir engineering information collected to characterize the injection zone and the confining zone;

*(II)* is based on anticipated operating data, including injection pressures, rates, and total volumes over the proposed duration of injection;

*(III)* takes into account relevant geologic heterogeneities and data quality, and their possible impact on model predictions;

*(IV)* considers the physical and chemical properties of injected and formation fluids; and

*(V)* considers potential migration through known faults, fractures, and artificial penetrations and beyond lateral spill points.

*(iii)* The applicant must provide the name and a description of the model, software, the assumptions used to determine the area of review, and the equations solved.

(B) Identification and table of penetrations. The applicant must identify, compile, and submit a table listing all penetrations, including active, inactive, plugged, and unplugged wells and underground mines in the area of review that may penetrate the confining zone, that are known or reasonably discoverable through specialized knowledge or experience. The applicant must provide a description of each penetration's type, construction, date drilled or excavated, location, depth, and record of plugging and/or completion or closure. Examples of specialized knowledge or experience may include reviews of federal, state, and local government records, interviews with past and present owners, operators, and occupants, reviews of historical information (including aerial photographs, chain of title documents, and land use records), and visual inspections of the facility and adjoining properties.

(C) Corrective action. The applicant must demonstrate whether each of the wells on the table of penetrations has or has not been plugged and whether each of the underground mines (if any) on the table of penetrations has or has not been closed in a manner that prevents the movement of injected fluids or displaced formation fluids that may endanger underground sources of drinking water or allow the injected fluids or formation fluids to escape the permitted injection zone. The applicant must perform corrective action on all wells and underground mines in the area of review that are determined to need corrective action. The operator must perform corrective action using materials suitable for use with the $CO_2$ stream. Corrective action may be phased.

(2) Area of review and corrective action plan. As part of an application, the applicant must submit an area of review and corrective action plan that includes the following information:

(A) the method for delineating the area of review, including the model to be used, assumptions that will be made, and the site characterization data on which the model will be based;

(B) for the area of review, a description of:

*(i)* the minimum frequency subject to the annual certification pursuant to §5.206(f) of this title (relating to Permit Standards) at which the applicant proposes to re-evaluate the area of review during the life of the geologic storage facility;

*(ii)* how monitoring and operational data will be used to re-evaluate the area of review; and

*(iii)* the monitoring and operational conditions that would warrant a re-evaluation of the area of review prior to the next scheduled re-evaluation;

(C) a corrective action plan that describes:

*(i)* how the corrective action will be conducted;

*(ii)* how corrective action will be adjusted if there are changes in the area of review;

*(iii)* if a phased corrective action is planned, how the phasing will be determined; and

*(iv)* how site access will be secured for future corrective action.

(e) Injection well construction.

(1) Criteria for construction of anthropogenic $CO_2$ injection wells. This paragraph establishes the criteria for the information about the construction and casing and cementing of, and special equipment for, anthropogenic $CO_2$ injection wells that an applicant must include in an application.

(A) General. The operator of a geologic storage facility must ensure that all anthropogenic $CO_2$ injection wells are constructed and completed in a manner that will:

*(i)* prevent the movement of injected $CO_2$ or displaced formation fluids into any unauthorized zones or into any areas where they could endanger underground sources of drinking water;

*(ii)* allow the use of appropriate testing devices and workover tools; and

*(iii)* allow continuous monitoring of the annulus space between the injection tubing and long string casing.

(B) Casing and cementing of anthropogenic $CO_2$ injection wells.

*(i)* The operator must ensure that injection wells are cased and the casing cemented in compliance with §3.13 of this title (relating to Casing, Cementing, Drilling, and Completion Requirements).

*(ii)* Casing, cement, cement additives, and/or other materials used in the construction of each injection well must have sufficient structural strength and must be of sufficient quality and quantity to maintain integrity over the design life of the injection well. All well materials must be suitable for use with fluids with which the well materials may be expected to come into contact and must meet or exceed test standards developed for such materials by the American Petroleum Institute, ASTM International, or comparable standards as approved by the director.

*(iii)* Surface casing must extend through the base of the lowermost underground source of drinking water above the injection zone and must be cemented to the surface.

*(iv)* Circulation of cement may be accomplished by staging. The director may approve an alternative method of cementing in cases where the cement cannot be circulated to the surface, provided the applicant can demonstrate by using logs that the cement does not allow fluid movement between the casing and the well bore.

*(v)* At least one long string casing, using a sufficient number of centralizers, must extend through the injection zone. The long string casing must isolate the injection zone and other intervals as necessary for the protection of underground sources of drinking water and to ensure confinement of the injected and formation fluids to the permitted injection zone using cement and/or other isolation techniques.

*(vi)* The applicant must verify the integrity and location of the cement using technology capable of radial evaluation of cement quality and identification of the location of channels to ensure that underground sources of drinking water will not be endangered.

*(vii)* The director may exempt existing wells that have been associated with injection of $CO_2$ for the purpose of enhanced recovery from provisions of these casing and cementing requirements if the applicant demonstrates that the well construction meets the general performance criteria in subparagraph (A) of this paragraph.

(C) Special equipment.

*(i)* Tubing and packer. All injection wells must inject fluids through tubing set on a mechanical packer. Packers must be set no higher than 100 feet above the top of the permitted injection interval or at a location approved by the director.

*(ii)* Pressure observation valve. The wellhead of each injection well must be equipped with a pressure observation valve on the tubing and each annulus of the well.

(2) Construction information. The applicant must provide the following information for each well to allow the director to determine whether the proposed well construction and completion design will meet the general performance criteria in paragraph (1) of this subsection:

(A) depth to the injection zone;

(B) hole size;

(C) size and grade of all casing and tubing strings *(e.g.,* wall thickness, external diameter, nominal weight, length, joint specification and construction material, tubing tensile, burst, and collapse strengths);

(D) proposed injection rate (intermittent or continuous), maximum proposed surface injection pressure, and maximum proposed volume of the $CO_2$ stream;

(E) type of packer and packer setting depth;

(F) a description of the capability of the materials to withstand corrosion when exposed to a combination of the $CO_2$ stream and formation fluids;

(G) down-hole temperatures and pressures;

(H) lithology of injection and confining zones;

(I) type or grade of cement and additives;

(J) chemical composition and temperature of the $CO_2$ stream; and

(K) schematic drawings of the surface and subsurface construction details.

(3) Well construction plan. The applicant must submit an injection well construction plan that meets the criteria in paragraph (1) of this subsection.

(4) Well stimulation plan. The applicant must submit, as applicable, a description of the proposed well stimulation program and a determination that well stimulation will not compromise containment.

(f) Plan for logging, sampling, and testing of injection wells after permitting but before injection. The applicant must submit a plan for logging, sampling, and testing of each injection well after permitting but prior to injection well operation. The plan need not include identical logging, sampling, and testing procedures for all wells provided there is a reasonable basis for different procedures. Such plan is not necessary for existing wells being converted to anthropogenic $CO_2$ injection wells in accordance with this subchapter, to the extent such activities already have taken place. The plan must describe the logs, surveys, and tests to be conducted to verify the depth, thickness, porosity, permeability, and lithology of, and the salinity of any formation fluids in, the formations that are to be used for monitoring, storage, and confinement to assure conformance with the injection well construction requirements set forth in subsection (e) of this section, and to establish accurate baseline data against which future measurements may be compared. The plan must meet the following criteria and must include the following information.

(1) Logs and surveys of newly drilled and completed injection wells:

(A) During the drilling of any hole that is constructed by drilling a pilot hole that is enlarged by reaming or another method, the operator must perform deviation checks at sufficiently frequent intervals to determine the location of the borehole and to assure that vertical avenues for fluid movement in the form of diverging holes are not created during drilling.

(B) Before surface casing is installed, the operator must run appropriate logs, such as resistivity, spontaneous potential, and caliper logs.

(C) After each casing string is set and cemented, the operator must run logs, such as a cement bond log, variable density log, and a temperature log, to ensure proper cementing.

(D) Before long string casing is installed, the operator must run logs appropriate to the geology, such as resistivity, spontaneous potential, porosity, caliper, gamma ray, and fracture finder logs, to gather data necessary to verify the characterization of the geology and hydrology.

(2) Testing and determination of hydrogeologic characteristics of injection and confining zone.

(A) Prior to operation, the operator must conduct tests to verify hydrogeologic characteristics of the injection zone.

(B) The operator must perform an initial pressure falloff or other test and submit to the director a written report of the results of the test, including details of the methods used to perform the test and to interpret the results, all necessary graphs, and the testing log, to verify permeability, injectivity, and initial pressure using water or $CO_2$.

(C) The operator must determine the fracture pressures for the injection and confining zone.

(3) Sampling.

(A) The operator must record and submit the formation fluid temperature, pH, and conductivity, the reservoir pressure, and the static fluid level of the injection zone.

(B) The operator must submit analyses of whole cores or sidewall cores representative of the injection zone and confining zone and formation fluid samples from the injection zone. The director may accept data from cores and formation fluid samples from nearby wells or other data if the operator can demonstrate to the director that such data are representative of conditions at the proposed injection well.

(g) Compatibility determination. Based on the results of the formation testing program required by subsection (f) of this section, the applicant must submit a determination of the compatibility of the $CO_2$ stream with:

(1) the materials to be used to construct the well;

(2) fluids in the injection zone; and

(3) minerals in both the injection and the confining zone.

(h) Mechanical integrity testing.

(1) Criteria. This paragraph establishes the criteria for the mechanical integrity testing plan for anthropogenic $CO_2$ injection wells that an applicant must include in an application.

(A) Other than during periods of well workover in which the sealed tubing-casing annulus is of necessity disassembled for maintenance or corrective procedures, the operator must maintain mechanical integrity of the injection well at all times.

(B) Before beginning injection operations and at least once every five years thereafter, the operator must demonstrate mechanical integrity for each injection well by pressure testing the tubing-casing annulus.

(C) Following an initial annulus pressure test, the operator must continuously monitor injection pressure, rate, injected volumes, and pressure on the annulus between tubing and long string casing to confirm that the injected fluids are confined to the injection zone.

(D) At least once every five years, the operator must confirm that the injected fluids are confined to the injection zone using a method approved by the director *(e.g.,* diagnostic surveys such as oxygen-activation logging or temperature or noise logs).

(E) The operator must test injection wells after any workover that disturbs the seal between the tubing, packer, and casing in a manner that verifies mechanical integrity of the tubing and long string casing.

(F) An operator must either repair and successfully retest or plug a well that fails a mechanical integrity test.

(2) Mechanical integrity testing plan. The applicant must prepare and submit a mechanical integrity testing plan as part of a permit application. The plan must include a schedule for the performance of a series of tests at a minimum frequency of five years. The performance tests must be designed to demonstrate the internal and external mechanical integrity of each injection well. These tests may include:

(A) a pressure test with liquid or inert gas;

(B) a tracer survey such as oxygen-activation logging;

(C) a temperature or noise log;

(D) a casing inspection log; and/or

(E) any alternative method that provides equivalent or better information approved by the director.

(i) Operating information.

(1) Operating plan. The applicant must submit a plan for operating the injection wells and the geologic storage facility that complies with the criteria set forth in §5.206(c) of this title, and that outlines the steps necessary to conduct injection operations. The applicant must include the following proposed operating data in the plan:

(A) the average and maximum daily injection rates and volumes of the $CO_2$ stream;

(B) the average and maximum surface injection pressure;

(C) the source(s) of the $CO_2$ stream and the volume of $CO_2$ from each source; and

(D) an analysis of the chemical and physical characteristics of the $CO_2$ stream prior to injection.

(2) Maximum injection pressure. The director will approve a maximum injection pressure limit that:

(A) considers the risks of tensile failure and, where appropriate, geomechanical or other studies that assess the risk of tensile failure and shear failure;

(B) with a reasonable degree of certainty will avoid initiation or propagation of fractures in the confining zone or cause otherwise non-transmissive faults transecting the confining zone to become transmissive; and

(C) in no case may cause the movement of injection fluids or formation fluids in a manner that endangers underground sources of drinking water.

(j) Plan for monitoring, sampling, and testing after initiation of operation.

(1) The applicant must submit a monitoring, sampling, and testing plan for verifying that the geologic storage facility is operating as permitted and that the injected fluids are confined to the injection zone.

(2) The plan must include the following:

(A) the analysis of the $CO_2$ stream prior to injection with sufficient frequency to yield data representative of its chemical and physical characteristics;

(B) the installation and use of continuous recording devices to monitor injection pressure, rate and volume; and the pressure on the annulus between the tubing and the long string casing, except during workovers;

(C) after initiation of injection, the performance on a semi-annual basis of corrosion monitoring of the well materials for loss of mass, thickness, cracking, pitting, and other signs of corrosion to ensure that the well components meet the minimum standards for material strength and performance set forth in subsection (e)(1)(A) of this section. The operator must report the results of such monitoring annually. Corrosion monitoring may be accomplished by:

*(i)* analyzing coupons of the well construction materials in contact with the $CO_2$ stream;

*(ii)* routing the $CO_2$ stream through a loop constructed with the materials used in the well and inspecting the materials in the loop; or

*(iii)* using an alternative method, materials, or time period approved by the director;

(D) monitoring of geochemical and geophysical changes, including:

*(i)* periodic sampling of the fluid temperature, pH, conductivity, reservoir pressure and static fluid level of the injection zone and monitoring for pressure changes, and for changes in geochemistry, in a permeable and porous formation near to and above the top confining zone;

*(ii)* periodic monitoring of the quality and geochemistry of an underground source of drinking water within the area of review and the formation fluid in a permeable and porous formation near to and above the top confining zone to detect any movement of the injected $CO_2$ through the confining zone into that monitored formation;

*(iii)* the location and number of monitoring wells justified on the basis of the area of review, injection rate and volume, geology, and the presence of artificial penetrations and other factors specific to the geologic storage facility; and

*(iv)* the monitoring frequency and spatial distribution of monitoring wells based on baseline geochemical data collected under subsection (c)(2) of this section and any modeling results in the area of review evaluation;

(E) tracking the extent of the $CO_2$ plume and the position of the pressure front by using indirect, geophysical techniques, which may include seismic, electrical, gravity, or electromagnetic surveys and/or down-hole $CO_2$ detection tools; and

(F) additional monitoring as the director may determine to be necessary to support, upgrade, and improve computational modeling of the area of review evaluation and to determine compliance with the requirements that the injection activity not allow the movement of fluid containing any contaminant into underground sources of drinking water and that the injected fluid remain within the permitted interval.

(k) Well plugging plan. The applicant must submit a well plugging plan for all injection wells and monitoring wells that penetrate the base of usable quality water that includes:

(1) a proposal for plugging all monitoring wells that penetrate the base of usable quality water and all injection wells upon abandonment in accordance with §3.14 of this title (relating to Plugging);

(2) proposals for activities to be undertaken prior to plugging an injection well, specifically:

(A) flushing each injection well with a buffer fluid;

(B) performing tests or measures to determine bottomhole reservoir pressure;

(C) performing final tests to assess mechanical integrity; and

(D) ensuring that the material to be used in plugging must be compatible with the $CO_2$ stream and the formation fluids;

(3) a proposal for giving notice of intent to plug monitoring wells that penetrate the base of usable quality water and all injection wells. The applicant's plan must ensure that:

(A) the operator notifies the director at least 60 days before plugging a well. At this time, if any changes have been made to the original well plugging plan, the operator must also provide a revised well plugging plan. At the discretion of the director, an operator may be allowed to proceed with well plugging on a shorter notice period; and

(B) the operator will file a notice of intention to plug and abandon (Form W-3A) a well with the appropriate Commission district office and the division in Austin at least five days prior to the beginning of plugging operations;

(4) a plugging report for monitoring wells that penetrate the base of usable quality water and all injection wells. The applicant's plan must ensure that within 30 days after plugging the operator will file a complete well plugging record (Form W-3) in duplicate with the appropriate district office. The operator and the person who performed the plugging operation (if other than the operator) must certify the report as accurate;

(5) a plan for plugging all monitoring wells that do not penetrate the base of usable quality water in accordance with 16 TAC Chapter 76 (relating to Water Well Drillers and Water Well Pump Installers); and

(6) a plan for certifying that all monitoring wells that do not penetrate the base of usable quality water will be plugged in accordance with 16 TAC Chapter 76.

(l) Emergency and remedial response plan. The applicant must submit an emergency and remedial response plan that:

(1) accounts for the entire area of review, regardless of whether or not corrective action in the area of review is phased;

(2) describes actions to be taken to address escape from the permitted injection interval or movement of the injection fluids or formation fluids that may cause an endangerment to underground sources of drinking water during construction, operation, closure and post-closure periods;

(3) includes a safety plan that includes emergency response procedures, provisions to provide security against unauthorized activity, and $CO_2$ release detection and prevention measures; and

(4) includes a description of the training and testing that will be provided to each employee at the storage facility on operational safety and emergency response procedures to the extent applicable to the employee's duties and responsibilities. The operator must train all employees before commencing injection and storage operations at the facility. The operator must train each subsequently hired employee before that employee commences work at the storage facility. The operator must hold a safety meeting with each contractor prior to the commencement of any new contract work at a storage facility. Emergency measures specific to the contractor's work must be explained in the contractor safety meeting. Training schedules, training dates, and course outlines must be provided to Commission personnel upon request for the purpose of Commission review to determine compliance with this paragraph.

(m) Post-injection storage facility care and closure plan. The applicant must submit a post-injection storage facility care and closure plan. The plan must include:

(1) the pressure differential between pre-injection and predicted post-injection pressures in the injection zone;

(2) the predicted position of the $CO_2$ plume and associated pressure front at closure as demonstrated in the area of review evaluation required under subsection (d) of this section;

(3) a description of the proposed post-injection monitoring location, methods, and frequency;

(4) a proposed schedule for submitting post-injection storage facility care monitoring results to the division; and

(5) the estimated cost of proposed post-injection storage facility care and closure.

(n) Fees, financial responsibility, and financial assurance. The applicant must pay the fees, demonstrate that it has met the financial responsibility requirements, and provide the Commission with financial assurance as required under §5.205 of this title (relating to Fees, Financial Responsibility, and Financial Assurance).

(1) The applicant must demonstrate financial responsibility and resources for corrective action, injection well plugging, post-injection storage facility care and storage facility closure, and emergency and remedial response until the director has provided to the operator a written verification that the director has determined that the facility has reached the end of the post-injection storage facility care period.

(2) In determining whether the applicant is financially responsible, the director must rely on the following:

(A) the person's most recent audited annual report filed with the U. S. Securities and Exchange Commission under Section 13 or 15(d), Securities Exchange Act of 1934 (15 U.S.C. Section 78m or 78o(d)). The date of the audit may not be more than one year before the date of submission of the application to the division; and

(B) the person's most recent quarterly report filed with the U. S. Securities and Exchange Commission under Section 13 or 15(d), Securities Exchange Act of 1934 (15 U.S.C. Section 78m or 78o(d)); or

(C) if the person is not required to file such a report, the person's most recent audited financial statement. The date of the audit must not be more than one year before the date of submission of the application to the division.

(o) Letter from the Texas Commission on Environmental Quality. The applicant must submit a letter from the Executive Director of the Texas Commission on Environmental Quality in accordance with Texas Water Code, §27.046, stating that drilling and operating the anthropogenic $CO_2$ injection well for geologic storage or operating the geologic storage facility will not injure any freshwater strata in that area and that the formation or stratum to be used for the geologic storage facility is not freshwater stratum.

(p) Other information. The applicant must submit any other information requested by the director as necessary to discharge the Commission's duties under Texas Water Code, Chapter 27, Subchapter B-1, or deemed necessary by the director to clarify, explain, and support the required attachments.

*§5.204. Notice and Hearing.*

(a) Placement of copy of application for public inspection. The applicant must make a complete copy of the permit application available for the public to inspect and copy by filing a copy of the application with the County Clerk at the courthouse of each county where the storage facility is to be located, or if approved by the director, at another equivalent public office. The applicant also must provide an electronic copy of the complete application to enable the Commission to place the copy on the Railroad Commission Internet website. The applicant must file any subsequent revision of the application with the County Clerk or other approved public office and must file at the Commission an electronic copy of the updated application at the same time the applicant files the revision at the Commission.

(b) Notice requirements.

(1) General notice by publication. To give general notice to local governments and interested or affected persons, the applicant must publish notice of the application for an original or amended storage facility permit no later than the date the application is mailed to or filed with the director. The applicant must use the appropriate form of notice, include the information as set forth in subparagraph (A) or (B) of this paragraph, and cause the notice to be published once a week for three consecutive weeks in each newspaper of general circulation in each county where the storage facility is located or is to be located. The applicant must file proof of publication of the notice with the application.

(A) Form for notice by publication of an application for an anthropogenic $CO_2$ geologic storage facility permit.
Figure: 16 TAC §5.204(b)(1)(A)

(B) Form for notice by publication of an application for amendment of an existing $CO_2$ geologic storage facility permit.
Figure: 16 TAC §5.204(b)(1)(B)

(C) The applicant must submit proof of publication of notice in the following form:
Figure: 16 TAC §5.204(b)(1)(C)

(2) Individual notice.

(A) Persons to notify. By no later than the date the application is mailed to or filed with the director, the applicant must give notice of an application for a permit to operate a $CO_2$ storage facility, or to amend an existing storage facility permit to:

*(i)* each adjoining mineral interest owner, other than the applicant, of the outmost boundary of the proposed geologic storage facility;

*(ii)* each leaseholder of minerals lying above or below the proposed storage reservoir;

*(iii)* each adjoining leaseholder of minerals offsetting the outermost boundary of the proposed geologic storage facility;

*(iv)* each owner or leaseholder of any portion of the surface overlying the proposed storage reservoir and the adjoining area of the outermost boundary of the proposed geologic storage facility;

*(v)* the clerk of the county or counties where the proposed storage facility is located;

*(vi)* the city clerk or other appropriate city official where the proposed storage facility is located within city limits; and

*(vii)* any other class of persons that the director determines should receive notice of the application.

(B) Content of notice. Individual notice must consist of:

*(i)* the applicant's intention to construct and operate an anthropogenic $CO_2$ geologic storage facility;

*(ii)* a description of the geologic storage facility location;

*(iii)* each physical location and the internet address at which a copy of the application may be inspected; and

*(iv)* a statement that:

*(I)* affected persons may protest the application;

*(II)* protests must be filed in writing and must be mailed or delivered to Technical Permitting, Oil and Gas Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711; and

*(III)* protests must be received by the director within 30 days of the date of receipt of the application by the division, receipt of individual notice, or last publication of notice, whichever is later.

(3) Individual notice by publication. The applicant must make diligent efforts to ascertain the name and address of each person identified under paragraph (2)(A) of this subsection. The exercise of diligent efforts to ascertain the names and addresses of such persons requires an examination of county records where the facility is located and an investigation of any other information that is publicly and/or reasonably available to the applicant. If, after diligent efforts, an applicant has been unable to ascertain the name and address of one or more persons required to be notified under paragraph (2)(A) of this subsection, the applicant satisfies the notice requirements for those persons by the publication of the notice of application as required in paragraph (1) of this subsection. The applicant must submit an affidavit to the director specifying the efforts that the applicant took to identify each person whose name and/or address could not be ascertained.

(c) Hearing requirements.

(1) If the Commission receives a protest regarding an application for a new permit or for an amendment of an existing permit for a geologic storage facility from a person notified pursuant to subsection (b) of this section or from any other affected person within 30 days of the date of receipt of the application by the division, receipt of individual notice, or last publication of notice, whichever is later, then the director will notify the applicant that the director cannot administratively approve the application. Upon the written request of the applicant, the director will schedule a hearing on the application. The Commission must give notice of the hearing to all affected persons, local governments, and other persons who express, in writing, an interest in the application. After the hearing, the examiner will recommend a final action by the Commission.

(2) If the Commission receives no protest regarding an application for a new permit or for the amendment of an existing permit for a geologic storage facility from a person notified pursuant to subsection (b) of this section or from any other affected person, the director may administratively approve the application.

(3) If the director administratively denies an application for a new permit or for the amendment of an existing permit for a geologic storage facility, upon the written request of the applicant, the director will schedule a hearing. After hearing, the examiner will recommend a final action by the Commission.

*§5.205. Fees, Financial Responsibility, and Financial Assurance.*

(a) Fees. In addition to the fee for each injection well required by §3.78 of this title (relating to Fees and Financial Security Requirements), the following non-refundable fees must be remitted to the Commission with the application:

(1) Base application fee.

(A) The applicant must pay to the Commission an application fee of $50,000 for each permit application for a geologic storage facility.

(B) The applicant must pay to the Commission an application fee of $25,000 for each application to amend a permit for a geologic storage facility.

(2) Injection fee. The operator must pay to the Commission an annual fee of $0.025 per metric ton of $CO_2$ injected into the geologic storage facility.

(3) Post-injection care fee. The operator must pay to the Commission an annual fee of $50,000 each year the operator does not inject into the geologic storage facility until the director has authorized storage facility closure.

(4) The anthropogenic $CO_2$ storage trust fund shall be capped at $5,000,000.

(b) Financial responsibility.

(1) A person to whom a permit is issued under this subchapter must provide annually to the director evidence of financial responsibility that is satisfactory to the director. The operator must demonstrate and maintain financial responsibility and resources for corrective action, injection well plugging, post-injection storage facility care and storage facility closure, and emergency and remedial response until the director has provided written verification that the director has determined that the facility has reached the end of the post-injection storage facility care period.

(2) In determining whether the person is financially responsible, the director must rely on:

(A) the person's most recent audited annual report filed with the U. S. Securities and Exchange Commission under Section 13 or 15(d), Securities Exchange Act of 1934 (15 U.S.C. Section 78m or 78o(d)); and

(B) the person's most recent quarterly report filed with the U. S. Securities and Exchange Commission under Section 13 or 15(d), Securities Exchange Act of 1934 (15 U.S.C. Section 78m or 78o(d)); or

(C) if the person is not required to file such a report, the person's most recent audited financial statement. The date of the audit must not be more than one year before the date of submission of the application to the director.

(3) The applicant's demonstration of financial responsibility must account for the entire area of review, regardless of whether corrective action in the area of review is phased.

(c) Financial assurance.

(1) Injection and monitoring wells. The operator must comply with the requirements of §3.78 of this title for all monitoring wells that penetrate the base of usable quality water and all injection wells.

(2) Geologic storage facility.

(A) The applicant must include in an application for a geologic storage facility permit:

*(i)* a written estimate of the highest likely dollar amount necessary to perform post-injection monitoring and closure of the facility that shows all assumptions and calculations used to develop the estimate;

*(ii)* a copy of the form of the bond or letter of credit that will be filed with the Commission; and

*(iii)* information concerning the issuer of the bond or letter of credit including the issuer's name and address and evidence of authority to issue bonds or letters of credit in Texas.

(B) A geologic storage facility may not receive $CO_2$ until a bond or letter of credit in an amount approved by the director under this subsection and meeting the requirements of this subsection as to form and issuer has been filed with and approved by the director.

(C) The determination of the amount of financial assurance for a geologic storage facility is subject to the following requirements:

*(i)* The director must approve the dollar amount of the financial assurance. The amount of financial assurance required to be filed under this subsection must be equal to or greater than the maximum amount necessary to perform corrective action, emergency response, and remedial action, post-injection monitoring and site care,

and closure of the geologic storage facility, exclusive of plugging costs for any well or wells at the facility, at any time during the permit term in accordance with all applicable state laws, Commission rules and orders, and the permit;

*(ii)* A qualified professional engineer licensed by the State of Texas must prepare or supervise the preparation of a written estimate of the highest likely amount necessary to close the geologic storage facility. The operator must submit to the director the written estimate under seal of a qualified licensed professional engineer; and

*(iii)* The Commission may use the proceeds of financial assurance filed under this subsection to pay the costs of plugging any well or wells at the facility if the financial assurance for plugging costs filed with the Commission is insufficient to pay for the plugging of such well or wells.

(D) Bonds and letters of credit filed in satisfaction of the financial assurance requirements for a geologic storage facility must comply with the following standards as to issuer and form.

*(i)* The issuer of any geologic storage facility bond filed in satisfaction of the requirements of this subsection must be a corporate surety authorized to do business in Texas. The form of bond filed under this subsection must provide that the bond be renewed and continued in effect until the conditions of the bond have been met or its release is authorized by the director.

*(ii)* Any letter of credit filed in satisfaction of the requirements of this subsection must be issued by and drawn on a bank authorized under state or federal law to operate in Texas. The letter of credit must be an irrevocable, standby letter of credit subject to the requirements of Texas Business and Commerce Code, §§5.101 - 5.118. The letter of credit must provide that it will be renewed and continued in effect until the conditions of the letter of credit have been met or its release is authorized by the director.

(E) The operator of a geologic storage facility must provide to the director annual written updates of the cost estimate to increase or decrease the cost estimate to account for any changes to the area of review and corrective action plan, the emergency response and remedial action plan, the injection well plugging plan, and the post-injection storage facility care and closure plan. The operator must provide to the director upon request an adjustment of the cost estimate if the director has reason to believe that the original demonstration is no longer adequate to cover the cost of injection well plugging and post-injection storage facility care and closure.

(3) The director may consider allowing the phasing in of financial assurance for only corrective action based on project-specific factors.

(4) The director may approve a reduction in the amount of financial assurance required for post-injection monitoring based on project-specific monitoring results.

(d) Notice of adverse financial conditions.

(1) The operator must notify the Commission of adverse financial conditions that may affect the operator's ability to carry out injection well plugging and post-injection storage facility care and closure. An operator must file any notice of bankruptcy in accordance with §3.1(f) of this title (relating to Organization Report; Retention of Records; Notice Requirements). The operator must give such notice by certified mail.

(2) The operator filing a bond must ensure that the bond provides a mechanism for the bond or surety company to give prompt notice to the Commission and the operator of any action filed alleging insolvency or bankruptcy of the surety company or the bank or alleging any violation that would result in suspension or revocation of the surety or bank's charter or license to do business.

(3) Upon the incapacity of a bank or surety company by reason of bankruptcy, insolvency or suspension, or revocation of its charter or license, the Commission must deem the operator to be without bond coverage. The Commission must issue a notice to any operator who is without bond coverage and must specify a reasonable period to replace bond coverage, not to exceed 90 days.

*§5.206. Permit Standards.*

(a) General criteria. The director may issue a permit under this subchapter if the applicant demonstrates and the director finds that:

(1) the injection and geologic storage of anthropogenic $CO_2$ will not endanger or injure any existing or prospective oil, gas, geothermal, or other mineral resource, or cause waste as defined by Texas Natural Resources Code, §85.046(11);

(2) with proper safeguards, both underground sources of drinking water and surface water can be adequately protected from $CO_2$ migration or displaced formation fluids;

(3) the injection of anthropogenic $CO_2$ will not endanger or injure human health and safety;

(4) the reservoir into which the anthropogenic $CO_2$ is injected is suitable for or capable of being made suitable for protecting against the escape or migration of anthropogenic $CO_2$ from the storage reservoir;

(5) the geologic storage facility will be sited in an area with suitable geology, which at a minimum must include:

(A) an injection zone of sufficient areal extent, thickness, porosity, and permeability to receive the total anticipated volume of the $CO_2$ stream; and

(B) a confining zone(s) that is laterally continuous and free of known transecting transmissive faults or fractures over an area sufficient to contain the injected $CO_2$ stream and displaced formation fluids and allow injection at proposed maximum pressures and volumes without compromising the confining zone or causing the movement of fluids that endangers underground sources of drinking water;

(6) the applicant for the permit meets all of the other statutory and regulatory requirements for the issuance of the permit;

(7) the applicant has provided a letter from the Executive Director of the Texas Commission on Environmental Quality in accordance with §5.203(o) of this title (relating to Application Requirements);

(8) the applicant has provided a signed statement that the applicant has a good faith claim to the necessary and sufficient property rights for construction and operation of the geologic storage facility for at least the first five years after initiation of injection in accordance with §5.203(d)(1)(A) of this title;

(9) the applicant has paid the fees required in §5.205(a) of this title (relating to Fees, Financial Responsibility, and Financial Assurance);

(10) the director has determined that the applicant has sufficiently demonstrated financial responsibility as required in §5.205(b) of this title; and

(11) the applicant submitted to the director financial assurance in accordance with §5.205(c) of this title.

(b) Injection well construction.

(1) Construction of anthropogenic $CO_2$ injection wells must meet the criteria in §5.203(e) of this title.

(2) Within 30 days after the completion or conversion of an injection well subject to this subchapter, the operator must file with the division a complete record of the well on the appropriate form showing the current completion.

(3) Except in the case of an emergency repair, the operator of a geologic storage facility must notify the director at least 48 hours, and obtain the director's approval, prior to conducting any well workover that involves running tubing and setting packer(s), beginning any workover or remedial operation, or conducting any required pressure tests or surveys. In the case of an emergency repair, the operator must notify the director of such emergency repair as soon as reasonably practical.

(c) Operating a geologic storage facility.

(1) Operating plan. The operator must maintain and comply with the approved operating plan.

(2) Operating criteria.

(A) Injection between the outermost casing protecting underground sources of drinking water and the well bore is prohibited.

(B) The total volume of $CO_2$ injected into the storage facility must be metered through a master meter or a series of master meters. The volume of $CO_2$ injected into each injection well must be metered through an individual well meter.

(C) The operator must comply with a maximum surface injection pressure limit approved by the director and specified in the permit. In approving a maximum surface injection pressure limit, the director must consider the results of well tests and, where appropriate, geomechanical or other studies that assess the risks of tensile failure and shear failure. The director must approve limits that, with a reasonable degree of certainty, will avoid initiation or propagation of fractures in the confining zone or cause otherwise non-transmissive faults or fractures transecting the confining zone to become transmissive. In no case may injection pressure cause movement of injection fluids or formation fluids in a manner that endangers underground sources of drinking water. The director may approve a plan for controlled artificial fracturing of the injection zone.

(D) The operator must fill the annulus between the tubing and the long string casing with a corrosion inhibiting fluid approved by the director.

(E) The operator must install and use continuous recording devices to monitor the injection pressure, and the rate, volume, and temperature of the $CO_2$ stream. The operator must monitor the pressure on the annulus between the tubing and the long string casing. The operator must continuously record, continuously monitor, or control by a preset high-low pressure sensor switch the wellhead pressure of each injection well.

(F) The operator must comply with the following requirements for alarms and automatic shut-off systems.

*(i)* The operator must install and use alarms and automatic shut-off systems designed to alert the operator and shut-in the well when operating parameters such as annulus pressure, injection rate or other parameters diverge from permitted ranges and/or gradients. On offshore wells, the automatic shut-off systems must be installed down-hole.

*(ii)* If an automatic shutdown is triggered or a loss of mechanical integrity is discovered, the operator must immediately investigate and identify as expeditiously as possible the cause. If, upon investigation, the well appears to be lacking mechanical integrity, or if monitoring otherwise indicates that the well may be lacking mechanical integrity, the operator must:

*(I)* immediately cease injection;

*(II)* take all steps reasonably necessary to determine whether there may have been a release of the injected $CO_2$ stream into any unauthorized zone;

*(III)* notify the director as soon as practicable, but within 24 hours;

*(IV)* restore and demonstrate mechanical integrity to the satisfaction of the director prior to resuming injection; and

*(V)* notify the director when injection can be expected to resume.

(d) Monitoring, sampling, and testing requirements. The operator of an anthropogenic $CO_2$ injection well must maintain and comply with the approved monitoring, sampling, and testing plan to verify that the geologic storage facility is operating as permitted and that the injected fluids are confined to the injection zone. The director may require additional monitoring as necessary to support, upgrade, and improve computational modeling of the area of review evaluation and to determine compliance with the requirement that the injection activity not allow movement of fluid that would endanger underground sources of drinking water.

(e) Mechanical integrity.

(1) The operator must maintain and comply with the approved mechanical integrity testing plan submitted in accordance with §5.203(j) of this title.

(2) Other than during periods of well workover in which the sealed tubing-casing annulus is of necessity disassembled for maintenance or corrective procedures, the operator must maintain mechanical integrity of the injection well at all times.

(3) The operator must either repair and successfully retest or plug a well that fails a mechanical integrity test.

(4) The director may require additional or alternative tests if the results presented by the operator do not demonstrate to the director that there is no leak in the casing, tubing, or packer or movement of fluid into or between formations containing underground sources of drinking water resulting from the injection activity.

(f) Area of review and corrective action. Notwithstanding the requirement in §5.203(d)(2)(B)(i) of this title to perform a re-evaluation of the area of review, at the frequency specified in the area of review and corrective action plan or permit, the operator of a geologic storage facility also must conduct the following whenever warranted by a material change in the monitoring and/or operational data or in the evaluation of the monitoring and operational data by the operator:

(1) a re-evaluation of the area of review by performing all of the actions specified in §5.203(d)(1)(A) - (C) of this title to delineate the area of review and identify all wells that require corrective action;

(2) identify all wells in the re-evaluated area of review that require corrective action;

(3) perform corrective action on wells requiring corrective action in the re-evaluated area of review in the same manner specified in §5.203(d)(1)(C) of this title; and

(4) submit an amended area of review and corrective action plan or demonstrate to the director through monitoring data and mod-

eling results that no change to the area of review and corrective action plan is needed.

(g) Emergency, mitigation, and remedial response.

(1) Plan. The operator must maintain and comply with the approved emergency and remedial response plan required by §5.203(l) of this title. The operator must update the plan in accordance with §5.207(a)(2)(D)(vi) of this title (relating to Reporting and Record-Keeping). The operator must make copies of the plan available at the storage facility and at the company headquarters.

(2) Training.

(A) The operator must prepare and implement a plan to train and test each employee at the storage facility on occupational safety and emergency response procedures to the extent applicable to the employee's duties and responsibilities. The operator must make copies of the plan available at the geological storage facility. The operator must train all employees before commencing injection and storage operations at the facility. The operator must train each subsequently hired employee before that employee commences work at the storage facility.

(B) The operator must hold a safety meeting with each contractor prior to the commencement of any new contract work at a storage facility. The operator must explain emergency measures specific to the contractor's work in the contractor safety meeting.

(C) The operator must provide training schedules, training dates, and course outlines to Commission personnel upon request for the purpose of Commission review to determine compliance with this paragraph.

(3) Action. If an operator obtains evidence that the injected $CO_2$ stream and associated pressure front may cause an endangerment to underground sources of drinking water, the operator must:

(A) immediately cease injection;

(B) take all steps reasonably necessary to identify and characterize any release;

(C) notify the director as soon as practicable but within at least 24 hours; and

(D) implement the approved emergency and remedial response plan.

(4) Resumption of injection. The director may allow the operator to resume injection prior to remediation if the operator demonstrates that the injection operation will not endanger underground sources of drinking water.

(h) Commission witnessing of testing and logging. The operator must provide the division with the opportunity to witness all testing and logging. The operator must submit a proposed schedule of such activities to the Commission at least 30 days prior to conducting the first test and submit notice at least 48 hours in advance of any actual testing or logging. Testing and logging may not commence before the end of the 48-hour period unless authorized by the director.

(i) Well plugging. The operator of a geologic storage facility must maintain and comply with the approved well plugging plan required by §5.203(k) of this title.

(j) Post-injection storage facility care and closure.

(1) Post-injection storage facility care and closure plan.

(A) The operator of an injection well must maintain and comply with the approved post-injection storage facility care and closure plan.

(B) The operator must update the plan in accordance with §5.207(a)(2)(D)(vi) of this title.

(C) Upon cessation of injection, the operator of a geologic storage facility must either submit an amended plan or demonstrate to the director through monitoring data and modeling results that no amendment to the plan is needed.

(2) Post-injection storage facility monitoring. Following cessation of injection, the operator must continue to conduct monitoring as specified in the approved plan until the director determines that the position of the $CO_2$ plume and pressure front are such that the geologic storage facility will not endanger underground sources of drinking water.

(3) Prior to closure. Prior to authorization for storage facility closure, the operator must demonstrate to the director, based on monitoring, other site-specific data, and modeling that is reasonably consistent with site performance that no additional monitoring is needed to assure that the geologic storage facility will not endanger underground sources of drinking water. The operator must demonstrate, based on the current understanding of the site, including monitoring data and/or modeling, all of the following:

(A) the estimated magnitude and extent of the facility footprint (the $CO_2$ plume and the area of elevated pressure);

(B) that there is no leakage of either $CO_2$ or displaced formation fluids that will endanger underground sources of drinking water;

(C) that the injected or displaced fluids are not expected to migrate in the future in a manner that encounters a potential leakage pathway into underground sources of drinking water;

(D) that the injection wells at the site completed into or through the injection zone or confining zone will be plugged and abandoned in accordance with these requirements; and

(E) any remaining facility monitoring wells will be properly plugged or are being managed by a person and in a manner approved by the director.

(4) Notice of intent for storage facility closure. The operator must notify the director at least 120 days before storage facility closure. At the time of such notice, if the operator has made any changes to the original plan, the operator also must provide the revised plan. The director may approve a shorter notice period.

(5) Authorization for storage facility closure. No operator may initiate storage facility closure until the director has approved closure of the storage facility in writing. After the director has authorized storage facility closure, the operator must plug all wells in accordance with the approved plan required by §5.203(k) of this title.

(6) Storage facility closure report. Once the director has authorized storage facility closure, the operator must submit a storage facility closure report within 90 days that must thereafter be retained by the Commission in Austin. The report must include the following information:

(A) documentation of appropriate injection and monitoring well plugging. The operator must provide a copy of a survey plat that has been submitted to the Regional Administrator of Region 6 of the United States Environmental Protection Agency. The plat must indicate the location of the injection well relative to permanently surveyed benchmarks;

(B) documentation of appropriate notification and information to such state and local authorities as have authority over drilling activities to enable such state and local authorities to impose

appropriate conditions on subsequent drilling activities that may penetrate the injection and confining zones; and

(C) records reflecting the nature, composition and volume of the $CO_2$ stream.

(7) Certificate of closure. Upon completion of the requirements in paragraphs (3) - (6) of this subsection, the director will issue a certificate of closure. At that time, the operator is released from the requirement in §5.205(c) of this title to maintain financial assurance.

(k) Deed notation. The operator of a geologic storage facility must record a notation on the deed to the facility property or any other document that is normally examined during title search that will in perpetuity provide any potential purchaser of the property the following information:

(1) that land has been used to geologically store $CO_2$;

(2) that the survey plat has been filed with the Commission;

(3) the address of the office of the United States Environmental Protection Agency, Region 6, to which the operator sent a copy of the survey plat; and

(4) the volume of fluid injected, the injection zone or zones into which it was injected, and the period over which injection occurred.

(l) Retention of records. The operator must retain for five years following storage facility closure records collected during the post-injection storage facility care period. The operator must deliver the records to the director at the conclusion of the retention period, and the records must thereafter be retained at the Austin headquarters of the Commission.

(m) Signs. The operator must identify each location at which geologic storage activities take place, including each injection well, by a sign that meets the requirements specified in §3.3(1), (2), and (5) of this title (relating to Identification of Properties, Wells, and Tanks). In addition, each sign must include a telephone number where the operator or a representative of the operator can be reached 24 hours a day, seven days a week in the event of an emergency.

(n) Other permit terms and conditions. In any permit for a geologic storage facility, the director must impose terms and conditions reasonably necessary to protect underground sources of drinking water. Permits issued under this subchapter continue in effect until revoked, modified, or suspended by the Commission. The operator must comply with each requirement set forth in this subchapter as a condition of the permit unless modified by the terms of the permit.

*§5.207. Reporting and Record-Keeping.*

(a) The operator of a geologic storage facility must provide, at a minimum, the following reports to the director and retain the following information.

(1) Test records. The operator must file a complete record of all tests in duplicate with the district office within 30 days after the testing. In conducting and evaluating the tests enumerated in this subchapter or others to be allowed by the director, the operator and the director must apply methods and standards generally accepted in the industry. When the operator reports the results of mechanical integrity tests to the director, the operator must include a description of the test(s) and the method(s) used. In making this evaluation, the director must review monitoring and other test data submitted since the previous evaluation.

(2) Operating reports. The operator also must include summary cumulative tables of the information required by the reports listed in this paragraph.

(A) Report within 24 hours. The operator must report to the appropriate district office the discovery of any significant pressure changes or other monitoring data that indicate the presence of leaks in the well or the lack of confinement of the injected gases to the geologic storage reservoir. Such report must be made orally as soon as practicable, but within 24 hours, following the discovery of the leak, and must be confirmed in writing within five working days.

(B) Report within 30 days. The operator must report:

*(i)* the results of periodic tests for mechanical integrity;

*(ii)* the results of any other test of the injection well conducted by the operator if required by the director; and

*(iii)* a description of any well workover.

(C) Semi-annual report. The operator must report:

*(i)* a summary of well head pressure monitoring;

*(ii)* changes to the physical, chemical, and other relevant characteristics of the $CO_2$ stream from the proposed operating data;

*(iii)* monthly average, maximum and minimum values for injection pressure, flow rate and volume, and annular pressure;

*(iv)* a description of any event that significantly exceeds operating parameters for annulus pressure or injection pressure as specified in the permit;

*(v)* a description of any event that triggers a shutdown device and the response taken; and

*(vi)* the results of monitoring prescribed under §5.206(d) of this title (relating to Permit Standards).

(D) Annual reports. The operator must submit an annual report detailing:

*(i)* corrective action performed;

*(ii)* new wells installed and the type, location, number, and information required in §5.203(e) of this title (relating to Application Requirements);

*(iii)* re-calculated area of review unless the operator submits a statement signed by an appropriate company official confirming that monitoring and operational data supports the current delineation of the area of review on file with the Commission;

*(iv)* the updated area for which the operator has a good faith claim to the necessary and sufficient property rights to operate the geologic storage facility;

*(v)* tons of $CO_2$ injected; and

*(vi)* The operator must prepare, maintain, and update required plans in accordance with the provisions of this section.

*(I)* Operators must submit an annual statement, signed by an appropriate company official, confirming that the operator has:

(-a-) reviewed the monitoring and operational data that are relevant to a decision on whether to reevaluate the area of review and the monitoring and operational data that are relevant to a decision on whether to update an approved plan required by §5.203 or §5.206 of this title; and

(-b-) determined whether any updates were warranted by material change in the monitoring and operational data or in the evaluation of the monitoring and operational data by the operator.

*(II)* Operators must submit either the updated plan or a summary of the modifications for each plan for which an update the operator determined to be warranted pursuant to subclause (I) of this clause. The director may require submission of copies of any updated plans and/or additional information regarding whether or not updates of any particular plans are warranted.

*(III)* The director may require the revision of any required plan whenever the director determines that such a revision is necessary to comply with the requirements of this title.

*(vii)* other information as required by the permit.

(b) Report format. The operator must report the results of injection pressure and injection rate monitoring of each injection well on Form H-10, Annual Disposal/Injection Well Monitoring Report, and the results of mechanical integrity testing on Form H-5, Disposal/Injection Well Pressure Test Report. Operators must submit other reports in a format acceptable to the Commission. At the discretion of the director, other formats may be accepted.

(c) Record retention. The operator must retain all wellhead pressure records, metering records, and integrity test results for at least five years. The operator must retain all documentation of good faith claim to necessary and sufficient property rights to operate the geologic storage facility until the director issues the final certificate of closure in accordance with §5.206(j)(7) of this title.

*§5.208. Penalties.*

(a) General. An operator that violates this subchapter may be subject to penalties and remedies specified in the Texas Natural Resources Code, Title 3, Texas Water Code, Chapter 27, and other statutes administered by the Commission.

(b) Certificate of compliance. The Commission may revoke a certificate of compliance for any oil, gas, or geothermal resource well in the manner provided in §3.73 of this title (relating to Pipeline Connection; Cancellation of Certificate of Compliance; Severance) for violation of this subchapter.

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

Filed with the Office of the Secretary of State on September 29, 2010.

TRD-201005636
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: November 14, 2010
For further information, please call: (512) 475-1295

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# PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

## CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) proposes amendments to §25.214, Tariff for Retail Delivery Service, and §25.272, Code of Conduct for Electric Utilities and Their Affiliates. The amendments to the Tariff make changes to conform the Tariff to new §25.497, relating to critical care customers adopted by the commission in Project Number 37622, *Rulemaking to Amend Customer Protection Rules Relating to Designation of Critical Care Customers.* The amendments to §25.272 allow a utility to submit customer information to First Responders. The amended §25.497 provides additional protections to customers who have been designated as critical load customers, chronic condition residential customers, and critical care residential customers. The proposed amendments to §25.272 and §25.214 are competition rules subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). Project Number 38676 is assigned to this proceeding. The commission is also proposing a form by which customers may request a designation as a chronic care residential customer or critical care residential customer. Persons who provide comments on both the proposed Tariff and proposed form are encouraged to submit the comments in a single document.

The commission is seeking comments on the amended rule, as well as comments on the following question, which may result in changes to the amended rule:

The Order Adopting the Repeal of §25.497 and New §25.497 in Project No. 37622, *Rulemaking Related to Critical Care Customers,* states: "the commission concludes that the process for turning lists over to first responders should be more thoroughly considered in the compliance project, to be opened following adoption of this rulemaking. The commission is concerned that the current substantive rules addressing proprietary customer information, most notably §25.272(g)(1), relating to privacy of customer information, may prohibit a Transmission and Distribution Utility (TDU) from providing the list. Therefore, the commission finds that the upcoming project to develop the critical care form shall address these issues, as well as the Joint TDUs' concerns relating to how this information would be provided to the correct people." This proposed rule includes changes to §25.272 to allow the utility to provide customer information to a First Responder.

Question: Are there any hurdles in commission rules, the Public Utility Regulatory Act, or other law that would prevent a utility from sharing this information to a First Responder, even with customer consent?

Christine Wright, Senior Market Analyst, Competitive Markets Division, has determined that, for each year of 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 amended rule.

Ms. Wright has determined that, for each year of the first five years the amended rules are in effect, the public benefits anticipated as a result of enforcing the amended rule will be consistent treatment of customers by retail electric providers and transmission and distribution utilities, and a more expeditious and effective process for individuals suffering from debilitating medical conditions that qualify them as chronic condition or critical care customers. No adverse economic impact is anticipated on small businesses or micro-businesses as a result of enforcing the amended rules. Therefore, no regulatory flexibility analysis is required. There is no anticipated economic cost to persons who are required to comply with the amended rule as proposed.

Ms. Wright has also determined that, for each year of the first five years the amended rules are in effect, there should be no effect on a local economy, and therefore no local employment

impact statement is required under the Administrative Procedure Act (APA), Texas Government Code §2001.022.

Initial comments on the amended rules may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711- 3326, within 21 days after publication. Sixteen copies of comments are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 31 days after publication. Comments should be organized in a manner consistent with the organization of the amended rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the amended rule. The commission will consider the costs and benefits in deciding whether to adopt the amended rule. All comments should refer to Project Number 38676.

## SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION
## DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

### 16 TAC §25.214

*(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 16 TAC §25.214(d) is not included in the print version of the Texas Register. The figure is available in the on-line version of the October 15, 2010, issue of the Texas Register.)*

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2010) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically §39.101 which requires the commission ensure customers have safe, reliable and reasonably priced electricity in cases of medical emergency; §14.001, which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §39.101(e), which provides the commission with the authority to adopt and enforce rules relating to the termination of service; and §39.203, which directs the commission to establish terms and conditions for transmission and distribution service.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 39.101(e), and 39.203.

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

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

(d) Pro-forma Retail Delivery Tariff. Tariff for Retail Delivery Service.

Figure: 16 TAC §25.214(d)

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 September 30, 2010.

TRD-201005646
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: November 14, 2010
For further information, please call: (512) 936-7223

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## SUBCHAPTER K. RELATIONSHIPS WITH AFFILIATES

### 16 TAC §25.272

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2010) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically §39.101 which requires the commission ensure customers have safe, reliable and reasonably priced electricity in cases of medical emergency; §14.001, which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §39.101(e), which provides the commission with the authority to adopt and enforce rules relating to the termination of service; and §39.203, which directs the commission to establish terms and conditions for transmission and distribution service.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 39.101(e), and 39.203.

*§25.272. Code of Conduct for Electric Utilities and Their Affiliates.*

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

(g) Information safeguards.

(1) Proprietary customer information. A utility shall provide a customer with the customer's proprietary customer information, upon request by the customer. Unless a utility obtains prior affirmative written consent or other verifiable authorization from the customer as determined by the commission, or unless otherwise permitted under this subsection, it shall not release any proprietary customer information to a competitive affiliate or any other entity, other than the customer, an independent organization as defined by PURA §39.151, or a provider of corporate support services for the sole purpose of providing corporate support services in accordance with subsection (e)(2)(A) of this section. The utility shall maintain records that include the date, time, and nature of information released when it releases customer proprietary information to another entity in accordance with this paragraph. The utility shall maintain records of such information for a minimum of three years, and shall make the records available for third party review within 72 hours of a written request, or at a time mutually agreeable to the utility and the third party. When the third party requesting review of the records is not the customer, commission, or Office of Public Utility Counsel, the records may be redacted in such a way as to protect the customer's identity. If proprietary customer information is released to an independent organization or a provider of corporate support services, the independent organization or entity providing corporate support services is subject to the rules in this subsection with respect to releasing the information to other persons.

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

(C) Exception to facilitate transition to customer choice. In order to facilitate the transition to customer choice, a utility

may release proprietary customer information to its affiliated retail electric provider or providers of last resort without authorization of those customers only during a [~~the period from September 1, 2001, through December 31, 2001, or during a different~~] period prescribed by the commission.

(D) (No change.)

(E) Exception for release to first responders. Beginning January 1, 2011, a utility may provide proprietary customer information with customer authorization to a requesting state, federal, or local government agency for purposes of identifying the customer as a critical load industrial customer, or critical load public safety customer, critical care residential customer, or chronic condition residential customer pursuant to §25.497 of this title (relating to Critical Load Industrial Customers, Critical Load Public Safety Customers, Critical Care Residential Customers, and Chronic Condition Residential Customers).

(2) - (5) (No change.)

(h) - (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 September 30, 2010.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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# TITLE 19. EDUCATION

## PART 2. TEXAS EDUCATION AGENCY

### CHAPTER 61. SCHOOL DISTRICTS
### SUBCHAPTER A. BOARD OF TRUSTEES RELATIONSHIP

**19 TAC §61.1, §61.2**

The State Board of Education (SBOE) proposes amendments to §61.1 and §61.2, concerning school district boards of trustees. Section 61.1 specifies requirements for continuing education for school board trustees. Section 61.2 addresses requirements for nominating trustees for military reservation school districts. As a result of the statutorily required four-year review of rules, the proposed rule actions would revise the rules to better align with statute and current practice.

The Texas Education Code (TEC), §11.159, Member Training and Orientation, requires the SBOE to provide a training course for school board trustees. Section 61.1 addresses this statutory requirement. School board trustee training under current SBOE rule includes a local school district orientation session, a basic orientation to the TEC, an annual team-building session with the local school board and the superintendent, and specified hours of continuing education based on identified needs.

The TEC, §11.352, Governance of Special-Purpose District, authorizes the SBOE to appoint a board of three, five, or seven trustees, as determined by the SBOE, for each district established under the TEC, §11.351. Additionally, it authorizes the SBOE to appoint a board of three or five trustees for each military reservation school district. Section 61.2 addresses this statutory requirement. Trustees of the boards of the Fort Sam Houston Independent School District (ISD), Lackland ISD, Randolph Field ISD, and Boys Ranch ISD are appointed by the SBOE in accordance with this rule and statute.

As a result of the statutorily required four-year review of the SBOE rules in 19 TAC Chapter 61, Subchapter A, the proposed amendments would revise the rules to better align with statute and current practice regarding the dissemination of information to boards of trustees and the public and the appointment of trustees to the Boys Ranch ISD. Specifically, the following changes would be made.

The proposed amendment to §61.1 would revise subsection (a) to reflect that the framework for governance leadership used in structuring continuing education for board members will be posted to the Texas Education Agency (TEA) website rather than mailed to board presidents annually. The requirement of the board president to share the information with other board members and the superintendent would not change. Subsection (j) would be revised to align with statute regarding the board meeting at which board training updates must be disseminated and noted in the minutes. In accordance with the TEC, §11.159(b), the amendment would specify that the announcement must be made at the last regular meeting of the board of trustees held during the calendar year. Additionally, technical edits would be made to update a cross reference to statute and correct word usage.

The proposed amendment to §61.2 would add a new subsection (b) to reflect the process used to nominate for SBOE approval members of the board of trustees for Boys Ranch ISD, a special-purpose district. Existing subsection (b) would be relettered as subsection (c). The section title would also be amended to reflect the addition of information relating to Boys Ranch ISD. In addition, technical edits would be made to correct word usage.

The proposed amendment to 19 TAC §61.1 would revise the procedures for dissemination of the framework to be used in structuring continuing education for school board members and the annual public reporting of continuing education completion information for all board members. The proposed amendment to 19 TAC §61.2 would establish the process for nominating trustee candidates for Boys Ranch ISD, including information that must be provided to the TEA for each nominee.

Verification of completion of board member continuing education must continue to be maintained by the participant and participant's school district. Minutes of the board meeting in which continuing education hours obtained by each board member for the past calendar year are announced must also continue to be maintained locally and made available to local media.

Laura Taylor, associate commissioner for accreditation, has determined that for the first five-year period the proposed rule actions are in effect there will be no additional costs for state or local government as a result of enforcing or administering the proposed rule actions.

Ms. Taylor has determined that for each year of the first five years the proposed rule actions are in effect the public benefit anticipated as a result of enforcing the rule actions would be better alignment with statute regarding dissemination of information to boards of trustees and the public and the appointment of

trustees to a special-purpose district. There is no anticipated economic cost to persons who are required to comply with the proposed rule actions.

In addition, there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposed rule actions submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register.*

The amendments are proposed under the Texas Education Code (TEC), §11.159, which authorizes the SBOE to provide a training course for school board trustees; and TEC, §11.352(c), which authorizes the SBOE to adopt rules for the governance of a special-purpose district.

The amendments implement the Texas Education Code, §11.159 and §11.352.

*§61.1. Continuing Education for School Board Members.*

(a) Under the Texas Education Code (TEC), §11.159, the State Board of Education (SBOE) shall adopt a framework for governance leadership to be used in structuring continuing education for school board members. The [~~Copies of the~~] framework shall be posted to the Texas Education Agency (TEA) website and shall be distributed [~~sent~~] annually by [~~to~~] the president of each board of trustees [~~to be distributed~~] to all current board members and the superintendent.

(b) The continuing education required under the TEC [~~Texas Education Code~~], §11.159, applies to each member of an independent school district board of trustees. The continuing education requirement consists of orientation sessions, an annual team-building [~~team building~~] session with the local board and the superintendent, and specified hours of continuing education based on identified needs. The superintendent's participation in team-building [~~team building~~] sessions as part of the continuing education for board members shall represent one component of the superintendent's ongoing professional development.

(1) Each school board member of an independent school district shall receive a local district orientation and an orientation to the TEC [~~Texas Education Code~~].

(A) Each new board member shall participate in a local district orientation session within 60 days before or after the board member's election or appointment. The purpose of the local orientation is to familiarize new board members with local board policies and procedures and district goals and priorities.

(B) A sitting board member shall receive a basic orientation to the TEC [~~Texas Education Code~~] and relevant legal obligations. The orientation shall have special but not exclusive emphasis on statutory provisions related to governing Texas school districts. The orientation shall be delivered by regional education service centers (ESCs) and shall be three hours in length. Topics shall include, but not be limited to, the TEC [~~Texas Education Code~~], Chapter 26 (Parental Rights and Responsibilities), and the TEC [~~Texas Education Code~~], §28.004 (Local School Health [~~Education~~] Advisory Council and Health Education Instruction).

(C) A newly elected board member of an independent school district shall receive the orientation to the TEC [~~Texas Education Code~~] within the first year of service. The orientation shall be delivered by ESCs and shall be three hours in length.

(D) After each session of the Texas Legislature, including each regular session and called session related to education, each school board member shall receive an update from an ESC or any registered provider to the basic orientation to the TEC [~~Texas Education Code~~]. The update session shall be of sufficient length to familiarize board members with major changes in the code and other relevant legal developments related to school governance. A board member who has attended an ESC basic orientation session that incorporates the most recent legislative changes is not required to attend an update.

(2) The entire board, including all board members, shall annually participate with their superintendent in a team-building [~~team building~~] session facilitated by the ESC or any registered provider. The team-building [~~team building~~] session shall be of a length deemed appropriate by the board, but generally at least three hours. The purpose of the team-building [~~team building~~] session is to enhance the effectiveness of the board-superintendent team and to assess the continuing education needs of the board-superintendent team. The assessment of needs shall be based on the framework for governance leadership and shall be used to plan continuing education activities for the year for the governance leadership team.

(3) In addition to the continuing education requirements in paragraphs (1) and (2) [~~paragraph (1) and paragraph (2)~~] of this subsection, each board member shall receive additional continuing education on an annual basis in fulfillment of assessed needs and based on the framework for governance leadership. The continuing education sessions may be provided by ESCs or other registered providers.

(A) In a board member's first year of service, he or she shall receive at least ten hours of continuing education in fulfillment of assessed needs. Up to five of the required ten hours may be fulfilled through online instruction, provided that the training is designed and offered by a registered provider, incorporates interactive activities that assess learning and provide feedback to the learner, and offers an opportunity for interaction with the instructor. The registered provider shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (g) of this section.

(B) Following a board member's first year of service, he or she shall receive at least five hours of continuing education annually in fulfillment of assessed needs. A board member may fulfill the five hours of continuing education through online instruction, provided that the training is designed and offered by a registered provider, incorporates interactive activities that assess learning and provide feedback to the learner, and offers an opportunity for interaction with the instructor. The registered provider shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (g) of this section.

(C) A board president shall receive continuing education related to leadership duties of a board president as some portion of the annual requirement.

(c) No continuing education shall take place during a school board meeting unless that meeting is called expressly for the delivery of board member continuing education. However, continuing education may take place prior to or after a legally called board meeting in accordance with the provisions of the Texas Government Code, §551.001(4).

(d) An ESC board member continuing education program shall be open to any interested person, including a current or prospective board member.

(e) A registration fee shall be determined by ESCs to cover the costs of providing continuing education programs offered by ESCs.

(f) A private or professional organization, school district, government agency, college/university, or private consultant shall register with the TEA [~~Texas Education Agency (TEA)~~] to provide the board member continuing education required in subsection [~~subsections~~] (b)(1)(D), (2) [~~(b)(2)~~], and (3) [~~(b)(3)~~] of this section.

(1) The registration process shall include documentation of the provider's training and/or expertise in the activities and areas covered in the framework for governance leadership.

(2) An updated registration shall be required of a provider of continuing education every three years.

(3) A school district that provides continuing education exclusively for its own board members is not required to register.

(g) The provider of continuing education shall provide verification of completion of board member continuing education to the individual participant and to the participant's school district. The verification must include the provider's registration number.

(h) At least 50% of the continuing education required in subsection (b)(3) of this section shall be designed and delivered by persons not employed or affiliated with the board member's local school district. No more than one hour of the required continuing education that is delivered by the local district may utilize self-instructional materials.

(i) To the extent possible, the entire board shall participate in continuing education programs together.

(j) Annually, at the last regular meeting of the board of trustees held during a calendar year [~~at the meeting at which the call for election of board members is normally scheduled~~], the current president of each local board of trustees shall announce the name of each board member who has completed the required continuing education, who has exceeded the required hours of continuing education, and who is deficient in the required continuing education as of the date of the meeting. The president shall cause the minutes of the local board to reflect the information and shall make this information available to the local media.

(k) Annually, the SBOE shall commend those local board-superintendent teams that receive at least eight hours of the continuing education specified in subsection (b)(2) and (3) [~~subsection (b)(2) and subsection (b)(3)~~] of this section as an entire board-superintendent team.

*§61.2. Nomination of Trustees for Military Reservation School Districts and Boys Ranch Independent School District.*

(a) In nominating trustee candidates for military reservation school districts, the commanding officer of the military reservation shall do the following:

(1) submit a list to the commissioner of education with at least three nominees for each vacancy. A majority of the trustees appointed to the school board must be civilian, and all may be civilian. When two or more vacancies occur simultaneously, a list of three different nominees for each vacancy shall be submitted. In cases when the commanding officer wishes to reappoint existing board members, a list of three nominees for each vacancy must still be submitted. Nominees not selected for existing vacancies may be resubmitted as candidates for subsequent vacancies. The commanding officer may rank in the order of preference the nominees submitted for each vacancy;

(2) submit a statement that verifies that each of the nominees is qualified under the general school laws of Texas and lives or is employed on the military reservation;

(3) submit a copy of a current biographical vita (resume) for each of the nominees, with a signature by the nominee attesting truth to the contents of the biographical vita;

(4) submit a statement from each of the nominees which expresses the nominee's willingness to accept appointment and to serve in such a capacity with full adherence to the state-established [~~state established~~] standards on the duties and responsibilities of school board members;

(5) submit a signed statement which expresses recognition of the powers of the board of trustees to govern and manage the operations of the military reservation school districts;

(6) submit a signed statement regarding the governance and management operations of the district which expresses recognition that the role of the commanding officer of the military reservation is limited only to the duty defined by statute in the process for appointing members of the board of trustees; and

(7) submit a statement that the membership composition of the entire board of trustees is in full compliance with the provisions of the Texas Education Code (TEC), §11.352.

(b) In nominating trustee candidates for the Boys Ranch Independent School District (ISD), the superintendent of the school district shall do the following:

(1) submit a name to the commissioner for each vacancy. When two or more vacancies occur simultaneously, a name for each vacancy shall be submitted. In cases when the superintendent wishes to reappoint existing board members, the name of the existing board member for each vacancy must still be submitted;

(2) submit a statement that verifies that each of the nominees is qualified under the general school laws of Texas;

(3) submit a copy of a current biographical vita (resume) for each of the nominees, with a signature by the nominee attesting truth to the contents of the biographical vita;

(4) submit a statement from each of the nominees which expresses the nominee's willingness to accept appointment and to serve in such a capacity with full adherence to the state-established standards on the duties and responsibilities of school board members;

(5) submit a signed statement which expresses recognition of the powers of the board of trustees to govern and manage the operations of the Boys Ranch ISD;

(6) submit a signed statement regarding the governance and management operations of the district which expresses recognition that the role of the superintendent is in full compliance with the provisions of the TEC, §11.201; and

(7) submit a statement that the membership composition of the entire board of trustees is in full compliance with the provisions of the TEC, §11.352.

(c) [~~(b)~~] A member of the board of trustees, who during the period of the term of office experiences a change of status which disqualifies such member for appointment under the provisions of the TEC [~~Texas Education Code~~], shall become ineligible to serve at the time of the change of status.

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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Cristina De La Fuente-Valadez
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# CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

## SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING SPECIAL EDUCATION SERVICES

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

### 19 TAC §89.1070

The Texas Education Agency (TEA) proposes an amendment to §89.1070, concerning special education services. The section specifies graduation requirements for students receiving special education services. The proposed amendment would reflect changes to assessment and curriculum requirements for graduation for students receiving special education services as required by House Bill (HB) 3, 81st Texas Legislature, 2009.

HB 3, 81st Texas Legislature, 2009, amended the Texas Education Code (TEC), §39.023, to include changes to graduation requirements effective September 1, 2009. As a result of the changes to the state law, 19 TAC §89.1070 must be amended to ensure school district compliance with new procedural requirements.

In accordance with state and federal law, an admission, review, and dismissal (ARD) committee may determine that, for a student receiving special education services, a locally developed course is an appropriate substitute for a course that meets state graduation requirements for the minimum high school program. Under current policy, however, there is no requirement for locally developed courses to be aligned with the courses for which they substitute. For example, a student taking Consumer Math or Fundamentals of Math to substitute for Algebra I or Geometry may not receive adequate instruction in the Texas essential knowledge and skills (TEKS) for Algebra I or Geometry, which are both required to be assessed through end-of-course (EOC) assessments. Therefore, a student taking a locally developed course as a substitute for an assessed course would not be prepared to participate in a state assessment. This would include students receiving special education services participating in the general assessments as well as alternate assessments.

Beginning with the 2011-2012 school year, school districts will be required to review the content of locally developed courses for alignment with the TEKS to ensure students receive instruction that is aligned with the required course and respective EOC assessment.

A stakeholder meeting of parents, advocates, school districts, support personnel organizations, and teacher and administrator organizations was convened in August 2010 during the development of the proposed rule changes. Section 89.1070 would be amended to reflect assessment and curriculum requirements for graduation as required by HB 3, as follows.

Subsection (b)(1) would be amended to update language relating to assessments and include a reference to the performance standards established in the TEC, Chapter 39. Subsection (b)(1) - (3) would be amended to include references to the curriculum standards a special education student may be required to complete to graduate and be awarded a high school diploma. Subsection (b)(2) would be amended to clarify the role of the ARD committee in determining the level of performance necessary for graduation.

In addition, to more clearly organize the four conditions under which a student with a disability can graduate, the section would be reorganized to move current subsections (c) and (d) to new subsection (b)(3) and (4). Subsequent subsections would be re-lettered accordingly. Technical corrections to update cross references would also be made.

The proposed amendment would ensure that a locally developed course substituting for an assessed course must be aligned with the curriculum standards. The proposed amendment would not add any new reporting requirements; however, new Public Education Information Management System (PEIMS) codes would be created to correspond with courses for which modified and alternate EOC assessments would be developed.

The proposed amendment would have no new locally maintained paperwork requirements.

Ann Smisko, associate commissioner for school improvement and support, has determined that for the first five-year period the amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment.

Dr. Smisko has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment would be aligning the rule with HB 3 and providing school districts with specific reference to the new state requirements that provide for the education of students with disabilities. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins October 15, 2010, and ends November 15, 2010. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A public hearing on the proposed amendment has been scheduled for Tuesday, October 19, 2010, at 9:00 a.m. The public hearing will be conducted through the Texas Education Telecommunications Network (TETN) at each of the 20 regional education service centers. Information about the public hearing can be found on the TEA website at http://www.tea.state.tx.us/special.ed/rules/proprule.html. Questions about the public hearing

should be directed to the TEA Division of IDEA Coordination at (512) 463-9414.

The amendment is proposed under 34 Code of Federal Regulations (CFR), §300.100, which requires states to have policies and procedures in place to ensure that they meet the conditions in 34 CFR, §§300.101-300.176; 34 CFR, §300.160, which requires states to ensure that all children with disabilities are included in all state and districtwide assessment programs with appropriate accommodations and alternate assessments, if necessary, as indicated in their respective individualized education programs; TEC, §28.0212, which provides that a student's individualized education program may be used as the student's personal graduation plan; TEC, §28.0213, which provides that a student's admission, review, and dismissal committee shall design an intensive program of instruction for a student who does not perform satisfactorily on a required state assessment; TEC, §29.001, which authorizes the commissioner of education to adopt rules for the administration and funding of the special education program; TEC, §29.003, which authorizes the commissioner to develop specific eligibility criteria for the special education program; TEC, §29.005(a), which requires that a committee composed of the persons required under 20 USC, §1401(11), develop a student's individualized education program; TEC, §39.023(c), which requires the agency to adopt end-of-course assessment instruments for certain core academic courses and provides that a student's admission, review, and dismissal committee shall determine whether any allowable modification is necessary in administering to the student an end-of-course assessment; and TEC, §42.003, which outlines the student eligibility requirements for the benefits of the Foundation School Program.

The amendment implements 34 CFR, §300.100 and §300.160, and the TEC, §§28.0212, 28.0213, 29.001, 29.003, 29.005(a), 39.023(c), and 42.003.

*§89.1070. Graduation Requirements.*

(a) Graduation with a regular high school diploma under subsection (b)(1), (2), or (4) [~~or (d)~~] of this section terminates a student's eligibility for special education services under this subchapter and Part B of the Individuals with Disabilities Education Act (IDEA), 20 United States Code, §§1400 et seq. In addition, as provided in Texas Education Code (TEC), §42.003(a), graduation with a regular high school diploma under subsection (b)(1), (2), or (4) [~~or (d)~~] of this section terminates a student's entitlement to the benefits of the Foundation School Program.

(b) A student receiving special education services may graduate and be awarded a regular high school diploma if the student meets one of the following conditions.[~~:~~]

(1) The [~~the~~] student has satisfactorily completed the state's or district's (whichever is greater) required standards in Chapters 110-128 and Chapter 130 of this title [~~minimum curriculum~~] and credit requirements for graduation (under the recommended or distinguished achievement high school programs in Chapter 74 of this title (relating to Curriculum Requirements)) applicable to students in general education, including satisfactory performance as established in the TEC, Chapter 39, on the required state assessments. [~~exit level assessment instrument; or~~]

(2) The [~~the~~] student has satisfactorily completed the state's or district's (whichever is greater) required standards in Chapters 110-128 and Chapter 130 of this title [~~minimum curriculum~~] and credit requirements for graduation (under the minimum high school program in Chapter 74 of this title) applicable to students in general education, including participation in required state assessments. The student's admission, review, and dismissal (ARD) committee will [~~shall~~] determine whether satisfactory performance on the [~~a~~] required state assessments is necessary [~~assessment shall also be required~~] for graduation.

(3) The student has satisfactorily completed the state's or district's (whichever is greater) required standards in Chapters 110-128 and Chapter 130 of this title through courses, one or more of which contain modified content that is aligned to the standards required under the minimum high school program in Chapter 74 of this title as well as the credit requirements under the minimum high school program, including participation in required state assessments. The student's ARD committee will determine whether satisfactory performance on the required state assessments is necessary for graduation. The student graduating under this subsection must also successfully complete the student's individualized education program (IEP) and meet one of the following conditions, consistent with the IEP:

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

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

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

(4) The student no longer meets age eligibility requirements and has completed the requirements specified in the IEP.

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

[~~(1) the student's individualized education program (IEP);~~]

[~~(2) one of the following conditions, consistent with the student's IEP:~~]

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

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

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

[~~(3) the state's or district's (whichever is greater) minimum credit requirements for students without disabilities; and~~]

[~~(4) the state's or district's minimum curriculum requirements to the extent possible with modifications/substitutions only when it is determined necessary by the ARD committee for the student to receive an appropriate education.~~]

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

(c) [~~(e)~~] All students graduating under this section shall be provided with a summary of academic achievement and functional performance as described in 34 Code of Federal Regulations (CFR), §300.305(e)(3). This summary shall consider, as appropriate, the views of the parent and student and written recommendations from adult service agencies on how to assist the student in meeting postsecondary goals. An evaluation as required by 34 CFR, §300.305(e)(1), shall be included as part of the summary for a student graduating under subsection (b)(3) [~~(c)~~] of this section.

(d) [~~(f)~~] Students who participate in graduation ceremonies but who are not graduating under subsection (b)(3) [~~(c)~~] of this section and who will remain in school to complete their education do not have to be evaluated in accordance with subsection (c) [~~(e)~~] of this section.

(e) [~~(g)~~] Employability and self-help skills referenced under subsection (b)(3) [~~(c)~~] of this section are those skills directly related to the preparation of students for employment, including general skills necessary to obtain or retain employment.

(f) [~~(h)~~] For students who receive a diploma according to subsection (b)(3) [~~(c)~~] of this section, the ARD committee shall determine needed educational services upon the request of the student or parent to resume services, as long as the student meets the age eligibility requirements.

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

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Cristina De La Fuente-Valadez
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# CHAPTER 130. TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR CAREER AND TECHNICAL EDUCATION

## SUBCHAPTER O. SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS

### 19 TAC §130.371

The State Board of Education (SBOE) proposes amendment to §130.371, concerning Texas essential knowledge and skills (TEKS) for principles of technology. The section establishes the TEKS for a career and technical education (CTE) course that may be taken to earn science credit. The proposed amendment would make minor modifications to the Principles of Technology course that would satisfy the physics graduation requirement to align with end-of-course assessment requirements.

Due to requirements for end-of-course assessments for physics, minor modifications are needed to the TEKS for the new CTE Principles of Technology course adopted in July 2009 in 19 TAC §130.371. In March 2010, the SBOE adopted new 19 TAC Chapter 112, Texas Essential Knowledge and Skills for Science, Subchapter D, Other Science Courses, §112.71, Principles of Technology, to reflect the modifications needed. The proposed rule action would amend the TEKS for Principles of Technology in 19 TAC Chapter 130 to align with the changes made to the Principles of Technology TEKS in 19 TAC Chapter 112.

The proposed rule action would have no new procedural and reporting implications. The proposed rule action would have no new locally maintained paperwork requirements.

Anita Givens, associate commissioner for standards and programs, has determined that for the first five-year period the proposed rule action is in effect there will be no additional costs for state or local government as a result of enforcing or administering the proposed rule action.

Ms. Givens has determined that for each year of the first five years the proposed rule action is in effect the public benefit anticipated as a result of enforcing the rule action would be added flexibility for students working to graduate under the Recommended High School Program who are required to earn four science credits. There is no anticipated economic cost to persons who are required to comply with the proposed rule action.

In addition, there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposed rule action submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register.*

The amendment is proposed under the Texas Education Code (TEC), §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to by rule designate subjects constituting a well-balanced curriculum and to require each district to provide instruction in the essential knowledge and skills at appropriate grade levels; and §28.025, which authorizes the SBOE to by rule determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum under §28.002.

The amendment implements the Texas Education Code, §§7.102(c)(4), 28.002, and 28.025.

*§130.371. Principles of Technology (One Science Credit).*

(a) General requirements. This course is recommended for students in Grades 10-12. Prerequisites: one unit of high school science and Algebra I. To receive credit in science, students must meet the 40% laboratory and fieldwork requirement identified in §74.3(b)(2)(C) of this title (relating to Description of a Required Secondary Curriculum).

(b) Introduction.

(1) Principles of Technology. In Principles of Technology, students conduct laboratory and field investigations, use scientific methods during investigations, and make informed decisions using critical thinking and scientific problem solving. Various systems will be described in terms of space, time, energy, and matter. Students will study a variety of topics that include laws of motion, conservation of energy, momentum, electricity, magnetism, thermodynamics, and characteristics and behavior of waves. Students will apply physics

concepts and perform laboratory experimentations for at least 40% of instructional time using safe practices.

(2) Nature of science. Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process." This vast body of changing and increasing knowledge is described by physical, mathematical, and conceptual models. Students should know that some questions are outside the realm of science because they deal with phenomena that are not scientifically testable.

(3) Scientific inquiry. Scientific inquiry is the planned and deliberate investigation of the natural world. Scientific methods of investigation can be experimental, descriptive, or comparative. The method chosen should be appropriate to the question being asked.

(4) Science and social ethics. Scientific decision making is a way of answering questions about the natural world. Students should be able to distinguish between scientific decision-making methods and ethical and social decisions that involve the application of scientific information.

(5) Scientific systems. A system is a collection of cycles, structures, and processes that interact. All systems have basic properties that can be described in terms of space, time, energy, and matter. Change and constancy occur in systems as patterns and can be observed, measured, and modeled. These patterns help to make predictions that can be scientifically tested. Students should analyze a system in terms of its components and how these components relate to each other, to the whole, and to the external environment.

(c) Knowledge and skills.

(1) The student, for at least 40% of instructional time, conducts laboratory and field investigations using safe, environmentally appropriate, and ethical practices. These investigations must involve actively obtaining and analyzing data with physical equipment, but may also involve experimentation in a simulated environment as well as field observations that extend beyond the classroom. The student is expected to:

(A) demonstrate safe practices during laboratory and field investigations; and

(B) demonstrate an understanding of the use and conservation of resources and the proper disposal or recycling of materials.

(2) The student uses a systematic approach to answer scientific laboratory and field investigative questions. The student is expected to:

(A) know the definition of science and understand that it has limitations, as specified in subsection (b)(2) of this section;

(B) know that scientific hypotheses are tentative and testable statements that must be capable of being supported or not supported by observational evidence. Hypotheses of durable explanatory power that [~~which~~] have been tested over a wide variety of conditions are incorporated into theories;

(C) know that scientific theories are based on natural and physical phenomena and are capable of being tested by multiple independent researchers. Unlike hypotheses, scientific theories are well-established and highly-reliable explanations, but may be subject to change as new areas of science and new technologies are developed;

(D) distinguish between scientific hypotheses and scientific theories;

(E) design and implement investigative procedures, including making observations, asking well-defined questions, formulating testable hypotheses, identifying variables, selecting appropriate equipment and technology, and evaluating numerical answers for reasonableness;

(F) demonstrate the use of course apparatus, equipment, techniques, and procedures, including multimeters (current, voltage, resistance), triple beam balances, batteries, clamps, dynamics demonstration equipment, collision apparatus, data acquisition probes, discharge tubes with power supply (H, He, Ne, Ar), hand-held visual spectroscopes, hot plates, slotted and hooked lab masses, bar magnets, horseshoe magnets, plane mirrors, convex lenses, pendulum support, power supply, ring clamps, ring stands, stopwatches, trajectory apparatus, tuning forks, carbon paper, graph paper, magnetic compasses, polarized film, prisms, protractors, resistors, friction blocks, mini lamps (bulbs) and sockets, electrostatics kits, 90-degree rod clamps, metric rulers, spring scales, knife blade switches, Celsius thermometers, meter sticks, scientific calculators, graphing technology, computers, cathode ray tubes with horseshoe magnets, ballistic carts or equivalent, resonance tubes, spools of nylon thread or string, containers of iron filings, rolls of white craft paper, copper wire, Periodic Table, electromagnetic spectrum charts, slinky springs, wave motion ropes, and laser pointers;

(G) use a wide variety of additional course apparatus, equipment, techniques, materials, and procedures as appropriate such as ripple tank with wave generator, wave motion rope, micrometer, caliper, radiation monitor, computer, ballistic pendulum, electroscope, inclined plane, optics bench, optics kit, pulley with table clamp, resonance tube, ring stand screen, four-inch ring, stroboscope, graduated cylinders, and ticker timer;

(H) make measurements with accuracy and precision and record data using scientific notation and International System (SI) units;

(I) identify and quantify causes and effects of uncertainties in measured data;

(J) organize and evaluate data and make inferences from data, including the use of tables, charts, and graphs;

(K) communicate valid conclusions supported by the data through various methods such as lab reports, labeled drawings, graphic organizers, journals, summaries, oral reports, and technology-based reports; and

(L) express and manipulate relationships among physical variables quantitatively, including the use of graphs, charts, and equations.

(3) The student uses critical thinking, scientific reasoning, and problem solving to make informed decisions within and outside the classroom. The student is expected to:

(A) in all fields of science, analyze, evaluate, and critique scientific explanations by using empirical evidence, logical reasoning, and experimental and observational testing, including examining all sides of scientific evidence of those scientific explanations, so as to encourage critical thinking by the student;

(B) communicate and apply scientific information extracted from various sources such as current events, news reports, published journal articles, and marketing materials;

(C) draw inferences based on data related to promotional materials for products and services;

(D) explain the impacts of the scientific contributions of a variety of historical and contemporary scientists on scientific thought and society;

(E) research and describe the connections between physics and future careers; and

(F) express and interpret relationships symbolically in accordance with accepted theories to make predictions and solve problems mathematically, including problems requiring proportional reasoning and graphical vector addition.

(4) The student uses the scientific process to investigate physical concepts. The student is expected to:

(A) understand that scientific hypotheses are tentative and testable statements that must be capable of being supported by observational evidence;

(B) understand that scientific theories are based on natural and physical phenomena and are capable of being tested by multiple independent researchers;

(C) design and implement investigative procedures;

(D) demonstrate the appropriate use and care of laboratory equipment;

(E) demonstrate accurate measurement techniques using precision instruments;

(F) record data using scientific notation and International System (SI) of units;

(G) identify and quantify causes and effects of uncertainties in measured data;

(H) organize and evaluate data, including the use of tables, charts, and graphs;

(I) communicate conclusions supported through various methods such as laboratory reports, labeled drawings, graphic organizers, journals, summaries, oral reports, or technology-based reports; and

(J) record, express, and manipulate data using graphs, charts, and equations.

(5) The student demonstrates appropriate safety techniques in the field and laboratory environments. The student is expected to:

(A) master relevant safety procedures;

(B) follow safety guidelines as described in various manuals, instructions, and regulations;

(C) identify and classify hazardous materials and wastes; and

(D) make prudent choices in the conservation and use of resources and the disposal of hazardous materials and wastes appropriately.

(6) The student uses critical-thinking, scientific-reasoning, and problem-solving skills. The student is expected to:

(A) analyze and evaluate scientific explanations by using empirical evidence, logical reasoning, and experimental and observational testing;

(B) communicate and apply scientific information;

(C) explain the societal impacts of scientific contributions; and

(D) research and describe the connections between technologies and future career opportunities.

(7) The student describes and applies the laws governing motion in a variety of situations [~~the nature of two-dimensional forces~~]. The student is expected to:

(A) generate and interpret relevant equations using graphs and charts for one- and two-dimensional motion, including:

*(i)* using and describing one-dimensional equations for displacement, distance, speed, velocity, average velocity, acceleration, and average acceleration;

*(ii)* using and describing two-dimensional equations for projectile and circular motion; and

*(iii)* using and describing vector forces and resolution;

(B) describe and calculate the effects of forces on objects, including law of inertia and impulse and conservation of momentum;

(C) develop and interpret free-body force diagrams; and

(D) identify and describe motion relative to different frames of reference.

(8) The student describes the nature of forces in the physical world. The student is expected to:

(A) research and describe the historical development of the concepts of gravitational, electromagnetic, weak nuclear, and strong nuclear forces;

(B) describe and calculate the magnitude [~~the nature~~] of gravitational forces between two [~~among~~] objects [~~and their masses~~];

(C) describe and calculate the magnitude [~~the nature~~] of electrical forces [~~and fields with respect to the nature of their charges~~];

(D) describe the nature and identify everyday examples of magnetic forces and fields;

(E) describe the nature and identify everyday examples of electromagnetic forces and fields;

(F) characterize materials as conductors or insulators based on their electrical properties;

(G) design and construct both series and parallel circuits and calculate current, potential difference, resistance, and power of various circuits;

[~~(G) describe and demonstrate electrical circuits;~~]

(H) investigate and describe the relationship between electric and magnetic fields in applications such as generators, motors, and transformers; and

(I) describe technological applications of the strong and weak nuclear forces in nature.

(9) The student describes and applies the laws [~~concepts~~] of the conservation of energy and momentum. The student is expected to:

(A) describe the transformational process between work, potential energy, and kinetic energy (work-energy theorem);

(B) use examples to analyze and calculate the relationships among work, kinetic energy, and potential energy;

(C) describe and calculate the mechanical energy [~~concept~~] of, the power generated within, the impulse applied to, and the momentum of a physical system; and

(D) describe and apply the laws [~~concepts~~] of conservation of energy and conservation of momentum.

(10) The student analyzes the concept of thermal energy. The student is expected to:

(A) describe how the macroscopic properties of a thermodynamic system such as temperature, specific heat, and pressure are related to the molecular level of matter, including kinetic or potential energy of atoms;

(B) contrast and give examples of different processes of thermal energy transfer, including conduction, convection, and radiation; and

(C) analyze and explain technological examples such as solar and wind energy that illustrate the laws of thermodynamics, including the law of conservation of energy and the law of entropy.

(11) The student analyzes the properties of wave motion and optics. The student is expected to:

(A) examine and describe oscillatory motion and wave propagation in various types of media;

(B) investigate and analyze characteristics of waves, including velocity, frequency, amplitude, and wavelength;

(C) investigate and calculate [~~describe~~] the relationship between wavespeed, frequency, and wavelength;

(D) compare and contrast the characteristics and behaviors of transverse waves, including electromagnetic waves and the electromagnetic spectrum, and longitudinal waves, including sound waves;

(E) investigate behaviors of waves, including reflection, refraction, diffraction, interference, resonance, and the Doppler effect;

(F) describe and predict image formation as a consequence of reflection from a plane mirror and refraction through a thin convex lens; and

(G) describe the role of wave characteristics and behaviors in medical and industrial technology applications.

(12) The student analyzes the concepts of atomic, nuclear, and quantum phenomena. The student is expected to:

(A) describe the photoelectric effect and the dual nature of light;

(B) compare and explain emission spectra produced by various atoms;

(C) describe the significance of mass-energy equivalence and apply it in explanations of phenomena such as nuclear stability, fission, and fusion;

(D) describe the role of mass-energy equivalence for areas such as nuclear stability, fission, and fusion; and

(E) explore technology applications of atomic, nuclear, and quantum phenomena such as nanotechnology, radiation therapy, diagnostic imaging, and nuclear power.

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 September 30, 2010.

TRD-201005644
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: November 14, 2010
For further information, please call: (512) 475-1497

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# TITLE 22. EXAMINING BOARDS

## PART 9. TEXAS MEDICAL BOARD

### CHAPTER 183. ACUPUNCTURE

**22 TAC §§183.2, 183.15, 183.20**

The Texas Medical Board (Board) proposes amendments to §183.2, concerning Definitions, §183.15, concerning Use of Professional Titles and §183.20, concerning Continuing Acupuncture Education.

The amendment to §183.2 provides that an acupuncture needle includes a solid body dry needle.

The amendment to §183.15 describes when and how a licensee may use additional professional titles in advertising and other related materials.

The amendment to §183.20 clarifies that to become an approved CAE provider, the provider must submit to the board evidence that the provider has three continuous years of previous experience providing at least one different CAE course in Texas in each of those years.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing this proposal will be to clarify the definition of acupuncture needles; to ensure that licensees advertise their credentials in an appropriate manner to avoid misleading the public about the licensee's training and education; and to ensure that approved provider status is only provided to individuals or entities that have a sufficient number and variety of courses approved for CAE credit over a three-year period with the Board.

Ms. Leshikar has also determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed. There will be no effect on small or micro businesses.

Comments on the proposals may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §205.201, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

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

*§183.2. Definitions.*

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

(1) (No change.)

(2) Acceptable approved acupuncture school--Effective January 1, 1996, and in addition to and consistent with the requirements of §205.206 of the Texas Occupations Code [~~Tex. Occ. Code~~]:

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

(3) (No change.)

(4) Acupuncture--

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

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

(5) - (34) (No change.)

*§183.15. Use of Professional Titles.*

(a) A licensee shall use the title "Licensed Acupuncturist," "Lic. Ac.," or "L. Ac.," immediately following his/her name on any advertising or other materials visible to the public which pertain to the licensee's practice of acupuncture, except as provided in subsection (b) of this section. Only persons licensed as an acupuncturist may use these titles. A licensee who is also licensed in Texas as a physician, dentist, chiropractor, optometrist, podiatrist, and/or veterinarian is exempt from the requirement that the licensee's acupuncture title immediately follow his/her name.

(b) If a licensee uses any additional title or designation, it shall be the responsibility of the licensee to comply with the provisions of the Healing Art Identification Act, Texas Occupations Code Annotated [~~Tex. Occ. Code Ann.~~], Chapter 104, that require individuals to designate the authority under which the title is used or the college or honorary degree that gives rise to the use of the title. A licensee may use the additional title or designation in materials described in subsection (a) of this section, immediately before or after the title "Licensed Acupuncturist," "Lic. Ac.," or "L. Ac.".

*§183.20. Continuing Acupuncture Education.*

(a) - (q) (No change.)

(r) Criteria for Provider Approval.

(1) In order to be an approved provider, a provider shall submit to the board a provider application on a form approved by the board, along with any required fee. All provider applications and documentation submitted to the board shall be typewritten and in English.

(2) To become an approved provider, a provider shall submit to the board evidence that the provider has three continuous years of previous experience providing at least one different CAE course [~~courses~~] in Texas in each of those years that were approved by the board. In addition the provider must have no history of complaints or reprimands with the board.

(3) The approval of the provider shall expire three years after it is issued by the board and may be renewed upon the filing of the required application, along with any required fee.

(4) Acupuncture schools and colleges which have been approved by the board, as defined under §183.2(2) of this title (relating to Definitions), who seek to be approved providers shall be required to submit an application for an approved provider number to the board.

(s) Requirements of Approved Providers.

(1) For the purpose of this chapter, the title "approved provider" can only be used when a person or organization has submitted a provider application form, and has been issued a provider number unless otherwise provided.

(2) A person or organization may be issued only one provider number. When two or more approved providers co-sponsor a course, the course shall be identified by only one provider number and that provider shall assume responsibility for recordkeeping, advertising, issuance of certificates and instructor(s) qualifications.

(3) An approved provider shall offer CAE programs that are presented or instructed by persons who meet the minimum criteria as described in subsection (t) of this section.

(4) An approved provider shall keep the following records for a period of four years in one identified location:

(A) Course outlines of each course given.

(B) Record of time and places of each course given.

(C) Course instructor curriculum vitaes or resumes.

(D) The attendance record for each course.

(E) Participant evaluation forms for each course given.

(5) An approved provider shall submit to the board the following within ten days of the board's request:

(A) A copy of the attendance record showing the name, signature and license number of any licensed acupuncturists who attended the course.

(B) The participant evaluation forms of the course.

(6) Approved providers shall issue, within 60 days of the conclusion of a course, to each participant who has completed the course, a certificate of completion that contains the following information:

(A) Provider's name and number.

(B) Course title.

(C) Participant's name and, if applicable, his or her acupuncture license number.

(D) Date and location of course.

(E) Number of continuing education hours completed.

(F) Description of hours indicating whether hours completed are in general acupuncture, ethics, herbology, biomedicine, or practice management.

(G) Statement directing the acupuncturist to retain the certificate for at least four years from the date of completion of the course.

(7) Approved providers shall notify the board within 30 days of any changes in organizational structure of a provider and/or the person(s) responsible for the provider's continuing education course, including name, address, or telephone number changes.

(8) Provider approval is non-transferable.

(9) The board may audit during reasonable business hours records, courses, instructors and related activities of an approved provider.

(t) - (v) (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 October 1, 2010.

TRD-201005679
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: November 14, 2010
For further information, please call: (512) 305-7016

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# PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

## CHAPTER 571. LICENSING

## SUBCHAPTER A. EXAMINATION

### 22 TAC §571.19

The Texas Board of Veterinary Medical Examiners proposes new §571.19, concerning Temporary Licensure During Declared State of Emergency.

New §571.19 sets forth the process for temporary licensure of veterinarians licensed in states other than Texas who enter the state to provide relief services during a state of emergency declared by the Office of the Governor. The rule proposed is the rule that has in the past been adopted on an emergency basis by the board at the time a state of emergency was declared.

Dewey E. Helmcamp III, Executive Director, has determined that for each year of the first five years that the new rule as proposed is in effect the anticipated public benefit as a result of enforcing the proposal will be to provide more notice to the public and veterinarians of other states of the requirements for temporary licensure prior to being in the state to provide relief veterinary services during a declared state of emergency and allow the board to utilize resources to respond to the emergency rather than being in the process of rulemaking.

Mr. Helmcamp has also determined that for each year of the first five years the rule is in effect, there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the rule as proposed. Mr. Helmcamp has also determined that the rule will have no local employment impact.

Mr. Helmcamp has also determined there will be no direct adverse effect on small businesses or micro-businesses as a result of enforcing the rule as proposed. Mr. Helmcamp has further determined that there are no economic costs to persons required to comply with the rule as proposed.

The Texas Board of Veterinary Medical Examiners invites comments on the proposed new rule from any member of the public. A written statement should be mailed or delivered to Loris Jones, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Ste. 3-810, Austin, Texas 78701-3942, by facsimile (FAX) to (512) 305-7574, or by e-mail vet.board@tbvme.state.tx.us. Comments will be accepted for 30 days following publication in the *Texas Register.*

The new rule is proposed under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a) which states that the Board may adopt rules necessary to administer the chapter.

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

*§571.19. Temporary Licensure During Declared State of Emergency.*

(a) An individual who is licensed to practice veterinary medicine in any of the United States may be issued a temporary license during a state of disaster declared by the Governor of the State of Texas under the following circumstances:

(1) The applicant must complete an Application for Temporary Emergency License.

(2) The Board will verify that the veterinarian is licensed in the states indicated in the Application and will confirm good standing.

(3) The applicant must file an application with the Texas Department of Public Safety for a controlled substances registration.

(4) An application fee is waived.

(b) A veterinarian granted a temporary emergency license under this section shall abide by the Texas Veterinary Licensing Act and the Board's rules. Violations of the Act, Board rules, or the temporary emergency license will subject the temporary licensee to disciplinary action by the Board.

(c) A temporary license issued under this rule will be valid for 120 days or until the end of the declaration of disaster, whichever is earlier.

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 October 1, 2010.

TRD-201005652
Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: November 14, 2010
For further information, please call: (512) 305-7563

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## SUBCHAPTER C. LICENSE RENEWALS

### 22 TAC §571.62

The Texas Board of Veterinary Medical Examiners proposes new §571.62, concerning Default on Student Loan.

New §571.62 is based on §57.491 of the Texas Education Code, which provides that a licensing agency shall not renew the license of a licensee whose name is provided by the lender as being in default on a student loan. The rule is intended to prevent individuals from renewing veterinary licenses if the individual is in default on payment of a student loan and to give the Board discretion to deny veterinary licenses to applicants for licensure who are in default on repayment of their student loans.

Dewey E. Helmcamp III, Executive Director, has determined that for each year of the first five years that the new rule as proposed is in effect, the anticipated public benefit as a result of enforcing the proposal will be to inform those seeking a veterinary license

of the requirement that they repay their student loans in a timely fashion, and to ensure that licensed veterinarians repay their student loans, many of which are backed by public funds.

Mr. Helmcamp has also determined that for each year of the first five years the rule is in effect, there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the rule as proposed. Mr. Helmcamp has also determined that the rule will have no local employment impact.

Mr. Helmcamp has also determined there will be a no direct adverse effect on small businesses or micro-businesses as a result of enforcing the rule as proposed. Mr. Helmcamp has further determined that there are no economic costs to persons required to comply with the rule as proposed.

The Texas Board of Veterinary Medical Examiners invites comments on the proposed new rule from any member of the public. A written statement should be mailed or delivered to Loris Jones, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Ste. 3-810, Austin, Texas 78701-3942, by facsimile (FAX) to (512) 305-7574, or by e-mail vet.board@tbvme.state.tx.us. Comments will be accepted for 30 days following publication in the *Texas Register.*

The new rule is proposed under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a) which states that the Board may adopt rules necessary to administer the chapter.

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

*§571.62. Default on Student Loan.*

(a) Denial. The board may deny an application for a license if it receives information from an administering entity that the applicant has defaulted on a student loan or has breached a student loan repayment contract by failing to perform his or her service obligation under the contract. The board may rescind a denial under this subsection upon receipt of information from an administering entity that the applicant whose application was denied is now in good standing.

(b) Renewal.

(1) The board shall not renew a license of a licensee who is in default of a student loan or a repayment agreement except as provided in paragraph (2) of this subsection.

(2) For a licensee in default of a loan or repayment agreement, the board shall renew the license if the licensee presents to the board a certificate certifying that:

(A) the licensee has entered into a repayment agreement on the defaulted loan; or

(B) the licensee is not in default on the loan or on the repayment agreement.

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 October 1, 2010.

TRD-201005653
Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: November 14, 2010
For further information, please call: (512) 305-7563

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**22 TAC §571.63**

The Texas Board of Veterinary Medical Examiners proposes new §571.63, concerning Default on Child Support.

New §571.63 sets forth the requirement under Chapter 232 of the Texas Family Code that the board is required to suspend and/or deny a renewal of a license upon receipt of a final order suspending a license, as further defined under Chapter 232 of the Texas Family Code, for failure to pay child support and/or where the Office of the Attorney General has notified the board to suspend and/or not renew a license for failure to pay child support.

Dewey E. Helmcamp III, Executive Director, has determined that for each year of the first five years that the new rule as proposed is in effect the anticipated public benefit as a result of enforcing the proposal will be to further notify licensees of the requirement set out in Chapter 232 of the Family Code and what could occur to their license for failing to pay child support. Another anticipated public benefit is to provide a further incentive to licensees to pay child support.

Mr. Helmcamp has also determined that for each year of the first five years the rule is in effect, there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the rule as proposed. Mr. Helmcamp has also determined that the rule will have no local employment impact.

Mr. Helmcamp has also determined there will be a no direct adverse effect on small businesses or micro-businesses as a result of enforcing the rule as proposed. Mr. Helmcamp has further determined that there are no economic costs to persons required to comply with the rule as proposed.

The Texas Board of Veterinary Medical Examiners invites comments on the proposed new rule from any member of the public. A written statement should be mailed or delivered to Loris Jones, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Ste. 3-810, Austin, Texas 78701-3942, by facsimile (FAX) to (512) 305-7574, or by e-mail vet.board@tbvme.state.tx.us. Comments will be accepted for 30 days following publication in the *Texas Register.*

The new rule is proposed under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a) which states that the Board may adopt rules necessary to administer the chapter.

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

*§571.63. Default on Child Support.*

The board shall suspend and/or deny a renewal of a license upon receipt of a final order suspending a license under Chapter 232 of Texas Family Code for failure to pay child-support and/or where the Office of the Attorney General has notified the board to suspend and/or not renew a license for failure to pay child-support.

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 October 1, 2010.

TRD-201005654

Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: November 14, 2010
For further information, please call: (512) 305-7563

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## CHAPTER 573. RULES OF PROFESSIONAL CONDUCT
## SUBCHAPTER G. OTHER PROVISIONS

**22 TAC §573.77**

The Texas Board of Veterinary Medical Examiners proposes new §573.77, concerning Default on Student Loan/Child Support Payments.

New §573.77 sets forth that the Board may take disciplinary action against a licensee who is in default on student loans as outlined in Chapter 57 of the Education Code and/or a licensee who has failed to pay child support under Chapter 232 of the Texas Family Code.

Dewey E. Helmcamp III, Executive Director, has determined that for each year of the first five years that the new rule as proposed is in effect the anticipated public benefit as a result of enforcing the proposal will be to further notify licensees of the requirement set out in Chapter 57 of the Education Code and Chapter 232 of the Family Code and what could occur to their license for failing to repay student loans or the failure to pay child support. Another anticipated public benefit is to provide a further incentive to licensees to repay student loans and pay child support.

Mr. Helmcamp has also determined that for each year of the first five years the rule is in effect, there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the rule as proposed. Mr. Helmcamp has also determined that the rule will have no local employment impact.

Mr. Helmcamp has also determined there will be a no direct adverse effect on small businesses or micro-businesses as a result of enforcing the rule as proposed. Mr. Helmcamp has further determined that there are no economic costs to persons required to comply with the rule as proposed.

The Texas Board of Veterinary Medical Examiners invites comments on the proposed new rule from any member of the public. A written statement should be mailed or delivered to Loris Jones, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Ste. 3-810, Austin, Texas 78701-3942, by facsimile (FAX) to (512) 305-7574, or by e-mail vet.board@tbvme.state.tx.us. Comments will be accepted for 30 days following publication in the *Texas Register.*

The new rule is proposed under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a) which states that the Board may adopt rules necessary to administer the chapter, as well as §801.151(b) which states "the Board may adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity, skills, and practice in the veterinary medical profession."

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

*§573.77. Default on Student Loan/Child Support Payments.*

(a) A licensee who has defaulted on a student loan or breached a student loan repayment contract by failing to perform his or her service obligation under the contract, or any other agreement between the licensee and the administering entity, relating to payment of a student loan may be subject to disciplinary action by the board.

(b) A licensee, who has a final order under Chapter 232 of the Texas Family Code suspending the license for failure to pay child-support and/or where the Office of the Attorney General has notified the board to not renew the license for failure to pay child-support, may be subject to disciplinary action by the board.

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 October 1, 2010.

TRD-201005655
Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: November 14, 2010
For further information, please call: (512) 305-7563

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## CHAPTER 577. GENERAL ADMINISTRATIVE DUTIES
## SUBCHAPTER B. STAFF

**22 TAC §577.20**

The Texas Board of Veterinary Medical Examiners proposes new §577.20, concerning Employee Education and Training.

The proposal will establish a new rule relating to administration of the board-sponsored education and training programs for employees of the Texas Board of Veterinary Medical Examiners in accordance with the State Employees Training Act, Texas Government Code §§656.041 - 656.104.

Dewey E. Helmcamp III, Executive Director, has determined that for each year of the first five years following the adoption of §577.20, the public benefit expected as a result of the proposed rule is that employees and the general public will benefit from the administration of education and training programs that materially aid board administrators and employees in effectively carrying out the duties of the board.

Mr. Helmcamp has also determined that during the first five-year period following the adoption of §577.20, there will be no foreseeable fiscal implications for state and local government as a result of the rule. Further, he has determined that for each of the first five years following the enactment of §577.20, there will be no foreseeable economic cost to persons required to comply with the section, and therefore there is no need to consider less costly alternatives to the new rule. Finally, Mr. Helmcamp has also determined that the enactment of §577.20 will have no adverse effect on small business or micro-business or local employment.

The Texas Board of Veterinary Medical Examiners invites comments on the proposed new rule from any member of the public. A written statement should be mailed or delivered to Loris Jones, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Ste. 3-810, Austin, Texas 78701-3942, by facsimile (FAX) to (512) 305-7574, or by e-mail vet.board@tbvme.state.tx.us.

Comments will be accepted for 30 days following publication in the *Texas Register.*

The new rule is proposed under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a) which states that the Board may adopt rules necessary to administer the chapter.

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

*§577.20. Employee Education and Training.*

(a) The board may use state funds to provide education and training for its employees in accordance with the State Employees Training Act (Texas Government Code, §§656.041 - 656.104).

(b) The education or training shall be related to the employee's current position or prospective job duties at the board.

(c) The board's education and training program benefits both the board and the employees participating by:

(1) preparing for technological and legal developments;

(2) increasing work capabilities;

(3) increasing the number of qualified employees in areas for which the board has difficulty in recruiting and retaining employees; and

(4) increasing the competence of agency employees.

(d) Board employees may be required to complete an education or training program related to the employee's duties or prospective duties as a condition of employment.

(e) Participation in an education or training program requires the appropriate level of approval prior to participation and is subject to the availability of funds within the agency's budget.

(f) The employee education and training program for the board may include:

(1) mandatory agency-sponsored training required for all employees;

(2) education relating to technical or professional certifications and licenses;

(3) education and training relating to the promotion of employee development;

(4) employee-funded external education;

(5) board-funded external education; and

(6) other board-sponsored education and training determined by the board to fulfill the purposes of the State Employees Training Act.

(g) The board's Human Resources Director is designated as the administrator of the board's education and training program.

(h) The administrator or the administrator's designee shall develop policies for administering each of the components of the employee education and training program. These policies shall include:

(1) eligibility requirements for participation;

(2) approval procedures for participation; and

(3) obligations of program participants.

(i) Approval to participate in any portion of the board's education and training program shall not in any way affect an employee's at-will status or constitute a guarantee or indication of continued employment, nor shall it constitute a guarantee or indication of future employment in a current or prospective position.

(j) Permission to participate in any education and training program may be withdrawn if the board determines, in its sole discretion, that participation would negatively impact the employee's job duties or performance.

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 October 1, 2010.

TRD-201005656
Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: November 14, 2010
For further information, please call: (512) 305-7563

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# TITLE 30. ENVIRONMENTAL QUALITY

## PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

## CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

## SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

## DIVISION 1. PERMIT APPLICATION

### 30 TAC §116.118

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

The Texas Commission on Environmental Quality (TCEQ or commission) proposes the repeal of §116.118.

BACKGROUND AND FACTUAL BASIS FOR THE PROPOSED REPEAL

On April 14, 2010, the United States Environmental Protection Agency (EPA) published notice in the *Federal Register* (75 *Federal Register* 19468) of its disapproval of the TCEQ rules that implement the state's qualified facilities program, established by the Texas Legislature in 1995, as a state implementation plan (SIP) revision. On September 15, 2010, the commission adopted amendments to Chapter 116 (TCEQ Rule Project No. 2010-006-116-PR) to address the issues identified by the EPA which resulted in the disapproval of the qualified facility program rules.

Section 116.118 addresses facilities that were exempted from obtaining an authorization to emit air contaminants under Texas Health and Safety Code (THSC), §382.0518(g) and how these facilities could meet the requirements of the qualified facility rules. These facilities are also known as grandfathered facilities. In 2001, the legislature amended THSC, Chapter 382 to require any facility constructed prior to 1971 to either obtain or apply for an authorization to emit contaminants by March 1, 2007,

or March 1, 2008, depending on its location, or cease emitting air contaminants. During the public comment period on Rule Project No. 2010-006-116-PR, the EPA also noted that the application of §116.118 appeared to be limited to grandfathered facilities. The commission agreed and decided that §116.118 had no further application and should be repealed. The section could not be repealed at the September 15, 2010, adoption of Rule Project No. 2010-006-116-PR because it was noticed for amendment only in the publication of the rule proposal in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978). The commission is now taking action to repeal §116.118.

SECTION DISCUSSION

*§116.118, Pre-change Qualification*

The commission proposes the repeal of §116.118, based on the reasoning in the BACKGROUND AND FACTUAL BASIS FOR THE PROPOSED REPEAL.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed repeal is in effect, no fiscal implications are anticipated for the agency or any other unit of state or local government as a result of administration or enforcement of the proposed repeal.

The proposed repeal would remove §116.118 from TAC. This section, which applies to grandfathered facilities, became obsolete as of March 2008, as all the grandfathered facilities had obtained permits by that time. No fiscal implications are anticipated for the agency or any other unit of state or local government as a result of the repeal.

PUBLIC BENEFIT AND COSTS

Mr. Horvath has also determined that for each year of the first five years the proposed repeal is in effect, the anticipated public benefit will be a more efficient air permitting program as a result of the removal of obsolete regulations.

The proposed repeal is administrative in nature and is not anticipated to impose any additional costs or to result in cost savings for businesses or individuals.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed repeal. The proposed repeal is administrative in nature and will not result in any additional costs or cost savings for facility owners or operators.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed the proposed repeal and determined that a small business regulatory flexibility analysis is not required because the repeal would remove an obsolete regulation and would not adversely affect a small or micro-business in a material way for the first five years the proposed repeal is in effect. The proposed repeal is administrative in nature and does not impose any additional costs on facility owners or operators.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed repeal and determined that a local employment impact statement is not required because the proposed repeal does not adversely affect a local economy in a material way for the first five years that the proposed repeal is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the repeal in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the repeal does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed repeal is to remove an obsolete regulation that has no further application to the air permitting program of the commission. As discussed in the FISCAL NOTE portion of this preamble, the proposed repeal is not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with these federal standards on 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.

Additionally, the repeal does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed repeal will remove a requirement from the air permitting rules that no longer has any applicability to the air permitting program. The proposed repeal does not exceed a requirement of a delegation agreement or a contract between state and federal government if this rulemaking is adopted. The repeal was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act (TCAA)), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this rulemaking, including THSC, §382.003(9) and §382.0518.

Therefore, this proposed repeal is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b). Comments on this draft determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS portion of this preamble.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that

restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed repeal under the Texas Government Code, §2007.043. The primary purpose of the proposed repeal is to remove an obsolete regulation that has no further application to the air permitting program of the commission. The proposed repeal will not create any additional burden on private real property. The proposed repeal will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposed repeal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed repeal will not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this repeal relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this proposed rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed rulemaking will benefit the environment by removing a potentially confusing regulation to help ensure that all facilities emitting air contaminants have an authorization under the TCAA. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this action is consistent with CMP goals and policies. Written comments on the consistency of the proposed repeal may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 116 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the proposed repeal is adopted, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, include any changes made using the amended Chapter 116 requirements into their operating permit.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on November 8, 2010, at 10:00 a.m. in Building B, Room 201A at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-052-116-PR. The comment period closes on November 15, 2010. Copies of the proposed repeal can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Mr. Beecher Cameron, Air Permits Division, at (512) 239-1495.

STATUTORY AUTHORITY

The repeal is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.0511, concerning Permit Consolidation and Amendment, which allows the commission to combine permits; §382.0512, concerning Modification of Existing Facility, which restricts what the commission may consider in determining a facility modification; and §382.0518, concerning Preconstruction Permit, which authorizes the commission to require a permit before a facility is constructed or modified.

The proposed repeal implements Texas Water Code, §5.103 and §5.105 and Texas Health and Safety Code, §§382.002, 382.003,

382.011, 382.012, 382.017, 382.051, 382.0511, 382.0512, and 382.0518.

*§116.118. Pre-change Qualification.*

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 October 1, 2010.

TRD-201005670
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: November 14, 2010
For further information, please call: (512) 239-6090

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# TITLE 43. TRANSPORTATION

## PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

### CHAPTER 21. RIGHT OF WAY

### SUBCHAPTER J. LEASING OF HIGHWAY ASSETS FOR TRANSPORTATION FACILITY

**43 TAC §§21.301 - 21.311**

The Texas Department of Transportation (department) proposes new Subchapter J, Leasing of Highway Assets for Transportation Facility, §§21.301 - 21.311.

EXPLANATION OF PROPOSED NEW SECTIONS

In Texas, freight traffic has experienced significant growth, and forecasts indicate that it will continue to grow in the future. While this growth represents economic opportunity for the state, it has also resulted in increased congestion on the state's transportation infrastructure. In many areas, truck traffic of freight contributes significantly to highway congestion, leading to lost time for drivers, increased energy consumption, and increased air emissions. Much of this traffic also translates into operational and maintenance costs for state and local governments. Furthermore, there is concern over the impact of emissions on air quality conditions.

In response to these issues, the department is considering ways to foster viable and sustainable solutions for freight transportation across the state by encouraging more efficient strategies. One option is to explore how underutilized state assets, like highway right of way, can be used to encourage implementation of alternative freight transportation services and potentially provide another source of revenue to address transportation needs. The department previously sought ideas for creating new transportation facilities through a Request for Information - Concepts for New, Low Carbon Emitting, Freight Transportation Facilities, which was published in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10385).

New §21.301, Purpose, sets forth the purpose of the subchapter, which is to establish the procedure for leasing department right of way for transportation facilities to reduce highway congestion and improve air quality. The right of way may not be leased for a pipeline, an electric transmission line, or another utility facility. The procedure provided by this subchapter is in addition to the procedure established under 43 TAC Chapter 21, Subchapter L (relating to Leasing of Highway Assets).

New §21.302, Definitions, provides definitions for "commission," "department," and "executive director."

New §21.303, Request for Proposals, describes how the department may solicit proposals for the lease of right of way for low emission alternative freight transportation facilities. This section states the information that proposers must include in the proposal and provides that the department may set geographic limitations on right of way to be leased. The request for proposal will set out in detail the specific evaluation criteria that the department establishes for the project under §21.305. It also describes how the department will give notice of the request for proposals. These provisions ensure that the procurement process is conducted efficiently and inform entities on how to participate in the process.

New §21.304, Proposals, describes the information a proposer must submit to the department in response to a request for proposals. The required information includes a description of the facility, description of the technology to be used, a financial plan, and right of way to be leased. The information must include information on air emissions. It must show the facility's effects on the state highway system. It must show the proposer's qualifications and the proposed business terms.

New §21.305, Selection of Entity, describes how the department will select an entity. The department will evaluate proposals based on the criteria that the department reasonably determines are relevant for the project, including among other factors, the comparative value of estimated emissions reductions generated by the proposed transportation facility, the revenue potential to the state, the current viability of proposed technology, or the financial viability of the proposer. In the request for proposal for a project, the department will set out in detail the specific evaluation criteria that the department has established for that project. The department may select more than one proposer. Alternatively, the department may reject all proposals. This allows the department to determine if any proposals merit further consideration but does not obligate the department to select a proposal if none would be beneficial to the department. The department will submit its recommendations to the commission which will select a proposal if the commission determines that: (1) at least one alternative for moving freight available that has lower emissions than by truck for an equivalent load and distance; (2) a suitable part of the right of way of, the airspace above, or the underground space below a highway on the state highway system will not be needed for a highway purpose during the term of the lease; (3) the use of that property for the alternative facility is not inconsistent with applicable highway use; and (4) the lease of that property would be economically beneficial to the department, considering the receipt of lease payments and any resulting reduced maintenance costs on the state highway system.

New §21.306, Negotiation with Selected Entity, provides that the department will attempt to negotiate an agreement with a selected entity to lease right of way from the department. The department may end negotiations with the entity if an acceptable agreement cannot be negotiated or if it appears that the entity's proposal will not offer the apparent best value. If the department ends negotiations, it may choose to reject all proposals, modify the request for proposals and reinitiate the procurement process, or if authorized by the commission, attempt to negotiate a lease

agreement with the proposer of the next most highly ranked proposal.

New §21.307, Agreement, describes an agreement between the department and a selected entity. The agreement must be in writing, executed by the executive director, and approved by the Federal Highway Administration. An agreement may not impair the state's right to use the right of way for a highway purpose if necessary. The section identifies certain subjects that must be covered in an agreement, for example, term, lease payments, and bond requirements. The agreement will also identify certain subjects that the selected entity is responsible for, for example, obtaining any environmental approvals.

New §21.308, Termination of Agreement, identifies the conditions under which an agreement may be terminated and the terms that must be included in the agreement concerning termination. The agreement may provide the department and the selected entity with specified rights to terminate an agreement. Additionally, the department may terminate the agreement on the failure of the selected entity to comply with the agreement, but only after notice of and an opportunity to correct the deficiency. The agreement also will specify that on termination the selected entity must either take certain actions to dismantle and remove the facility from the right of way or provide for the improvement of the facility to comply with the hand-over provisions in the agreement.

New §21.309, Payment, establishes the basic requirements for the lease payments. The lease payments will include both a fair market value payment for use of the right of way, unless the commission authorizes an exception to those charges under Transportation Code, §202.052(d), and may include an administrative cost component to reimburse the department for expenses associated with the contract administration. All funds associated with this contract would be deposited into the state highway fund. This ensures that the department obtains a reasonable price for its assets and is compensated for additional expenses it incurs.

New §21.310, Sublease, provides that a sublease of the lease must be approved by the department. If a sublessee is a utility provider, the facility must comply with the department's utility accommodation rules.

New §21.311, General Requirements, describes miscellaneous requirements for and restrictions on an agreement. The department may not convey or sever from the real property an improvement constructed on the leased area. The lessee is prohibited under the lease from providing outdoor advertising, and it is responsible for any common carrier obligation associated with the transportation facility. The lessee's use of the leased right of way does not constitute abandonment of the property by the department.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years the new sections as proposed are in effect, there will be fiscal implications for state or local governments as a result of enforcing or administering the new sections.

No new employees or consultants will be engaged for this proposed rule change. Requisite duties will be absorbed within existing resources. The cost for these resources is expected to be offset by lease payments which will begin during the final years of the five years included in this study. Lease payments may exceed stated costs and any such surplus revenues would be used for transportation purposes.

Mark Tomlinson, Director, Texas Turnpike Authority Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

PUBLIC BENEFIT AND COST

Mr. Tomlinson has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the new sections will be the movement of freight in a manner that reduces highway congestion and improves air quality. The department has not yet received proposals under the rules and so it is not possible to quantify all potential benefits at this time. Additional possible impacts include reduced highway pavement wear and the development of innovative methods of freight transportation. There are no anticipated economic costs for persons required to comply with the sections as proposed.

There will be no net adverse economic effect on small businesses. Potential losses in business by trucking companies may be offset by the creation of new manufacturing jobs associated with Texas-based construction of new transportation technologies, and the subsequent operation and maintenance of those systems.

TAKINGS IMPACT ASSESSMENT

The department has evaluated the proposed rulemaking in accordance with Government Code, §2007.043(b) and §2.18 of the Office of the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. The department has determined that the proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19 of the Texas Constitution. Furthermore, the department has determined that the proposed rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the new rule. The purpose of the rules is to lease existing state-owned right of way for transportation purposes. The state does not anticipate that there will be takings.

SUBMITTAL OF COMMENTS

Written comments on the proposed new sections may be submitted to Mark Tomlinson, Director, Texas Turnpike Authority Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 15, 2010.

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §202.052 and §202.053, which authorize the department to lease a highway asset.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 202, Subchapter C.

*§21.301. Purpose.*

(a) This subchapter establishes the procedure to be used for leasing state-owned right of way for freight movement to reduce congestion on the state highway system and to improve air quality when the commission authorizes such a lease for a specified project.

(b) This subchapter may not be used for the lease of right of way for the purposes of a pipeline, electric transmission line, or other utility facility.

(c) The procedure provided by this subchapter is separate from and in addition to the procedure established under Subchapter L of this chapter (relating to Leasing of Highway Assets).

*§21.302. Definitions.*

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

(1) Commission--The Texas Transportation Commission.

(2) Department--The Texas Department of Transportation.

(3) Executive director--The executive director of the department or the executive director's designee, not below the level of deputy executive director or assistant executive director.

*§21.303. Request for Proposals.*

(a) The department may issue a request for proposals from public and private entities for the submission of detailed documentation regarding a proposed project and the associated lease of right of way.

(b) The request for proposals will provide the information necessary for a responsive proposal.

(c) The request for proposal will set out in detail the specific evaluation criteria that the department establishes for the project under §21.305 of this subchapter (relating to Selection of Entity).

(d) A request for proposal may describe the geographic limits of potential right of way to be leased.

(e) The department will publish notice of the intent to issue a request for proposal on the department's Internet website and in the *Texas Register* and at least one newspaper of general circulation in the state. The department may also furnish notice to entities associated with freight movement that the department believes might be interested and qualified to participate in submitting a proposal.

(f) The deadline for submitting a proposal will not be before the 31st day after the date that the notice is published in the *Texas Register* under subsection (e) of this section.

(g) The department will not accept unsolicited proposals under this subchapter.

*§21.304. Proposals.*

(a) To be responsive to a request under this subchapter, a proposal must set out in detail:

(1) the description of the property that is proposed to be leased;

(2) the proposed lease term, amount to be paid under the lease, and the payment schedule;

(3) the proposer's qualifications and demonstrated technical competence related to the proposed project;

(4) proposed technologies to be used for the proposed project, including information from test facilities or operational facilities;

(5) schematic designs and architectural designs sufficient to show the extent and nature of the proposed project;

(6) the proposer's ability to meet schedules;

(7) a detailed financial plan, including cost methodology, cost proposals, and project financing approach;

(8) the estimated air emissions of the proposed transportation facility and a comparison to the estimated emissions from equivalent truck transportation;

(9) the effects on the highway facility, including changes in access, clear-zones, lines of sight, signage, drainage, vegetation, and safety; and

(10) any other information that the department considers relevant or necessary.

(b) The information provided under subsection (a)(8) of this section must provide an evaluation of the type of emissions, including regulated pollutants and carbon, and the impacts on existing air quality conditions in the area of the proposed facility.

*§21.305. Selection of Entity.*

(a) The department will evaluate proposals based on the criteria that the department considers appropriate for the project. The criteria may include the comparative value of estimated emissions reductions generated by the proposed transportation facility, the revenue potential to the state, the current viability of proposed technology, the financial viability of the proposer, or other factors that the department reasonably determines are relevant for the project.

(b) Based on the evaluation criteria described under subsection (a) of this section, the department will rank all proposals that are complete, responsive to the request for proposals, and in conformance with the requirements of this subchapter.

(c) The department may select one or more entities whose proposals offer the apparent best value to the department, or may reject all proposals.

(d) The department will submit a recommendation to the commission regarding approval of the proposal or proposals determined to provide the apparent best value to the department. The commission may disapprove the recommendation or the commission may approve the recommendation, if it finds that:

(1) one or more alternative transportation facilities for moving freight are available that have lower emissions than emissions produced for the movement of the same amount of freight an equivalent distance by truck;

(2) part of the right of way of, the airspace above, or the underground space below a highway that is part of the state highway system will not be needed for a highway purpose during the term of the lease and is suitable for the identified mode of moving freight;

(3) the use of the right of way, airspace, or underground space for the identified mode of moving freight would not be inconsistent with applicable highway use; and

(4) the lease of the property described in paragraph (2) of this subsection would be economically beneficial to the department, taking into account the receipt of lease payments and the reduced maintenance costs on the state highway system.

(e) The department's execution of the agreement is subject to the successful completion of negotiations, any necessary federal action, and satisfaction of such other conditions that are identified in the request for proposals or by the commission.

*§21.306. Negotiation with Selected Entity.*

(a) The department will attempt to negotiate an agreement with the approved proposer for the lease right of way from the department and for the design, development, construction, financing, operation, and maintenance of the proposed transportation facility.

(b) If an agreement that is satisfactory to the department cannot be negotiated with that proposer, or if, in the course of negotiations, it appears that the proposal will not provide the department with the overall best value, the department will formally end negotiations with that proposer, and, in its sole discretion:

(1) if authorized by the commission, proceed to the next most highly ranked proposal and attempt to negotiate an agreement with that entity in accordance with this subsection;

(2) reject all proposals and end the process; or

(3) modify the request for proposals and begin the process under this subchapter again.

*§21.307. Agreement.*

(a) An agreement under this subchapter must be in writing, must be executed by the executive director, and must contain the terms specified in this section. The agreement is subject to approval by the Federal Highway Administration.

(b) The department may not execute an agreement that would impair or relinquish the state's right to use the property for a right of way purpose when the property is needed to construct or improve the roadway for which it was acquired.

(c) If the proposed project does not obtain the required governmental approvals or permits, the department will cancel the lease.

(d) The agreement must contain:

(1) the term of the lease, the amount of rent and required deposits, if any, and the method of payment;

(2) a detailed description of the right of way to be leased, including a three-dimensional description if needed;

(3) the general design for the use of the leased right of way, including any improvements to be constructed, all maps, plans, or sketches necessary to set out the pertinent features in relation to any highway facility, and a description of any temporary improvements to be provided by the lessee;

(4) a performance bond and payment bond, as provided under Transportation Code, §202.053;

(5) a removal bond in an amount equal to the anticipated future cost of removing any improvements, as well as the restoration and mitigation of the right of way to a suitable and safe condition, based on a removal, restoration, and mitigation plan approved by the department;

(6) appropriate terms relating to indemnity, liability, insurance, and risk of loss; and

(7) any other provisions considered necessary or desirable by the department.

(e) The agreement must provide that the selected proposer is responsible for:

(1) preparation of any environmental review documents required under federal law or Chapter 2 of this title (relating to Environmental Policy);

(2) preparation of applications and obtaining any environmental permits or other approvals by third parties or governmental entities;

(3) funding all planning, design, testing, construction, operation, or maintenance of the lessee's proposed activities, with acknowledgement of the lessee's right to mortgage or otherwise pledge or grant a security interest in the leasehold to secure financing for the acquisition of the leasehold and for the construction and operation of an improvement permitted under the lease;

(4) making any changes to existing highway facilities at its sole expense for the proper operation and maintenance of the facilities if the department determines that the proposed use of the leased right of way requires changes or additions;

(5) acquiring additional real property rights located outside of the department's holdings that are necessary to conduct the proposed activities; and

(6) all utility adjustments and relocations required for its proposed activities.

*§21.308. Termination of Agreement.*

(a) An agreement under this subchapter may be terminated if, in the department's sole opinion:

(1) the leased assets are not being used in accordance with the lease or have been abandoned; or

(2) the selected proposer has not complied with the terms of the agreement.

(b) The department will give written notice to the selected proposer of noncompliance with the agreement and specify a reasonable period during which the selected proposer may correct the noncompliance. If the selected proposer fails to correct the issues within the specified period, the department may terminate the agreement.

(c) The agreement may contain a provision for early termination of the agreement by either party with or without cause. The right of either party to terminate the agreement without cause before the stated termination date may be conditioned on the payment to the non-terminating party of an amount negotiated by the parties and specified in the agreement.

(d) Upon termination of the agreement for any reason, the department may require the selected proposer to:

(1) dismantle and remove the freight transportation facility and to restore the right of way at no cost to the department; or

(2) hand back the facility to the department in a condition complying with minimum specified criteria and standards.

(e) The selected proposer shall bear the cost of any remedial or rehabilitation work identified as being necessary to improve the facility to comply with the minimum specified criteria or standards under subsection (d)(2) of this section.

*§21.309. Payment.*

(a) The department will charge for the lease of right of way under this subchapter not less than fair market value, unless the commission authorizes an exception under Transportation Code, §202.052(d). The department may consider its costs in administering the agreement in establishing the amount to be paid for the lease.

(b) All payments received under this subchapter will be deposited into the state highway fund.

*§21.310. Sublease.*

Any proposed sublease of a lease under this subchapter must be approved by the department. If a sub-lessee is a utility provider, the installation, adjustment, relocation, and maintenance of its facilities must be in accordance with the department's utility accommodation policy in Subchapter C of this chapter (relating to Utility Accommodation).

*§21.311. General Requirements.*

(a) The department may not convey title to, or sever from the real property, a permanent improvement constructed on the property leased under this subchapter.

(b) Outdoor advertising will not be permitted under an agreement under this subchapter.

(c) The person who enters into an agreement with the department under this subchapter is responsible for any common carrier obligation associated with the facility developed under the agreement.

(d) A person's use of right of way under an agreement under this subchapter does not constitute abandonment of the property by the department.

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

Filed with the Office of the Secretary of State on October 1, 2010.

TRD-201005657
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 14, 2010
For further information, please call: (512) 463-8683

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## CHAPTER 23. TRAVEL INFORMATION

The Texas Department of Transportation (department) proposes amendments to §23.1, Purpose, §23.2, Definitions, §23.10, Travel Literature, §23.12, Texas Official Travel Map, and §23.14, Display of Travel Literature in the Texas Travel Information Centers.

### EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, Chapter 204 directs the department to advertise and attract traffic to the highways of this state by publishing the state's travel literature containing information on public parks, recreational areas, scenic areas, and other public places and objects of interest and value to the public and highway users, and by periodically publishing the state highway map. The chapter also requires the department to operate Texas Travel Information Centers at the principal gateways to this state to provide highway information, travel guidance, and descriptive material designed to assist the traveling public and stimulate travel to and within the state.

Amendments to §23.1, Purpose, and §23.2, Definitions, change the name of the division from the "Travel Division" to the "Travel Information Division" to better describe the division's functions.

Amendments to §23.10, Travel Literature, clarify subject matter that may be included in the department's travel literature by specifying that subject matter must appeal to a broad spectrum of tourists, not just to a general audience, and must highlight the assets of the state of Texas. The amendments also clarify examples of a routine commercial service, which cannot be included in the department's travel literature. Large outlet malls and Texas wineries are exempted from that exclusion. The amendments also clarify subject matter that cannot be included in the department's travel literature by excluding municipal amenities such as parks, golf courses, and pools that primarily serve only a community and its surrounding residents. These changes more accurately reflect the goal of appealing to a broad spectrum of tourists and not just a general audience.

Amendments to §23.12, Texas Official Travel Map, clarify the items that are depicted on the map by adding the Texas Travel Information Centers. The amendments change the criteria for a city or town to be included on the map by deleting the requirement that a city or town have a United States post office and by deleting the requirement that a city or town have an auto repair service available in the area and requiring that a city or town be located on the state maintained highway system, have a population of 50 or more, and be near a significant park or recreational area, or a historical, recreational, or scenic tourist interest facility that is open to the public continuously or on a regular seasonal basis rather than meeting only one of the above criteria. Post offices are closing across the country, so the requirement that a town have a post office is no longer a fair requirement. The Travel Information Division does not have the resources to determine what towns have auto repair services, so that requirement is also being removed. The three requirements that remain better qualify a community for inclusion on the map because they are reasonable requirements collectively but still allow the map to include only Texas towns that are generally well traveled by the public.

The amendments also add spurs, loops, and business routes that provide access to widely recognized parks, lakes, tourist attractions, or recreational areas to the examples of roadways that may be depicted on the map. The current rules include only FM, RM, or RR, but department roadways include spurs, loops, and business routes; the purpose of adding these routes to the rules is for clarification.

The amendments to §23.14, Display of Travel Literature in the Texas Travel Information Centers, clarify the types of literature and other promotional items that may be distributed at Travel Information Centers by including information about performing arts theaters and specialty shopping facilities that are tourist attractions. Performing arts theaters and specialty shopping facilities are destinations that appeal to tourists.

### FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Doris Howdeshell, Director, Travel Information Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

### PUBLIC BENEFIT AND COST

Ms. Howdeshell has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to improve the department's ability to promote travel and tourism in the state without increasing the cost to taxpayers. There are no anticipated economic costs for persons required

to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§23.1, 23.2, 23.10, 23.12, and 23.14 may be submitted to Doris Howdeshell, Director, Travel Information Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 15, 2010.

## SUBCHAPTER A. GENERAL PROVISIONS

**43 TAC §23.1, §23.2**

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, Chapter 204, which requires the department to promote travel and tourism in the state by operating the Travel Information Centers and publishing the state's travel literature, including the Texas Official Travel Map.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

*§23.1. Purpose.*

This chapter prescribes the policies and procedures for operation of the Travel Information Division of the Texas Department of Transportation. The division directly serves the Texas Transportation Commission and the department's administration by administering public information and travel and tourism programs. Public information activities consist of preparing and disseminating information of public interest concerning road conditions, litter reduction, highway beautification, and information on Texas' travel opportunities. The travel and tourism functions, as authorized by Transportation Code, Chapter 204, include operation of the state's network of Texas travel information centers, production and dissemination of the state's travel and tourism literature, and publication of *Texas Highways* magazine, the state's official travel magazine.

*§23.2. Definitions.*

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

(1) Commission--The Texas Transportation Commission.

(2) Department--The Texas Department of Transportation.

(3) Director--The director of the Travel Information Division.

(4) Display case--An enclosed structure, provided by the department and located at a Travel Information Center, with space for backlit photographic transparencies and small pieces of artwork and items of interest.

(5) Division--The Travel Information Division of the Texas Department of Transportation.

(6) Magazine--*Texas Highways* magazine.

(7) Metropolitan area--A group of cities in a large urban area.

(8) Promotional graphics, photographs and icons--Artwork, video, still photographic images and transparencies, paraphernalia, and items of interest which depict the theme or image of the region's or metropolitan area's travel and tourism attraction or allure.

(9) Promotional posters--Artwork, still photographic images, and transparencies which depict or promote a particular event, city, region, or attraction.

(10) Purchaser--A person who purchases a *Texas Highways* magazine product.

(11) Purchaser and subscriber mailing list--A list that contains the names and addresses of purchasers and subscribers.

(12) Region--A geographic area within the state of Texas with a common feature or theme and that is readily recognized as a single entity.

(13) Subscriber--A person who pays a fee to receive *Texas Highways* magazine by mail.

(14) Travel and tourism--Scenic, cultural, artistic, and historical points of interest, public and private leisure and recreation attractions, and parks located within the official boundaries of the state of Texas.

(15) Travel Information Center--A recognized location where travel literature and travel counseling are provided by the department's trained professional travel counselors, strategically located in buildings designated with signs, some with adjoining rest areas, on key highways entering the state, at the historical site of Judge Roy Bean's court at Langtry, and in the Capitol Complex Visitor Center in Austin.

(16) Travel literature--Maps, pamphlets, brochures, documents, guidebooks, bulletins, and [~~or~~] other printed materials and electronic media, except *Texas Highways* magazine, that are designed to inform the public, stimulate travel to and within the state of Texas, and publicize points of interest, recreational grounds, scenic places, historical facts, or other items of interest and value to the traveling public.

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 October 1, 2010.

TRD-201005658
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 14, 2010
For further information, please call: (512) 463-8683

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## SUBCHAPTER B. TRAVEL INFORMATION

**43 TAC §§23.10, 23.12, 23.14**

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, Chapter 204, which requires the department to promote travel and tourism in the state by operating the Travel Information Centers and publishing the state's travel literature, including the Texas Official Travel Map.

CROSS REFERENCE TO STATUTE

*§23.10. Travel Literature.*

(a) Purpose. The Texas Department of Transportation, under Government Code, §2052.002, and Transportation Code, Chapter 204, publishes travel literature for free distribution to the traveling public. This section sets forth department policies and procedures relating to the production, development, printing, advertising content, and distribution of that literature.

(b) Subject matter.

(1) The director, or the director's designee, may select subject matter concerning geographic locations, events, and other items or points of interest to the general traveling public for inclusion in department travel literature provided that:

(A) the subject matter is a cultural, historical, or recreational destination that appeals to a broad spectrum of tourists and highlights the assets of the state of Texas, but does not include a community amenity that primarily serves a local community or its surrounding residents, such as a city or county park, golf course, or swimming pool [~~general audience~~];

(B) the subject matter is regularly accessible (open) to the general public; and

(C) the subject matter is not a routine commercial service, including, but not limited to:

*(i)* car rentals;

*(ii)* hospitals or medical facilities;

*(iii)* retail stores or shopping centers, but excluding large outlet malls made up of retail stores in which manufacturers sell their stock directly to the public through their own branded stores; or

*(iv)* commercial facilities such as movie theaters, bowling alleys, and gyms.

(2) A winery listed as a Texas winery by the Texas Department of Agriculture is not a routine commercial service for the purposes of this subsection. A custom winery, as defined by the Texas Department of Agriculture, is not a Texas winery for the purposes of this subsection.

(3) [~~(2)~~] The department may consider for inclusion in travel literature, subject matter submitted by a person or organization, with complete information to the division prior to the publishing deadline announced for each specific travel literature publication.

(4) [~~(3)~~] The director may remove subject matter concerning events and other items or points of interest to the traveling public if the department receives three or more consumer complaints concerning inaccurate information or inadequate services. The department will send a written notice of noncompliance to the person or organization affected. If the director determines the complaints are valid and they remain unresolved after 180 days, the director will remove the subject matter from all travel literature, including the state's official travel web site. A person or organization may appeal removal to the department's executive director, or the executive director's designee, not below the level of division director, whose decision will be final.

(c) Distribution.

(1) Policy. This subsection prescribes the policies and procedures of the department relating to the distribution and dissemination of travel literature to:

(A) provide for equitable free distribution, within budgetary constraints, of available travel literature; and

(B) maximize the resources of the department available to advertise the highways of the state and to promote travel to and within the state.

(2) Single copies. A single copy of a publication may be distributed free of charge to each individual requesting a publication.

(3) Multiple copies or bulk quantities.

(A) Except as provided in paragraph (4) of this subsection, and subject to inventory and budgetary constraints, the department may distribute multiple copies or bulk quantities of a publication to an individual or organization free of charge, provided that the recipient, in a written form prescribed by the department:

*(i)* certifies that all copies of publications will be redistributed to the public or end user free of charge; and

*(ii)* describes how the copies will assist the traveling public and stimulate travel to or within the state.

(B) The director may deny the distribution of multiple copies or bulk quantities under this paragraph if he or she determines that the copies will not assist the traveling public and stimulate travel to or within the state. When a request is made in writing, the director or the director's designee will provide written notice of the reasons for the director's denial. When a request is made orally, the director or the director's designee[~~,~~] will deliver orally the reasons for denial.

(4) Exceptions. Subject to inventory and budgetary constraints, the department may provide multiple quantities of travel literature:

(A) free of charge, to each elected state and federal official, for use in their official duties;

(B) to the Office of the Governor, Economic Development and Tourism, the Texas Education Agency, local governmental or private entities involved in tourism, and other state and federal agencies, on such written terms and conditions as may be mutually agreed upon; and

(C) to other individuals and entities if the recipient:

*(i)* reimburses the department for its costs to print the additional quantities; and

*(ii)* satisfies the requirement of paragraph (3)(A)(i) of this subsection.

(d) Commercial cooperation. The department may, consistent with Government Code, Chapters 2155-2158 and 2252, and Texas Constitution, Article XVI, Section 21, enter into cooperative contracts with commercial entities for production, marketing, and distribution of department travel literature to achieve:

(1) greater volume;

(2) reduced cost to the department;

(3) higher quality;

(4) wider circulation; and

(5) other considerations that will achieve more effective or more economical production and distribution of travel literature than could be attained by departmental efforts alone.

(e) Advertising.

(1) General policy. Transportation Code, Chapter 204, empowers the department to publish literature for the purpose of advertising the highways of this state and attracting traffic thereto. In furtherance of that purpose of assisting and encouraging travel in Texas,

the department may include certain paid advertising in travel literature, provided that the quality and quantity of the primary information content is not impaired.

(2) Acceptable subjects. Subjects acceptable for advertising in department travel literature include:

(A) Texas vacation, travel or tourism-related features, sites, facilities, destinations, accommodations, restaurants, events, and services;

(B) Texas shopping opportunities;

(C) pleasure-driving features, equipment, facilities, destinations, and services;

(D) recreational features, sites, equipment, facilities, and services;

(E) camping, hiking, fishing, boating, and outdoor features, sites, equipment, facilities, and services;

(F) public transportation modes, products, facilities, and services; and

(G) other features, sites, products, equipment, facilities, and services relating to travel and tourism.

(3) Unacceptable subjects. Advertising subjects not acceptable in department travel literature include:

(A) out-of-state travel-tourism features, locations, destinations, facilities, and services unless augmenting Texas travel or tourism, or unless on border locations with ties to Texas;

(B) alcoholic beverages, except for Texas wineries;

(C) tobacco products;

(D) sexually-oriented products and services;

(E) in-state tourism features, locations, destinations, facilities, accommodations, and services not regularly accessible (open) to the general public year-round except for attractions or destinations that open seasonally because of weather conditions; and

(F) other subjects not related to travel and tourism.

(4) Advertising sales and solicitations.

(A) Mailing list. Any entity or individual interested in advertising in department travel literature will be included in the department's mailing list upon request. The department will annually publish in the *Texas Register* an invitation to receive advertising rate information.

(B) Publication of advertiser information. The department will calculate advertising rates and develop a rate card for each travel literature publication deemed by the department as appropriate for advertising. The department will publish the advertising rate information on a continuous basis in the Standard Rate and Data Service, Consumer Magazine and Agri-Media Source. The department will also publish the advertising rate information annually in the *Texas Register.*

(C) Contents of the rate card. The rate card will include information about:

*(i)* advertising space and positions;

*(ii)* advertising rates;

*(iii)* publication issue and closing dates;

*(iv)* circulation data;

*(v)* publisher's editorial profile; and

*(vi)* other related information.

(D) Procedure for selling advertising.

*(i)* The department or its designated agent will mail a description of the publication accepting advertising, publication deadlines, rates, and an invitation to receive a sample copy of the publication to those on the mailing list 30 days after publication in the *Texas Register.* If the department offers advertising in a travel publication that was not included in the original *Texas Register* notice, then a notice will be placed in the *Texas Register* announcing the acceptance of advertising in the new travel publication. Thirty days after this notice is published, the department or its designated agent will mail a description of the new publication, publication deadlines, rates, and an invitation to receive a sample copy of the publication to those on the mailing list.

*(ii)* The department or its designated agent will mail a rate card upon request to an entity or individual not on the mailing list after the publication in the *Texas Register* and prior to the last space-closing date of the publication.

*(iii)* On and after the 31st day following the initial date of mailing, the department or its designated agent will accept all insertion orders (orders for paid advertising) received prior to the publication deadline on a first-come, first-served basis or until all advertising space for a particular publication is filled. Insertion orders postmarked or received prior to the end of the 30-day period will not be accepted. All insertion orders will be stamped with the date as they are received. Orders for premium space will be accepted only by mail postmarked or delivered on or after the 31st day following the initial date of mailings. Advertisers must indicate ranked preference on all premium positions desired. If more than one insertion order for a premium position is received on the same day, the department will determine selection by a drawing held on the 15th day following the first day insertion orders can be accepted. Insertion orders for an inside front cover spread and inside back cover spread will take precedence over an inside front cover and inside back cover insertion order.

*(iv)* Reminders of advertising space deadlines and rates may be mailed at the discretion of the department if advertising space remains available prior to space closing deadlines.

(5) Restrictions.

(A) The department will not accept advertising it considers to be misleading or a misrepresentation of facts.

(B) The department will not accept advertising from an entity that discriminates against customers on the basis of race, color, creed, religion, sex, or national origin.

(C) The director may remove an advertiser based on the department's receiving three or more consumer complaints concerning service or merchandise. The department will send a written notice of noncompliance to the advertiser. If the director determines the complaints are valid and they remain unresolved after 180 days, the director will remove the advertiser from the travel publication. A business may appeal removal to the department's executive director, or the executive director's designee, not below the level of division director, whose decision will be final.

*§23.12. Texas Official Travel Map.*

(a) Purpose. Under Transportation Code, Chapter 204, the department publishes the Texas Official Travel Map (map) for the general motoring public depicting major Texas highways, cities and towns, mileage between such points, locations of Texas state parks, national forests, national parks and wildlife refuges, [~~picnic and~~] safety rest areas, Travel Information Centers, major lakes and rivers, counties, and certain other geographic details.

(b) Content. Content will be determined by the department and may include:

(1) a city or town that meets [~~one or more of~~] the following criteria:

(A) located on the state-maintained highway system;

(B) has a population of 50 or more; and

[~~(C) has a United States post office;~~]

(C) [~~(D)~~] is near a significant park or recreational area, or a historical, recreational, or scenic tourist interest facility that is open to the public continuously or on a regular seasonal basis; [~~and~~]

[~~(E) has auto repair or service available in the area;~~]

(2) highways designated by the commission, including:

(A) interstate highways;

(B) United States highways;

(C) state highways;

(D) farm-to-market (FM), ranch-to-market (RM), or recreational (RR) roads that connect with one or more higher-grade highways or roadways; and

(E) FM, RM, RR, spurs, loops, business routes, or park roads that provide access to widely recognized parks, lakes, tourism attractions, or recreational areas;

(3) map insets:

(A) representing cities or areas, selected by the department, in descending numerical order on the basis of annual traffic volume in each of the metropolitan areas, or their location as a port of entry, to best utilize the limited space available on the map; and

(B) designed insets to show only a few primary highways or through routes (not all city streets); and

(4) mileage chart containing a limited number of cities and towns selected on the basis of a matrix composed of the following factors:

(A) the significance of the location as a geographic reference point for calculating long-distance trips within Texas, to assure statewide balance in the selections;

(B) the importance of the location as a gateway or entrance point to the state of Texas;

(C) the status of the location as a primary travel or tourist destination;

(D) the population size of the location; and

(E) the use of the location as the site of significant highway intersections.

*§23.14. Display of Travel Literature in the Texas Travel Information Centers.*

(a) Purpose. This section establishes the policies and procedures governing the acceptance, display, and distribution of travel literature and other promotional items by the department's travel information centers.

(b) Definition. For purposes of this section the term "travel literature" includes descriptive materials, pamphlets, booklets, videos, photos, icons, and promotional items.

(c) Policy for racks and display cases.

(1) General. Travel literature accepted and displayed in a travel information center:

(A) must be approved for display by the director or the director's designee;

(B) must be 100% travel and tourism-oriented;

(C) must be of a professional quality; and

(D) may contain coupons, prizes, or contests related to travel and tourism.

(2) Subject matter. Travel literature must contain subject matter relating to:

(A) recreation;

(B) scenic areas;

(C) historic sites;

(D) the arts, including museums and performing arts theaters;

(E) fairs, festivals, or special events of public interest;

(F) accommodations, including, but not limited to, bed and breakfasts and guest ranches;

(G) restaurants;

(H) shopping centers, malls, or outlet stores, or specialty shopping facilities that serve as tourist attractions;

(I) RV parks and campgrounds;

(J) city, county, state, and national parks;

(K) travel maps or public transportation information; or

(L) traveler safety.

(3) Size. Travel literature must meet size criteria established by the division.

(d) Policy specific to display cases.

(1) Acceptance. An organization or individual may submit a proposal for the use of promotional graphics, photographs, icons, and other promotional items in a display case to promote Texas travel and tourism opportunities. Proposals will be accepted on a first-come, first-served basis. Displays will be rotated and a waiting list [~~per location~~] will be established.

(2) Agreement. Prior to the department accepting materials for use in a display case, the individual or organization must enter into a written agreement with the department for a period of not less than six months.

(3) Content. Display case materials shall focus on promoting tourism that stimulates travel to a metropolitan area or specific region, and shall not contain:

(A) dated material; or

(B) special events, promotions, or facilities that are only open to groups and not individuals.

(4) Cost. Materials for display cases must be provided to the department free of charge.

(5) Specifications. An individual or organization submitting materials approved for display shall provide:

(A) five horizontal transparencies which are 16 inches high and 20 inches wide;

(B) six horizontal transparencies which are 11 inches high and 14 inches wide; and

(C) three vertical transparencies which are 11 inches wide and 14 inches high.

(e) Unacceptable travel literature. In addition to the requirements of subsections (c) and (d) of this section, the department will not accept travel literature that:

(1) is solely for the purpose of selling a single, tangible item, including, but not limited to, a brochure selling a tape, CD, magazine, or cookbook, with the exception of *Texas Highways,* the state's official travel magazine;

(2) is solely for the purpose of selling a membership;

(3) is solely for the purpose of promoting facilities or other subjects not directly related to travel and tourism;

(4) contains terminology, advertising, or pictures that are adult or sexually-oriented or are otherwise not directly related to family-oriented travel or tourism;

(5) promotes or describes in-state locations, destinations, facilities, accommodations, or attractions not regularly accessible (open) to the general public year-round except for attractions or destinations that open seasonally because of weather conditions;

(6) is for display on the wall, including, but not limited to, a poster or banner; or

(7) is for the purpose of promoting out-of-state travel and tourism activities, destinations, facilities, attractions, and services that do not augment Texas travel and tourism, unless the travel literature:

(A) is regional and contains 51% or more information on Texas travel and tourism;

(B) is an accommodation guide which has hotel/motel information on Texas properties along with hotel/motel information on other states; or

(C) concerns the City of Texarkana, which is located in both Texas and Arkansas and shares a single chamber of commerce, and produces a combined information brochure.

(f) Display and distribution.

(1) Display. Private sector travel literature will be:

(A) displayed in a manner which the travel information center supervisor believes is the most efficient and informative for the visitor;

(B) displayed in a manner which gives more exposure to destinations near the travel information center or to destinations in high demand;

(C) displayed in season, if it is of a seasonal nature; and

(D) rotated periodically to provide exposure for all travel interests.

(2) Updating travel literature. New private sector travel literature will replace the old travel literature on display when a new date appears on the brochure or when substantial changes have been made to the item. Outdated travel literature will not be sent back to the original establishment, but will be disposed of through a recycling program or the most appropriate manner.

(3) Promotional items. Promotional posters or items will not be accepted for display or distribution without the written approval of the director or the director's designee.

(g) Vending machines. The sale of souvenirs and other related commercial items is prohibited at the travel information centers. In accordance with Title 23, Code of Federal Regulations, Part 752, the department may permit vending machines in centers for the purposes of dispensing food, drink, and other articles that it determines appropriate and desirable. No charge to the public may be made for goods and services except for telephone and articles dispensed by such vending machines. The Texas Department of Assistive and Rehabilitative Services, Division for Blind Services has first right of refusal to operate vending machines in travel information centers.

(h) Non-department use of travel information centers.

(1) Request. An organization or individual wanting to do an on-site promotion at a travel information center rest area must submit a request in writing. Requests will be accepted on a first-come, first-served basis.

(2) Agreement. Prior to the department allowing on-site promotions, the organization or the individual must enter into a written agreement with the department agreeing to abide by the requirements of this subsection.

(3) Activity.

(A) Rest stop activities shall be conducted in a manner which will cause the least interference with the travel information center's operation and picnic or rest area.

(B) Alcoholic beverages are prohibited.

(C) All non-alcoholic refreshments and [~~or~~] promotional items offered at the rest stop must be free of charge to visitors.

(D) All promotional items must meet requirements of subsections (c) and (e) of this section and be offered free of charge to visitors.

(4) Signs.

(A) The organization or individual shall prominently display a sign indicating that all drinks, refreshments, services, and items provided are free of charge.

(B) Any signs associated with the refreshment rest stop, with the exception of those stated in subparagraph (A) of this paragraph, shall be limited to only those necessary to identify the organization and normal ownership signs permanently affixed to trailers, vehicles, tents, and other equipment directly associated with the operation of the rest stop.

(C) Any signs to be used or installed for the refreshment rest stop, including advance signs advising motorists of the refreshment rest stop, must receive prior approval of the director or the director's designee. An approved sign may not be attached to or interfere with the travel information center's operation or highway signs.

(5) Services. The department will not furnish utilities, except where explicitly designed to be provided for this purpose.

(6) Cleanup. Cleanup of the facilities used for the refreshment rest stop during and immediately afterward is the responsibility of the organization.

(7) Compliance. The department will monitor or check periodically for compliance with the requirements of this subsection. Noncompliance may call for immediate cancellation of refreshment rest stop activities and may be the basis for refusing future requests.

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 October 1, 2010. ♦ ♦ ♦

TRD-201005659
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 14, 2010
For further information, please call: (512) 463-8683

# WITHDRAWN RULES

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

## TITLE 22. EXAMINING BOARDS

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### PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

#### CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

#### SUBCHAPTER B. SUPERVISION OF PERSONNEL

**22 TAC §573.17**

The Texas Board of Veterinary Medical Examiners withdraws proposed new §573.17 which appeared in the July 23, 2010, issue of the *Texas Register* (35 TexReg 6430).

Filed with the Office of the Secretary of State on September 30, 2010.

TRD-201005648
Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: September 30, 2010
For further information, please call: (512) 305-7563

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#### SUBCHAPTER G. OTHER PROVISIONS

**22 TAC §573.65**

The Texas Board of Veterinary Medical Examiners withdraws the proposed amendment to §573.65 which appeared in the August 13, 2010, issue of the *Texas Register* (35 TexReg 6922).

Filed with the Office of the Secretary of State on September 30, 2010.

TRD-201005649
Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: September 30, 2010
For further information, please call: (512) 305-7563

♦ ♦ ♦

# ADOPTED RULES

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

## TITLE 1. ADMINISTRATION

## PART 3. OFFICE OF THE ATTORNEY GENERAL

### CHAPTER 55. CHILD SUPPORT ENFORCEMENT

### SUBCHAPTER D. FORMS FOR CHILD SUPPORT ENFORCEMENT

**1 TAC §55.120**

The Office of the Attorney General, Child Support Division adopts an amendment to §55.120(b), concerning the Request for Review of National Medical Support Notice. The amendment is adopted with changes to the proposed text as published in the August 27, 2010, issue of the *Texas Register* (35 TexReg 7635) and will be republished. The figure in subsection (b) has been modified from the proposal. The date in the lower right hand corner has been changed from "September 2010" to "October 2010."

The Request for Review of National Medical Support Notice was revised to recite the new time period to contest the National Medical Support Notice. The adopted amendment is necessary to reflect revisions made to the form.

The amendment replaces the published form and provides the public with the updated Request for Review of National Medical Support Notice.

No comments were received regarding the adoption of the amendment.

The amendment to §55.120(b) is adopted under the Texas Family Code §154.186(c), which authorizes the State's Title IV-D agency to prescribe forms for the efficient use of the National Medical Support Notice.

*§55.120. National Medical Support Notice, Request for Review of National Medical Support Notice, Termination of National Medical Support Notice.*

(a) The National Medical Support Notice is federally mandated for use in IV-D cases and may be used in any other suit in which an obligor is ordered to provide health insurance coverage for a child.
Figure: 1 TAC §55.120(a) (No change.)

(b) The Request for Review of National Medical Support Notice may be used by an obligor to contest the National Medical Support Notice sent to the employer.
Figure: 1 TAC §55.120(b)

(c) The Termination of National Medical Support Notice may be used in any Suit Affecting the Parent Child Relationship order to terminate medical child support.
Figure: 1 TAC §55.120(c) (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 September 28, 2010.

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Jay Dyer
Deputy Attorney General
Office of the Attorney General
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*For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.*

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### SUBCHAPTER N. NATIONAL MEDICAL SUPPORT NOTICE

**1 TAC §55.707**

The Office of the Attorney General, Child Support Division adopts an amendment to 1 TAC §55.707, concerning Employee Contest Procedures regarding the National Medical Support Notice. The section is adopted with changes to the proposed text as published in the August 20, 2010, issue of the *Texas Register* (35 TexReg 7169) and will be republished. The proposed text in §55.707(a) is revised by changing the words "Notice of Issuance" to lowercase "notice of issuance."

The section changes the time frame to contest a National Medical Support Notice from 75 business days after receipt of the notice by the employer to 30 calendar days from the date of the notice of issuance of the National Medical Support Notice.

No comments were received regarding adoption of the amendment.

The amendment is authorized under Texas Family Code §154.186, which provides the Office of the Attorney General with the authority to establish procedures consistent with federal law for use of the National Medical Support Notice.

*§55.707. Employee Contest Procedures.*

(a) The employee may contest withholding under the Notice based upon a mistake of fact by requesting a review by the Title IV-D agency no later than 30 calendar days from the date of the notice of issuance.

(b) The form for requesting a review to contest withholding under the Notice is located on the Office of the Attorney General's website www.oag.state.tx.us.

(c) The Title IV-D Agency shall provide the employee, within 10 business days of receipt of the request for review, information regarding the date, time, and place of the review, which may be by telephonic conference or in person, as may be appropriate under the circumstances.

(d) The Title IV-D agency shall complete the review within 30 business days from the date of receipt of a request for review. The employer and employee must comply with the terms of the Notice during the contest period until notified by the Title IV-D agency to revise or terminate coverage.

(e) After the review, the Title IV-D agency may issue a revised Notice to the employer or terminate the Notice. A revised Notice or Termination Notice shall be sent to the employer no later than 10 business days after the date of the review.

(f) If the review fails to resolve an issue in dispute, and the National Medical Support Notice is not terminated or revised, the Title IV-D agency shall notify the employee of that determination within five business days of the date of the review and inform the employee that he/she may request a court hearing to resolve the issue(s) in dispute by filing a Motion to Withdraw the National Medical Support Notice and requesting a hearing with the court of continuing 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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# TITLE 16. ECONOMIC REGULATION

## PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

### CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts amendments to §25.454, relating to Rate Reduction Program, §25.480, relating to Bill Payment and Adjustments, and §25.483, relating to Disconnection of Service, with changes to the proposed text as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2910). The amendments expand eligibility for deferred payment, level or average payment plans, and protections for low-income customers and customers with medical conditions. To the extent a customer enters into an agreement with its retail electric provider (REP) and takes advantage of the deferred payment plans or level or average payment plans under the amended §25.480, the rule allows a REP, under limited circumstances, to prevent the customer from changing retail providers until the deferred balance is paid.

REPs will now be required to make deferred payment plans available to all customers during extreme weather emergencies; during declared states of disaster as directed by the commission; when a customer has been underbilled, and during the months of July, August, and September, and during periods of extended cold weather in January and February, for certain eligible customers.

Among other things, the amendments will help certain eligible customers, who may not meet the existing deferred payment plan or level or average payment plan eligibility requirements, to avoid disconnection as a result of high bills that result from hot or cold weather. The commission believes that targeted provisions of these amendments will protect a larger number of vulnerable customers at a time when customers are most likely to need assistance to pay high bills. At the same time, a switch-hold is being adopted to reduce the non-payment issues that would arise in connection with the broader customer eligibility for deferred payment plans and level or average payment plans.

The amendments are competition rules subject to judicial review as specified in the Public Utility Regulatory Act (PURA) §39.001(e). The amendments are adopted under Project No. 36131.

A public hearing on the amendments was held at the commission offices on May 17, 2010 at 1:00 p.m. In attendance at the public hearing were representatives from American Association of Retired Persons (AARP); American Electric Power (AEP); Bounce Energy, Direct Energy; CenterPoint Energy Houston Electric LLC (CenterPoint); the Electric Reliability Council of Texas (ERCOT); National Multiple Sclerosis Society: Lonestar (MS Society); Office of Public Utility Counsel (OPC); Oncor Electric Delivery Company LLC (Oncor); One Voice Texas; Public Citizen; Reliant Energy, Inc. (Reliant); Retail Electric Provider Coalition (REP Coalition); Smart UR Citizens; State Representative Sylvester Turner's staff; State Representative Lon Burnam and his staff; Steering Committee of Cities Served by Oncor (Cities); Texas Energy Association for Marketers (TEAM); Texas Industrial Energy Consumers (TIEC); Texas Legal Services Center (TLSC); Texas-New Mexico Power Company (TNMP); Texas Organizing Project (TOP); Texas Ratepayers' Organization to Save Energy (TX ROSE); and TXU Energy Retail Company LLC (TXU). Oral comments at the hearing were provided by representatives from AARP, MS Society, One Voice Texas, Public Citizen, Smart UR Citizens, State Representative Lon Burnam and his staff, TLSC, and TOP. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received filed comments on the proposed amendments from AARP; AEP Texas Central Company, AEP Texas North Company, CenterPoint, Oncor, and TNMP (collectively Joint TDUs); Alliance for Retail Markets, CPL Retail Energy LP, Direct Energy LP, TEAM, TXU, and WTU Retail Energy LP (collectively, REP Group); Cities; City of Houston, Texas (Houston); ERCOT; MS Society; Public Citizen; Reliant; Texas Public Policy Foundation (Public Policy); TLSC, TX ROSE, State Representative Sylvester Turner, State Representative Rafael Anchía, State Representative Lon Burnam, One Voice, The Senior Source, TOP, Gray Panthers Texas, Smart UR Citizens, and Mr. Bert Walsh (collectively, Consumers); TOP; State Representatives Armando Walle, Paula Pierson, Sylvester Turner; and Tammylee Willoz. State Representatives

Burnam and Anchía filed a letter in support of the comments submitted by AARP and asked that their names be added to the list of those supporting AARP's position.

*Summary of Comments*

*Question 1. Are the provisions relating to unauthorized switch-holds appropriate? Please suggest any modifications.*

AARP, MS Society, OPC, Public Citizen, State Representatives, TOP, and Reliant urged the commission to reject the switch-hold process, which prevents a customer from switching to another REP, and opined that it is a bad, anti-competitive policy that will make disconnections worse by extending the time a customer may be without service. These commenters stated that the switch-hold process would conflict with PURA §§17.004(a)(2), 17.004(e), 39.001(d), 39.001(b), 39.101(a)(1), 39.101(b)(2), 39.102(a), and 39.106. AARP added that the commission's general power to regulate and adopt rules under PURA §14.001 and §14.002 applies to only the businesses of public utilities and "not the ability to regulate customers." AARP opined that the switch-hold is an attempt to regulate a customer's fundamental right under deregulation to switch to lower cost providers and would place a greater priority on protecting REPs from bad debt than protecting consumers. TOP filed letters from 26 citizens stating that the switch-hold would discriminate against low-income consumers who have no alternatives to obtain reasonable credit terms and conditions and asked that the commission not adopt the switch-hold for deferred, level or average payment plans.

OPC and the MS Society stated that, while they oppose switch-holds, it is imperative that the commission maintain oversight and control with respect to a REP's use of the switch-hold and that the commission should include protections related to unauthorized switch-holds. OPC proposed language that would subject the REP to penalties for failing to follow the correct procedures for removing the switch-hold, in addition to the proposed penalty for the unauthorized placement of a switch-hold.

Consumers pointed out that the proposed rule in Project No. 37685 (Rulemaking Regarding Certification of Retail Electric Providers, §25.107) recognizes the gravity of switch-holds by proposing that a REP certification may be revoked for erroneous use of a switch-hold, but the proposed rule fails to provide any customer protection against the improper or negligent use of a switch-hold. Consumers offered that the proposed rule being considered in Project No. 36131 should be modified to spell out consequences for intentional conduct with increased consequences for seriousness of the violation.

Cities opined that the provisions relating to unauthorized switch-holds is not enough and noted that an unauthorized switch-hold would bar a customer from realizing any savings that might be realized by switching REPs. Cities and Consumers argued that, ideally, the REP that placed the unauthorized switch-hold should be required to make the customer whole for any monetary losses and missed opportunities. However, Cities opined that the commission lacks the authority to award monetary damages to customers and, instead, proposed that unauthorized switch-holds be considered and treated as a new sub-category of Class A violation due to the seriousness and difficulty in quantifying the harm incurred by a victim. OPC concurred with Cities' recommendation that a switch-hold be considered a sub-category of a Class A violation rather than a Class B violation. Cities stated that if an unauthorized switch-hold occurs, the REP should be required to inform customers within 15 days of lifting the switch-hold that the customer has the right to file a complaint with the commission. Consumers agreed that the REP should be required to provide notice to a customer informing them about any violation and the customer's rights to civil recourse. Consumers also recommended that the commission automatically refer any intentional wrongdoings by REPs regarding the switch-hold to the Attorney General for investigation and enforcement.

The REP Group commented that the provisions related to unauthorized switch-holds strike the right balance, appropriately detailing requirements for placing and removing a switch-hold and establishing the potentially significant administrative penalties for REPs that do not follow the process. The penalty for a Class B violation, as proposed in the published rule, may be up to $5,000 per violation per day. The REP Group disagreed with commenters that contended that the proposed rule will prevent any customer from switching to a provider of choice. Instead, the REP Group argued, the proposed rule would require customers to pay back a no-interest loan before making the switch. The REP Group also disagreed with comments that the commission lacks statutory authority to implement the switch-hold process. The REP Group argued that certain provisions of PURA plainly authorize the commission to adopt and enforce rules relating to the extension of credit, level or average billing programs, and termination of service, including PURA §17.004(b) and §39.101(e), among others.

Additional comments concerning the commission's authority to allow a switch-hold and the impact of the switch-hold are discussed in the Authority and Policy Concerns section regarding §25.480(l) below.

*Commission Response*

The commission disagrees with the position of AARP, MS Society, OPC, Public Citizen, State Representatives, TOP, and Reliant that the switch-hold is a bad, anti-competitive policy that would conflict with PURA, as discussed in the Authority and Policy Concerns section of the preamble below regarding §25.480(l).

The commission agrees with OPC's proposed language to clarify that a REP will be subject to penalties for placing a customer on an unauthorized switch-hold as well as for not following the outlined procedures for removing the switch-hold and modifies §25.480(m)(3) accordingly.

The commission is not adopting the suggestion of Cities, OPC, and Consumers to specify that erroneous switch-holds and violations of the switch-hold process are a Class A violation. Consumers also recommended that the commission automatically refer any intentional wrongdoings by REPs regarding the switch-hold to the Attorney General for investigation and enforcement. While the commission may under PURA §15.021 request assistance from the Attorney General's Office, the commission does not agree that the rule should be modified to provide for an automatic referral to the AG's office for any intentional wrongdoings by REPs regarding the switch-hold. Under PURA §15.023, the commission has the ability to levy penalties against parties that violate commission rules. The rule being adopted states that a REP who erroneously places a switch-hold flag on an ESI ID that prevents a legitimate switch or does not remove the switch-hold within the time frame required by the rule will be considered to have committed a Class B violation. Section 25.8 states that a Class B violation may result in penalties up to $5,000 per day per violation. The commission believes that the Class B violation penalty provision in the rule is sufficient inducement for the

REPs to abide by the rule and addresses the concerns about any potential misuse of the switch-hold by a REP. Additionally, the commission has established Project No. 37685 which proposes to amend §25.107(j) to classify erroneous switch-holds as a significant violation that may lead to suspension or revocation of a REP's certificate. OPC, while remaining opposed to switch-holds, filed reply comments in Project No. 37685 supporting the proposed amendment.

*Question 2. If the disconnection of customers designated as critical care is allowed, what additional protections and procedures should be in place to ensure that the loss of electricity will not result in the loss of life?*

AARP, Houston, MS Society, OPC, Public Citizen, TOP, and Consumers opposed disconnection of any customer whose life will be at risk without electricity and proposed that those customers dependant on electric life support equipment not be subject to disconnection. Houston agreed with these commenters that the only way to avoid potential loss of life of critical care customers is to not disconnect; and consequently, Houston opposed any changes to the existing critical care rules. AARP, MS Society, OPC, and Consumers stated that disconnection of critical care customers would violate PURA §39.101(a) that entitles a customer to "safe, reliable, and reasonably priced electricity, including protection against service disconnections in an extreme weather emergency" as provided by subsection (h) or in cases of medical emergency. Consumers opined that a medical emergency will result if a critical care customer's electricity service is disconnected.

AARP, OPC, and Public Citizen proposed that if the commission proceeds with explicitly providing for the disconnection of chronic condition and critical care customers, the TDU should, at a minimum, be required to obtain the commission's approval before disconnection. They noted that in Rhode Island, utilities must obtain written approval from the Division of Public Utilities and Carriers before disconnecting households where all residents are aged 62 or older or any resident is handicapped. Further protections should be extended to chronic condition and critical care customers to ensure that they have the most flexible payment plans available without adding new restrictions such as placing of switch-holds, restricting availability of plans to only certain months, or increasing the initial down payment to begin a plan.

The MS Society proposed a multi-step disconnection notification process with distinct roles for REPs and TDUs to help ensure chronic condition customers are not disconnected without advanced notice. Under the MS Society proposal, REPs would be required to notify the customer and secondary contact with a written notice of its intent to disconnect not later than 21 days prior to the date of disconnection. This written notice would be sent by mail and would request that the customer contact the REP. If the customer or secondary contact does not respond to the letter prior to the disconnection date, the REP would not issue a disconnect order but instead would notify the customer and secondary contact by an auto-dialer phone message of the pending disconnection and request that the customer contact the REP. If the customer or secondary contact did not respond to the automated call or letter prior to the disconnection date, the REP would be required to have a staff person make a direct phone call to both the customer and the secondary contact notifying them of the pending disconnection. If there were no response and the 21-day period had passed, the REP would be allowed to issue a disconnect order. The TDU would be required to contact the chronic condition residential customer and the secondary contact before disconnecting. If the TDU did not reach the customer and secondary contact by phone, the TDU would be required to visit the premise, and, if there were no response, would be required to leave a door hanger containing the pending disconnection information and information on how to contact the REP and TDU.

Cities took no position on whether disconnection of critical care customers should be allowed but urged the commission to adopt rules that would recognize that seriously-ill critical care customers face serious disabilities and urged the commission to do everything in its power to ensure that no lives are lost due to disconnection of electric service. The Joint TDUs expressed concern regarding disconnection and opined that they are unaware of any protections or mechanism that will ensure that the loss of electricity may not potentially result in the loss of life. Cities and Reliant commented that the enhanced notice and the 21-day advanced notice in the proposed rule would provide critical care customers sufficient time to leave the premises in order to prevent loss of life or serious degradation of health due to the disconnection of electric service.

The REP Group and Reliant expressed general support for the proposed safeguards and noted that the notice to be sent to the customer and secondary contact 21 days in advance of disconnection should provide sufficient time for chronic condition and critical care customers to relocate or make other arrangements to help avoid loss of life or degradation of health. In the event that phone contact is not made, the REP Group noted that the proposed rule requires the TDU to visit the premises of a critical care customer and leave a door hanger containing the disconnection information. The REP Group believed that a social services solution for critical care customers who do not pay their electric bills should be developed but that such a solution would probably require legislative action.

The REP Group pointed out that the existing TDU standard tariff states a TDU shall not disconnect a customer if the disconnection will cause a dangerous or life-threatening condition "without prior notice of reasonable length such that Retail Customer can ameliorate the condition." The REP Group opined that the commission did not intend to provide TDUs with new or different authority related to disconnection of critical care customers, other than the process that is described in the tariff. They proposed to delete the phrase "if the TDU refuses to disconnect" in proposed §25.483(g). The REP Group supported the portion of proposed §25.483(g)(4) that requires a TDU to cease charging transmission and distribution charges when the disconnection is delayed but suggested modifications to proposed §25.483(g)(4) that would commence cessation of charges when the disconnection is delayed beyond the completion timelines in the TDU's Discretionary Charges tariff.

OPC disagreed with the REP Group proposal to delete the phrase "if the TDU refuses to disconnect" from subsection (g)(4) because the TDU may have reason to delay or refuse disconnection. In fact, OPC noted that proposed §25.483(g)(2) instructs the TDU to delay disconnection if the TDU reasonably believes that the REP does not know that the customer is critical care. OPC stated that the REP Group asserted that subsection (g)(4) could be interpreted to mean that TDUs have authority related to disconnection of critical care customers that is new or different than the process described in the existing tariff. However, OPC opined that the portion of the tariff cited by the REP Group will need to be modified once this rule is adopted

because the tariff refers to the ill and disabled process, which will no longer be applicable under the proposed rule.

*Commission Response*

The commission shares the concerns raised by commenters about the importance that electricity has for certain customers. In addition to the protections in the proposed rule that expand eligibility for payment plans, the commission amends §25.483(g) of the adopted rule to enable a Critical Care Residential Customer to request a delay in disconnection for up to 63 days from issuance of the bill when the customer establishes that disconnection of service will cause some person at that residence to become seriously ill or more seriously ill. To ensure that the most vulnerable persons have sufficient protection from disconnection, the commission modifies the proposed rule to distinguish the process of disconnection for Critical Care Residential customers from the process of disconnection for Chronic Condition Residential customers.

The commission agrees with Cities, Reliant, and the REP Group that the notice required in the rule will provide Critical Care Residential customers with sufficient time to leave the premises in order to prevent loss of life or serious degradation of health due to the disconnection of electric service. The notice is to be sent to the customer and secondary contact not later than 21 days prior to the date that service would be disconnected.

The commission agrees with the MS Society that door hangers should include information on how the customer may contact the REP and the TDU and modifies the rule accordingly.

The commission notes that the REP Group opined that a social services solution for critical care customers that do not pay their bill would probably require legislative action. While the commission agrees with the REP Group that legislative action would probably be required for the commission to require REPs to provide electricity to any customer for free, the commission would point out that there are social services and agencies that provide assistance to customers that do not pay their electric bill and that the rule adopted in this project contains customer protections that expand eligibility for payment plans and allows critical care customers time to seek payment assistance. Additionally, PURA §39.903 provides a system benefit fund to, among other things, provide one-time bill payment assistance to electric customers with a seriously ill or disabled low-income customer who has been threatened with disconnection for nonpayment. The commission has not, however, had money appropriated to it for this purpose.

*Question 3. Does the switch-hold provision in §25.480(l) contain sufficient protections to ensure that a customer's ESI ID is not subject to a switch-hold for a relatively small debt to the REP?*

*a. Should the rule include a minimum amount owed in order for a customer's ESI ID to be eligible for a switch-hold? If so, is $500 the appropriate threshold?*

AARP, Consumers, OPC, Public Citizen, and Reliant believed that the switch-hold provision in §25.480(l) does not contain sufficient protections for small debts. Consumers cited the example of average or level payment plans in which the customer may have low debt or even a credit yet the switch-hold could be placed on the customer's account and be removed only if the customer stopped using this type of payment program and showed that there was no money owed. AARP and Public Citizen presented an example in which a customer could enter into a deferred payment plan in August and have $30 left to pay in December. AARP and Public Citizen argued that blocking the choice of a customer that is current with all payments and yet still has $30 deferred from five months ago is unreasonable. Consumers added that the proposed rule would allow REPs to place a switch-hold on customers who enter into a level or average payment plan even though the customer may have no debt and could even have a credit. Yet, the only way a customer could get the switch-hold removed would be to stop using the level or average payment plan. Consumers opined that this seems extremely inequitable and could drive moderate income customers away from using a level or average payment plan because of its consequences. Consumers recommended that the commission not allow a switch-hold on customer accounts that are not delinquent.

AARP and Public Citizen stated that the commission should reject switch-holds but if it proceeds with switch-holds, it should adopt a threshold that is $500 above the dollar amount of security deposit the REP is retaining for that account. Consumers agreed that $500 was an appropriate amount.

OPC stated that there should be some minimum amount owed before the REP could place a switch-hold on the account. OPC wasn't sure what the amount should be but argued that, at a minimum, it should be an amount greater than the customer's deposit held by the REP. Additionally, OPC stated that the costs to the REPs and TDUs for implementing the switch-hold should also be considered when determining a threshold minimum because at some point it is not economically justifiable to apply a switch-hold to customers that owe less than a certain amount of money.

Reliant pointed out that theoretically the rule would allow a switch-hold to be placed on an account when a customer owes one dollar to the REP. Clearly such a scenario is unreasonable and the cost associated with applying the switch-hold could cost more than the potential bad debt the REP would have for that customer. While Reliant stated that it would support a threshold of $500, it argued that if the policy goal is to ensure that customers who leave REPs after engaging in a deferred payment plan are held responsible for the electricity they used, then a threshold approximately equal to the average security deposit is reasonable. Reliant calculated that amount at approximately $450. Reliant stated that during the workshops for this project, some expressed concern that the threshold could lead to gaming by customers; for example, a customer could switch away when owing a dollar less than the threshold. Reliant stated that the threshold for removal of a switch-hold need not be the same as the initiating threshold and that limiting the number of customers with a switch-hold significantly reduces the administrative burden on the retail market.

The REP Group opposed the recommendation of AARP, OPC, and Consumers to set a threshold delinquent amount before a switch-hold could be applied. The REP Group believed that a threshold is not appropriate in the context of payment plans that extend credit beyond the normal post-pay model that generally exists in the competitive electric model. The REP Group contended that adopting a $500 threshold would render a switch-hold process virtually meaningless as for the most part it would generally equate to two delinquent invoices plus a current invoice and REPs should not allow customers to go that far past due.

The REP Group believed that a minimum threshold would be inappropriate in the context of deferred, level and average payment plans. They opposed the threshold because it could make the switch-hold process much more complicated and

require significant resources to monitor and track balances. The REP Group likened the situation to that of administration of conventional loans, where security is established at the beginning of the loan and is not released until the terms of the loan are satisfied. They concluded that the process adopted in this rule should follow this well-established principle, and that no threshold should be established for switch-holds related to payment plans as switch-holds are intended to help ensure that customers adhere to the terms of the payment plan and to reduce bad debt that otherwise would be socialized among customers who pay their bills on time.

*Commission Response*

AARP, Consumers, and Reliant recommended that the commission adopt a $500 threshold delinquent amount before a REP could apply a switch-hold. While OPC agreed that there should be a minimum amount owed before the REP could place a switch-hold, they were less certain as to what the minimum amount should be but that, at a minimum, the amount should be greater than the customer's deposit held by the REP. OPC and Reliant pointed out that at some point the cost for the REP to apply the switch-hold may exceed the amount the customer owes making application of the switch-hold uneconomically justified. The REP Group opposed establishing a minimum amount and argued that it would make the switch-hold process more complicated and require significant resources to monitor and track balances to determine if the REP has a deposit and if so, at what point the delinquent amount exceeds the deposit. The commission agrees with the REP Group that it would be inappropriate to set a minimum threshold amount owed before a REP is allowed to place a switch-hold. The commission believes that the rule requires REPs to extend credit to customers and that the additional risk is beyond that which REPs would generally be subject to in the post-pay competitive market. This additional risk should be balanced with a tool such as the switch-hold process that will help ensure that REPs have the ability to collect the debt it is owed from the customer that has incurred the debt.

The commission agrees with AARP, OPC, and Consumers that it would be inappropriate to allow a switch-hold for customers that are not delinquent in paying their bill when they enter into a level or average payment plan. The commission is adopting §25.480(h) to prohibit REPs from applying a switch-hold to accounts when a customer that is not delinquent in payment enters into a level or average payment plan, unless that payment plan is entered into by an eligible customer during July through September or during a period of extended cold weather in January or February, where the customer selects a level or average payment plan instead of paying the balance due.

*Question 3.*

*b. If a threshold is not adopted, what are the ramifications to the competitive market if a significant portion of the ESI IDs in the market are subject to a switch-hold at any given time?*

AARP and Public Citizen stated that if significant portions of the ESI IDs happen to be subject to a switch-hold at any given time, this circumstance would be a clear signal that the market in Texas has utterly failed and that immediate action is necessary to restore affordable service.

The REP Group stated that it is doubtful that the policy would result in a significant portion of ESI IDs being subject to a switch-hold. They added that even if significant portions of the ESI IDs were subject to a switch-hold, the customers would be treated no differently than they were when the electricity market was fully regulated. In the fully regulated market, customers were required to pay amounts owed to the electricity provider to maintain service. The REP Group stated that the proposed rule changes would essentially extend a no-interest loan that extends due dates beyond the normal post-pay model and sets a reasonable policy that customers are expected to pay balances prior to switching to another provider. New occupants will have to prove that they are a new occupant (by providing a lease, affidavit of landlord, closing documents, certificate of occupancy or utility bill dated in the past two months).

Reliant expressed concern about the effect the switch-hold will have on the market as a whole, in addition to the cost imposed on individual market participants. Reliant argued that the commission and many stakeholders have spent more than eleven years crafting and refining the intricacies of the competitive market in Texas, with great success. Reliant stated that imposing a switch-hold will impede the liquidity of the competitive market by limiting customers' right to choose. Reliant was concerned about the mechanics of the process as well as the potential for headlines leading to public backlash.

OPC opined that as frequently as the commission has touted the ability of customers to switch providers, especially during the summer months, a switch-hold is likely to cause confusion if customers are prevented from switching. OPC expressed concern that a significant portion of customers that will be subject to a switch-hold are going to be lower income customers, because the switch-hold will apply to only those on a deferred payment plan and those LITE-UP customers on level plans which could potentially create a significant divide that would lock only lower income customers into a REP.

Consumers stated that a switch-hold is nothing more than the commission's authorization to REPs to provide electric service through the tying of a monopoly product (transmission and distribution service) with a competitive one. This raises anticompetitive concerns as the more REPs can use the switch-hold process to activate this tying arrangement, the greater the implication in the marketplace for antitrust and anticompetitive results. The REP Group rejected this argument and stated that PURA §39.001(a) states that the sale of electricity is not a monopoly service and implementation of a switch-hold process does not and cannot modify that finding. The REP Group added that customers will continue to have the right to choose a REP in the competitive market, conditioned upon satisfaction of commitments and agreements under a payment plan entered into with the current REP.

*Commission Response*

The commission does not entirely agree with Reliant's position that the switch-hold would limit the customer's choice. The rule that is being adopted will limit a customer's ability to switch REPs only in the narrow circumstances in which the REP has extended additional credit to the customer though a deferred payment plan or a level or average payment plan and the customer fails to pay the amounts due. The commission agrees with the REP group that there will not likely be a significant number of customers that will be subject to a switch-hold. The commission oversees the retail market and is in regular contact with REPs and customer advocates. If the commission's expectations about the number of customers who are placed on switch-hold do not prove to be correct, it has the latitude to re-evaluate the impact of the rule on the effectiveness of the competitive retail electric market. Therefore, the commission has included REP reporting requirements

in §25.480(g)(2) so that the commission can track the number of customers who have a switch-hold applied during the year. An important component of a competitive market is that customers pay their electric bills. As pointed out by the REP Group, customers were required to pay their bill to maintain electric service prior to competition in the fully regulated market. Customers in non-competitive areas remain subject to such requirements. Just as REPs are required under commission rules to extend credit to customers who seek electric service, customers are required to make payment on their purchases of electricity. A customer's freedom of choice is not limited by a switch-hold so long as that customer keeps payments current or timely pays off any credit that has been extended to that customer. As stated by the REP Group, customers will continue to have the right to choose a REP in the competitive market, conditioned upon satisfaction of commitments and agreements under a payment plan entered into with the current REP.

The commission disagrees with Consumers' argument that a switch-hold is nothing more than the commission's authorization to REPs to provide electric service through the tying of a monopoly product (transmission and distribution service) with a competitive one. For the reasons set out in the preceding paragraph, the switch-hold represents a limited impairment of a customer's ability to switch providers that is related to the need to ensure repayments of extensions of credit from a REP to the customers. This mechanism is not a fundamental change in the competitive retail market, in which most customers, most of the time, will have the ability to select the retail provider of their choice.

The commission appreciates OPC's concern about the switch-hold being applied to only LITE-UP customers when they enter into a level or average payment plan. The commission modifies the proposed rule to allow REPs to place a switch-hold only on customer accounts that are delinquent at the time they enter the level or average payment plan, or when the payment plan is entered into by an eligible customer during July through September or during a period of extended cold weather in January or February, where the customer selects a level or average payment plan instead of paying the balance due.

*Question 3.*

*c. In §25.480(j)(1), the proposed rules require a REP to offer a deferred payment plan for bills that become due during an extreme weather emergency, and to customers in an area covered by a Governor's declaration of disaster. Should the rule also exempt such customers from the switch-hold? Should any other groups of customers--e.g., critical care, low-income, elderly--be exempt from the switch-hold?*

The REP Group stated that the proposed switch-hold policy would appropriately make customers accountable when they take advantage of payment plans that extend credit beyond the normal disconnect cycle. The REP Group argued that the rule should not exempt certain categories of customers from the switch-hold policy because of their customer characteristics or because the customer agreed to a payment plan during a specific type of event.

Reliant stated that certain situations such as extreme weather and disasters call for leniency when granting payment plans. Certainly customers who are disadvantaged by these circumstances should be exempt from the switch-hold. Reliant opined that other groups recognized as being eligible for separate consideration in the application of the commission such as critical care, low-income and elderly should be exempt from the switch-hold as well. Public Citizen, AARP, and Consumers believed that exemptions from switch-holds should be provided for all people during weather emergencies, in areas declared disaster areas, all critical care, all low-income and all elderly customers.

OPC believed that there should be as many exemptions from the switch-hold as possible; however, OPC's priority for exemptions would be the customers whose lives may be placed in danger due to a lack of electricity. OPC stated that for health and safety reasons critical care customers and the elderly are especially in need of electricity and should be exempt from the switch-hold. These customers may have mobility or transportation availability challenges that make it difficult for them to leave their home.

*Commission Response*

The commission agrees with Reliant that REPs should exercise leniency when granting payment plans during extreme weather, disasters, and similar conditions. These rules do not require a REP to implement a switch-hold but the switch-hold is a mechanism by which REPs may balance the expansion of credit extension requirements under this rule with the REPs' resulting increased risk of, and exposure to, bad debt. The commission is not persuaded by the arguments of AARP, OPC, Public Citizen and Consumers that exemptions from switch-holds should be granted. Given the protections for vulnerable customers under this rule and the proposed rule in Project No. 37622, the commission does not believe that the placement of a switch-hold on a customer's account will impair the health and safety of customers. Nothing in the rule prohibits REPs from exercising discretion in granting additional leniency, but the commission does not believe it appropriate to require additional exemptions from the switch-hold through rule. Decisions concerning exemptions are best left to individual REPs.

*Question 4. What are the costs and benefits of implementing the switch-hold as described in §25.480(l)? Are there alternative means for a REP to mitigate the business risk of a customer default, aside from imposing a switch-hold on the customer's ESI ID?*

Reliant believed that the costs of implementing a switch-hold would far outweigh the benefits and would result in all ERCOT market participants incurring additional costs with only marginal benefits. A switch-hold process would need to be populated and updated at least daily to ensure that customers who have fulfilled payment plans are free to switch. This complexity introduces additional opportunity for error, potential disputes, and increased costs. Reliant believed that the imposition of a switch-hold process and its associated costs on all customers is not an effective way to address REP bad debt.

Reliant urged the commission to ensure that REPs have availed themselves of all the existing available tools to manage and mitigate bad debt rather than imposing additional regulatory "solutions" to competitive issues. According to Reliant, REPs have numerous commercially available tools that would enable them to manage and mitigate bad debt as an alternative to the switch-hold. The commission's rules provide a REP with the flexibility to determine satisfactory credit ratings based on its own competitive expertise and risk tolerance. A REP should periodically examine whether its internal definition of satisfactory credit is appropriate or needs modification. REPs are authorized to collect a security deposit or a letter of guarantee to minimize risk. These security deposits are not required to be refunded until the customer has made 12 consecutive on-time payments. Some REPs prematurely surrender the account security deposits by system-

atically refunding deposits after 12 calendar months, without regard to timeliness of payment. Additionally, §25.478(e) allows REPs to request, under certain conditions, an additional deposit based on the customer's historical usage to more appropriately secure the account against default; §25.477(a)(3) allows a REP to refuse service to a customer who is intending to deceive the REP by changing the name of the account-holder to evade payment of charges; and §25.477(a)(4) allows a REP to refuse service to a customer for indebtedness. Market participants are investing time and effort to develop a set of procedures to prevent a customer from evading a switch-hold arising from tampering. Reliant opined that REPs should be performing similar validations with each new enrollment to ensure that credit is not being extended to a customer who has previously "walked" on the REP. If the initial evaluation to determine indebtedness does not reveal a prior past due balance and the REP later discovers such indebtedness, §25.479(h) allows an outstanding balance to be transferred to the customer's current account with the REP. Reliant argued that REPs can take these measures as well as their own proprietary measures to secure accounts to reduce the impact from defaulted customer accounts.

Reliant observed that if the commission believes that a switch-hold is a necessary remedy, the commission should strengthen its rules relating to obtaining and validating customer identification prior to enrollment to ensure consistency. Current rules do not require a REP to verify the identity of an applicant and there is no standard among REPs regarding what constitutes acceptable identification. As a result, a customer could enroll with multiple REPs using a different type of identification with each or use slight variations of the customer's name to side-step a switch-hold process. Reliant stated the commission should consider strengthening its current rules that facilitate competition rather than implementing a switch-hold. For example, the commission could set a minimum standard of acceptable identification that would target gaming and identity theft without interfering with a customer's choice in the competitive market. Reliant stated that, regardless of the number of switch-holds in effect, the switch-hold process would require additional time-consuming steps for every enrollment transaction in the ERCOT market (approximately 800,000 switches and 2.2 million move-ins during 2009). In other words, the market will incur additional costs associated with processing and validating 3,000,000 customer transactions associated with switch-holds each year when those customers who are truly gaming the system can continue to do so. Reliant recommended that the commission focus on making gaming, rather than switching, more difficult.

AARP and Public Citizen urged the commission to reject the switch-hold process, close this rulemaking, and open two new rulemakings. One rule would be to develop strong, meaningful new disconnection protections for vulnerable Texans facing dangerous electricity disconnections and the other rule would be to explore the so-called bad debt issue of REPs. AARP urged the commission to explore the business practices suggested by Reliant to enable REPs to better manage bad debt and not to adopt the switch-hold process, as it would further endanger more Texans by keeping them disconnected for a longer period of time. AARP concluded by opining that the fundamental purpose of this rulemaking was and is to help Texans avoid dangerous disconnections.

OPC stated that it sees no benefit in implementing a switch-hold and noted that there are alternative means for a REP to mitigate the business risk of a customer default. OPC agreed with Reliant that PURA §17.008(d) allows a REP to use an applicant's electric bill payment history to deny service. The REP Group agreed with OPC and Reliant that a REP may refuse service based on a customer's electric bill payment history but added that there is no practical way for the REPs to implement an electric bill payment database to track customer payment records since the commission has determined that it cannot require a REP to fund the database. OPC noted that the proposed rule contains several other provisions that will mitigate the REP's business risks as the result of any customer default: increase in the initial payment from 25% to 50% for a deferred payment plan, limitations on the customers that would be eligible for a payment plan, and limitations on the time of the year that a REP is required to offer the deferred payment plans. OPC offered that if customers were required to take service from a REP for six months instead of the current three months prior to being eligible for a deferred payment plan, the incidence of customers leaving a REP with a deferred balance would decrease because of the demonstrated loyalty.

Additionally, OPC stated that the rule should contain some performance standards or metrics that should be met to ensure that the switch-hold process is not more costly than any rate savings that should accompany a reduction in REP debt. OPC expressed surprise that the rule does not include any meaningful reporting on this issue, as a decrease in costs was a stated objective of Commissioner Nelson in moving forward with the switch-hold at the November 20, 2009 workshop. OPC added that without a performance standard or metric there would be no way to validate or reject the REP Group's argument that switch-holds would help ensure customer adherence to terms of a payment plan and would reduce bad debt that otherwise would be socialized among customers who pay their bills on time. OPC stated that it does not expect lower electric rates by implementing the switch-hold process but does expect that there will be an increase in customer confusion, customer complaints, and billing costs.

OPC agreed with Reliant that the switch-hold process will require additional time-consuming steps for enrollment transaction, that the switch-hold list will need to be updated daily, and that the updating will provide the opportunity for error, disputes, and increased costs. OPC opined that these are valid, serious concerns that should be addressed in a meaningful way, rather than leaving it to be worked out at the ERCOT stakeholder process. OPC asserted that REPs that choose not to run their businesses in a profitable, risk-minimizing manner will inevitably fail, which is how a competitive market is intended to work.

OPC and Consumers reiterated Reliant's point that the commission has given the REPs adequate tools to mitigate risk such as late penalty fees, deposits for people with bad credit or poor payment histories and a switch-hold is unnecessary. OPC urged the commission to encourage other REPs to use these existing tools. Consumers maintained that a switch-hold is not within the commission's authority to establish and punishes customers who pay their deferred payment plans timely by restricting the customer's access to the market for up to a business day after they make the final payment on the plan. Since prices change daily, this can be a real cost to the customer.

Consumers offered comments related to the cost of the switch-hold to consumers by comparing it to the old company town days, where workers could only shop at the company store and prices kept rising and workers could never pay off the debt. Like the company store scenario, Consumers noted that the proposed rule does not set any pricing safeguards. Consumers expressed

concern that REPs are assessing extra fees on bills that have not been authorized by the commission like a disconnect recovery charge that is applied in addition to the 5% late fee. Consumers urged the commission to structure the rules to prevent any additional fees from being charged and to establish cost-based pricing for customers placed on a switch-hold. Additionally, Consumers noted that the proposed rule provides no protection against price gouging when a consumer is on a month-to-month contract because the customer's fixed contract expired during the deferred payment plan period. Consumers reviewed copies of bills where the monthly rate rose from 14.84 cents per kWh in May 2008 to 19.87 cents per kWh in October 2008, a 33.89% increase. Consumers raised concern that the switch-hold process would lock a customer out of the competitive marketplace and force the customer to pay non-competitive prices resulting in captive ratepayers without price and fee or surcharge protection.

Consumers opined that the switch-hold process could result in additional costs in related retail markets such as the rental housing market. Consumers presented a scenario where a customer is disconnected and placed on a switch-hold. In this scenario, Consumers observed that one option for the tenant would be to abandon tenancy, resulting in an economic loss for the landlord. Consumers urged the commission to explore these significant costs to ensure that commission interference into the competitive electric retail market will not negatively impact other market sectors.

Consumers raised an additional concern that the switch-hold is a two-sided coin in that customers are denied access to REPs, but other REPs are also denied access to these consumers. The commission has recognized in Project No. 22255 (Customer Protection Rules for Electric Restructuring Implementing SB 7 and SB 86) that niche sellers will arise in a competitive market to serve customers that are low spenders with credit history problems. Consumers opined that these niche providers could be negatively impacted and possibly driven out of the market if REPs are allowed to place a switch-hold on a customer's account. Consumers asked that the commission explore this cost impact before it denies these niche sellers access to the customers by allowing a REP to place a switch-hold on the customer's account.

Consumers stated that the issue of switch-hold raises a serious question of whether competition is a workable model for the delivery of reliable electricity at affordable rates. Consumers provided a comparison of electric rate increases for the period from January 2002 to January 2010 and concluded that regulated prices increased at a lower rate than the national average while competitive retail prices for First Choice Power in the Oncor service territory increased at a significantly higher rate.

Consumers commented that, in addition to the higher price increases, customers in the de-regulated market are faced with additional costs and fees above the TDU charges such as REP disconnect and reconnect charges and there are no assurances that rate decreases from TDU rate cases will flow 100% to consumers. Consumers cited a study requested and funded by Entergy (Entergy Report) and a Center for Public Priorities publication attached to their initial comments and concluded that 35% of the Texas population has incomes inadequate to cover their basic essentials and noted that these studies underscore that greater customer protections should be in place to enable low and moderate income customers to have a realistic ability to pay their electric bills and maintain service. The proposed switch-hold would increase risks to financially fragile customers. Consumers denounced the REP Group's characterization of customers who do not pay electric bills as being bad actors and stated that these are simply people who cannot afford the repayment schedule requested by the REPs. The Entergy Report found that the inability to pay utilities is second only to the inability to pay rent, as a reason for homelessness. Consumers opined that low and moderate income consumers would be better off in a regulated monopoly that would provide more stable pricing, no additional REP fees and charges, and would provide rate reductions when ordered by a regulatory agency. Consumers recommended that the commission increase the payment due date from the current 16 days to 25 days from issuance and, alternatively, that it allow customers to choose the due date for their billing.

The REP Group argued that the benefit of implementing a switch-hold is that cost causers will be required to pay their own debts instead of leaving their unpaid bills to become bad debt that is socialized among paying customers. Since the switch-hold process has already been developed in the context of meter tampering, the REP Group opined that the added costs to expand the switch-hold process in this rule should be minimal. The REP Group also noted that the proposed rule provides additional benefits to customers by increasing the number of customers who will be eligible for payment plans.

The REP Group agreed with Reliant and Consumers that REPs should use good debt-management tools. The REP Group also agreed with AARP, OPC, and Reliant that REPs can require security deposits but noted that security deposits are intended to address the fact that REPs sell electricity on credit as customers generally use electricity before a bill for the service is generated and that a REP may provide 65 to 80 days of service before it is allowed to disconnect service for non-payment. However, the REP Group maintained that the current security deposit amount allowed by the customer protection rules is insufficient to offset the additional costs and risks posed by the expanded payment plans proposed in this project.

The REP Group encouraged the commission to reject the suggestions of Consumers to increase the payment due date from the current 16 days to 25 days from issuance and the alternate proposal to allow customers to choose the due date for their billing. The REP Group stated that these proposals are similar to the ones made by consumer groups in the initial customer protection rulemaking and rejected by the commission in 2000 (Project No. 22255). The REP Group noted that increasing the due date from 16 to 25 days would result in customers in competitive areas having approximately 50% more days to remit payment than customers in areas of the state not open to competition. Competitive REPs should not be required to provide a customer more time to pay electric bills than is required in the regulated environment. The REP Group reiterated its position that REPs generally sell electricity on credit and provide 65 to 80 days of service before being allowed to disconnect a customer for non-payment. The Consumers' proposal, if adopted, would impose significantly higher risks on REPs and, at the very least, customer deposits would need to increase to offset the potential impact from additional bad debt. The REP Group noted that the existing deposit cap was set by the commission with a 16-day due date as the basis of the formula and allows the REP to collect up to one-fifth of the customer's estimated annual billing, or the sum of the estimated billing for the next two months. If the due date were expanded by the proposed nine days, then the increased risk to the REP would need to be reflected in the de-

posit cap. The REP Group also opposed Consumers' reasoning to change the due date from 16 days to 25 days to match the new federal standards for consumer payments on credit cards because of significant differences between credit card companies and electric service industries. Banks and credit card companies can choose to deny an extension of credit to a customer. In addition, credit card companies may: (1) increase the interest charges for existing balances and new transactions at any time if payment is not received within a certain number of days after the due date; (2) increase interest charges for new transactions; and (3) offer no grace period for repayment of the balance for purchases if the previous balance was not paid in full by the due date. In opposing Consumers' suggestion that REPs be required to let customers choose their own bill due date, the REP Group pointed out that home loan companies can charge consumers interest on the extension if a customer chooses to have his house payment due on a date that requires the lender to defer receipt of the payment but REPs do not have this option. The REP Group noted that some REPs do provide customers with the option of choosing their bill due date, but these types of payment arrangements should continue to be left to the competitive market and not be mandated by commission rule. The REP Group concluded by stating customers should not be required to absorb the increased costs that would result from the proposals to extend payment due dates.

*Commission Response*

The commission agrees with AARP, OPC, Public Citizen, Reliant, and Consumers that REPs should maximize their use of the tools found in the commission's existing rules and in the competitive market to manage bad debt. The commission believes that some REPs face challenges with the high level of bad debt they are experiencing, and that the expanded eligibility for deferred payment plans and average or level payment plans would exacerbate the bad debt experience. The commission believes that the switch-hold is a necessary, additional risk management tool, to allow REPs to prevent increased bad debt and the increase in rates that is likely to be associated with higher levels of uncollectible debt. The commission believes that the cost does not outweigh the benefit of the switch-hold, and that the extended credit contained in this rule should be balanced with a tool that will help ensure that REPs have the ability to collect the debt they are owed.

The REP Group is correct in noting that the commission has previously determined in Project No. 36860 (Rulemaking Relating to Customer Database of Bill Payment Information) that it cannot require a REP to fund a database of customer payment history. However, the commission believes that REPs may voluntarily implement an electric bill payment history database to track payment history and encourages REPs to explore ways to implement this database.

The commission appreciates Consumers' comment that the proposed switch-hold may increase risks to financially fragile customers by exposing them to increasing electric prices and fees without the protection of being allowed to switch to a cheaper or more reliable alternative REP. However, the commission does not agree with Consumers that the proposed rule prohibits the customer from switching providers. The rule merely requires the customer to pay for consumed electric service prior to switching. The expanded eligibility for payment plans is intended to provide additional protections for these customers.

In response to the comments of Consumers and OPC concerning customer rates when the customer's contract expires while on a switch-hold, the commission modifies §25.480(l) to require REPs to offer competitive rates on contract termination during the time that a switch-hold is applied and prohibit REPs from discriminating against any customer that is on a switch-hold in the provision of services or pricing of products. Customers on a switch-hold shall be eligible for all services and products that are generally available to the REP's other customers.

AARP and Public Citizen suggested that the commission close this rulemaking and open two new separate rulemakings to address disconnection protections for vulnerable Texans facing disconnection and bad debt issue of REPs. The commission believes that this rulemaking addresses both of these issues and that there is no need to establish the separate rulemakings at this time.

OPC opined that if customers were required to take service from a REP for six months instead of the current three months, the incidence of customers leaving a REP with a deferred balance would decrease because of the demonstrated loyalty. Expanding the eligibility for payment plans was one of the key protections to customer who are having difficulty paying their bills, and the three month minimum service history is an important part of this expansion. The commission believes that requiring customers to take service from a REP for six months rather than the current three months before being eligible for a deferred payment plan would leave some vulnerable customers without a payment plan option for an additional three months. The commission makes no change based on OPC's suggestion.

Reliant and OPC raised a concern about the costs associated with the switch-hold process. Reliant contended that additional costs will be incurred to process and validate 3,000,000 transactions each year, but customers who are truly gaming the system can continue to do so. While the commission is concerned about gaming the system and will continue monitoring the market, this rule is intended to balance the need for additional customer protections for vulnerable customers when they most need it with the concern that the additional protections would increase bad debt that would increase rates for all customers. The commission agrees with the REP Group that the incremental costs associated with the switch-hold process in this rule should be minimal since the switch-hold process is already being developed to address issues associated with meter tampering. The commission expects that protection benefits of expanding the payment plans available to vulnerable customers in this proceeding will outweigh the minimal incremental costs associated with the switch-hold in this proceeding.

*Question 5. Section 25.480(j) specifies the minimum down payment and number of installments for a deferred payment plan made available to eligible customers during the months of July, August, and September (as well as during January and February, subject to certain weather conditions). Should the rule specify the minimum down payment and number of installments for deferred payment plans to be made available during the remaining months of the year?*

AARP and Public Citizen believed that the proposed rule would weaken existing customer protections by allowing REPs to require the customer to make an initial payment up to 50% of the outstanding balance prior to being allowed to enter into a deferred payment plan instead of the 25% under the existing rule provided that customers meet the basic requirements under the existing §25.480(j)(3). The proposed rule would also restrict what months the payment plans must be available from 12 months to three months (or to five months in extreme weather

years). AARP and Public Citizen urged the commission to reject this weakening of existing customer protections. Reliant also expressed concern about removing existing customer protections and encouraged the commission to specify the minimum down payment and number of installments for deferred payment plans during the other months of the year. Consumers stated that the rule should specify the minimum terms and conditions the customer must meet in order to be eligible for any deferred payment plan. Without the parameters for the amount of the initial payment and the amount and number of subsequent payments in payment plans, customers could be pressured into accepting terms and conditions that are unrealistic and not in the best interests of themselves or their REPs. Consumers argued that the proposed rule should include standards for voluntary deferred payment plans and noted that it is essential that a customer taking a deferred payment plan have terms and conditions that can be met because of the possibility of having their electric service disconnected. Consumers noted that the minimum standards would not preclude the REP from providing more liberal payment plans.

The REP Group opposed expanding the rule to specify the down payments and number of installments for months outside the summer and winter months specified in the proposed rule. To be financially viable, REPs must conduct their business to earn a profit and must collect outstanding account balances to earn that profit. This provides REPs with a strong incentive to work with customers who attempt to settle their debts. REPs should continue to have flexibility to work with their customers to craft deferred payment plans specific to their mutual needs.

*Commission Response*

The commission is persuaded by the comments of the REP Group that the competitive market will perform more appropriately without placing specific regulatory requirements on terms and conditions of deferred payment plans in months other than those specified in the proposed rule. The commission is confident that REPs will distinguish themselves through their flexibility in developing payment plans and innovative methods to work with customers to meet their payment obligations.

*Question 6. If the switch-hold is invalidated by legislative or judicial action, should the rest of the rule remain in effect?*

Cities opined that this question is premature as the commission and interested parties may find intertwined features of the rule that need to be changed in tandem to reflect any specific court or legislative action taken.

AARP and Public Citizen argued that if the switch-hold is invalidated by legislative or judicial action, the rest of the rule should remain in effect if the customer protections in the final rule are amended to be stronger than the status quo. OPC pointed out that other proposed changes in the rule will mitigate some of the REP's bad debt issues; therefore, OPC would not oppose leaving the rest of the rule in effect in the event that the switch-hold is invalidated through some legislative or judicial action. Consumers commented that the rule should remain in effect if the switch-hold is invalidated by legislative or judicial action and added that the proposed changes to the deferred payment plan requirements will mitigate bad debt which is a desirable outcome. Consumers reminded the commission of its earlier commitment to adopt a rule that would eliminate the filing of emergency rule making petitions every summer and noted that without the expanded deferred payment plan there will be no workable resolution for the problems consumers encounter in managing high bills during the summer. Consumers expressed its position that the switch-hold is anti-competitive and is the least effective measure provided in the proposed rule for ensuring that consumers can pay their electric bills.

Public Policy opposed extension of the deferred payment plans beyond what is currently required under statute and opposed the switch-hold process. However, Public Policy stated that should the switch-hold be invalidated through legislative or judicial action, then the rest of the rule should be invalidated as well. Reliant disagreed and argued that the rest of the rule should remain in effect. Reliant opined that in this instance, the function of PURA would not be impaired if the switch-hold is declared unlawful and that the draft rule can stand on its own without the switch-hold. Reliant added that other isolated provisions of commission rules have been declared unlawful in the past without invalidating the remaining provisions.

The REP Group believed that the proposed rule should not remain in effect if the switch-hold process is invalidated by legislative or judicial action. The REP Group opined that the proposed rule establishes the switch-hold process for payment plans in conjunction with expanding customer eligibility for payment plans beyond what is already required in the existing rule.

*Commission Response*

The commission is persuaded by Cities' argument that the question is premature.

Discussion of REP Bad Debt

The REP Group encouraged the commission to take steps to close the loophole in the current market design where bad debt is serious and has grown substantially since market open. The REP Group opined that the switch-hold process is an important component of a workable comprehensive solution to expand protections for vulnerable customers who have difficulty paying electric bills, especially in the summer and winter months, while limiting further bad debt costs that would ultimately increase prices to customers who timely pay their bills.

To demonstrate that bad debt is serious and has grown substantially, the REP Group stated that the integrated utilities (Entergy, El Paso, TXU, and Reliant) reported uncollectible amounts between 0.124% and 0.675% of revenues prior to the opening of the competitive market. The REP Group referred to Joint Responders Comments to Staff Questions filed in this proceeding on October 26, 2009 that show for a 19-month period ending July 2009 that the uncollectible amounts for some of the Joint Responder REPs (representing 22% of the ERCOT market) exceeded $200 million, or approximately 4% of revenues; that 52% of customers accepting a deferred payment plan defaulted on payments, but the default rate for LITE-UP customers was 45%; and that 38% of the customers who changed providers left an unpaid balance that REPs were unable to recover. The REP Group contrasted the 4% uncollectibles experienced by the Joint Responders with Austin Energy's 2006 Annual Report that stated the "bad debt ratio," which is bad debt expense divided by revenues, was 0.49% in 2006--down from 1.58% in 2000.

The REP Group provided information to show that the 2009 bad debt for TXU Energy, First Choice Power, and Reliant ranged from 1.46% to 7.7% of revenues as contrasted to the uncollectible amounts that ranged from 0.124% to 0.675% of total revenues of their respective IOUs prior to the opening of the competitive market. The REP Group stated that based on recent

data of one unidentified REP, approximately 40% of unpaid final accounts were from customers in the collections path who received a disconnection notice and changed their REP before being disconnected. That REP's data also showed that another 29% of unpaid final bills were from customers who were disconnected and never reconnected by the disconnecting REP.

The REP Group concluded that the statistics regarding bad debt prior to opening of the competitive market, bad debt from three major REPs in 2009, and Austin Energy's current statistics, indicate that there is a problem with bad debt in the Texas competitive market that needs to be addressed. The REP Group opined that the commission's proposed rule is a step in the right direction although it does not adequately address the other unpaid final bills that contribute significantly to the bad debt problem (namely customers who leave final bills unpaid that are not on a deferred, average or level payment plan).

Consumers challenged the bad debt data provided by the REP Group. Consumers argued that the data were not subject to validation nor did they have the ability to compare them to other financial records available. Consumers did not agree that choosing Austin Energy for a single comparison point was appropriate, as it could have had the lowest bad debt. Consumers also raised questions about the REPs' overall process for extending credit and managing debt and the REPs' revenues attributable to charges for late payments or non-payments. Consumers concluded that the data provided by the REPs does not provide the commission with a credible basis for adopting a switch-hold. Determining whether the bad debt level was a result of poor business practices or an intentional decision to become a niche market participant is important in determining whether prudent REPs do not have the ability to avoid excessive bad debt levels.

Cities agreed with Consumers that the REP Group failed to demonstrate that their bad debt problem justifies such an extreme measure as the implementation of a switch-hold process.

Consumers stated that the REP Group's argument that members are experiencing increasing levels of bad debt from some of their customers who do not pay their bills resulting in their other customers having to pay increasingly higher rates, is not supported by sound analysis. Consumers inferred that the wide-range of bad debt levels reported by the REP Group (from 0.67% to 8.23% in 2008 and 1.46% to 7.75% in 2009) shows that some REPs are more prudent in their underwriting practices and debt collection practices. Consumers included transcripts of a PNM quarterly stakeholder call discussing its underlying REP and the fact that its risk wasn't well managed. Consumers pointed out that this REP attributed its write-offs to the economic climate and added that better debt management processes have resulted in an improvement in recent collection rates.

Additionally, Consumers stated that bad debt levels occurring in 2008 and 2009 should be viewed in relation to the economy. For example, Capital One's charge-offs jumped to 10.41%, Texas Hospital Debt charges were 19.5%, Target reported 13.9% annualized bad debt on its credit card segment. Compared to other bad debt levels, Consumers concluded, REP bad debt was relatively low. Consumers noted that these other companies and sectors did not prevent their bad debt customers from going elsewhere in the retail market place because they couldn't.

Consumers opined that abolishment of bad debt is an appealing goal but that it is not a reasonable one in the competitive electric market or any other market. Consumers proposed five steps for the commission to take to encourage REPs to mitigate bad debt short of blocking consumers from switching service providers:

1. The commission should acknowledge that REPs have a responsibility for being prudent in their underwriting and debt collection practices. Consumers also urged the commission to adopt a process consistent with PURA that would ensure timely provision of bill payment histories before adopting a switch-hold provision.

2. Consumers asked that the commission investigate the level of revenues that REPs receive in fees related to payment defaults, compared to the corresponding costs incurred by REPs for late or nonpayment of electric service by consumers. Consumers claimed that the REPs have failed to explain or show that the fees and surcharges they issue to consumers do not adequately limit bad debt risk to a reasonable level.

3. The commission should consider increasing the payment deadline from the current 16 days after the bill is mailed to 25 days to match the new federal standards for consumer payments on credit cards or allow customers to choose the date on which their payments are due.

4. Consumers indicated that it supported the commission's proposed amendments in §25.480 that will improve the ability of consumers to repay an outstanding balance under a deferred payment plan, because it allows a larger down payment which would decrease the amount to be recovered in the future and it increases the number of installment payments which further decreases the additional monthly amount the customer must repay in addition to their bill.

5. Consumers encouraged the commission to take a more active role in the energy efficiency programs provided by TDUs and require greater resources to be committed to weatherization programs for low and moderate income customers. The reduced consumption resulting from these programs would lower bills and mitigate the risk of bad debt.

Reliant expressed no surprise that business risks are higher in a competitive market than in a monopoly setting but pointed to the wide range of bad debt among the competitors (ranging from 1.46% to 7.75% for TXU, Reliant, and First Choice Power) as being evidence that REPs use the existing tools differently, with varying degrees of success.

*Commission Response*

The commission notes the concerns about existing bad debt levels raised by the REP Group and appreciates the concerns raised by Cities, Reliant and Consumers about the appropriateness of the comparisons presented by the REP Group. However, as noted in the preamble to the published rule, the primary benefits of the rule amendments will be the increased ability for certain customers to qualify for payment plans. The commission believes that the information provided by the REP Group comparing bad debt for REPs in the competitive market to bad debt prior to market open and to bad debt in the non-competitive markets demonstrates that there are legitimate reasons to be concerned about bad debt, whatever its causes. While some commenters challenged the REP Group's claim concerning the level of existing bad debt, no commenter opined that the increased risk associated with the expanding payment plans for vulnerable groups will not increase the level of existing bad debt. The commission believes that it is appropriate to balance the need for additional customer protections for vulnerable customers when they most need it with the concern that the additional protections

would increase bad debt that would increase rates for all customers. Therefore, the commission adopts the switch-hold as a measure to reduce a potential increase in the bad debt problem that may be made by the extension of additional credit to customers under this rule. The commission declines to make any changes to the proposed rule based on comments concerning existing bad debt.

Consumers stated that TLSC requested the commission to provide information on late fees used to mitigate bad debt under the Public Information Act but none was provided. TLSC did not ask about late payment fees being used to mitigate bad debt as stated in Consumers' comments. TLSC did submit several questions on May 7, 2010 concerning bad debt and one question asking for "any studies, reports, and/or correspondence prepared by or for the commission or provided to the commission that provide the total amounts of revenue Texas Retail Electric providers have received in late payment fees." The requests were limited to the timeframe from April 5, 2010 through May 7, 2010. During that timeframe, the commission had not received any information that matched the request for information on the receipt of late payment fees by REPs. On the remaining questions, the commission referred TLSC to filings in this project.

*§25.454. Rate Reduction Program*

*Subsection (g)(3)(E)--notify customers three times a year*

The REP Group and Reliant argued that the number of required notices to residential customers about critical care protections and the availability of the LITE-UP discount should be limited to two, consistent with the current rule. Reliant observed that over the last several years the PUC staff has typically required a specific text to be displayed as a bill message or bill insert in the months of February and September. Reliant questioned the need for the September notice, because it does not prompt the customer to take any action and only reminds customers about the end of the summer discount season. While this might possibly deflect customer questions about the absence of the discount from the October bill, the REP should be free to publish such notice voluntarily but not be required to do so.

The REP Group and Reliant pointed out that customers learn about LITE-UP through the commission's public service radio announcements and that customers are informed of LITE-UP and critical care protections through their REP's Terms of Service and Your Rights as a Customer documents. Reliant argued that the vast majority of LITE-UP eligible customers are automatically enrolled through the low-income discount administrator's (LIDA's) monthly matching process and that only a small number of customers who would qualify would benefit from requiring a third notice. Reliant opined that it is not good public policy to require broadcast of information to all customers repeatedly throughout the year when it only applies to a small number of customers. If this proposed rule were adopted along with the proposed §25.497 notice related to critical care protections, REPs would be required to display nine mandated messages on customer bills during the five months of June through October. Reliant pointed out that space is limited on customer bills and within the billing envelope to display messages and provide bill inserts. Reliant cited *Pacific Gas and Electric Company vs. PUC,* 475 U.S. 1 (1986) as support for its argument that the billing envelopes are the property of the provider sending the bill. The requirement of three notices per year is more than necessary to provide customer education.

*Commission Response*

The commission recognizes the concerns of the REP Group and Reliant concerning the limitation of space on customer's bills and in the REP's envelopes but believes that the public interest is best served by more information rather than less. The commission believes that consumers will benefit by increasing the number of notices from two to three so that customers can be advised about the availability of the rate reduction program twice and reminded through the third notice that the rate reduction is about to end so that customers can plan their budgets accordingly. The commission has authority under PURA §17.004(9) and §39.101, and other provisions of PURA described in this document, to require REPs to provide notices to customers and the commission believes that the education of customers about resources available to low-income customers is always good public policy.

Reliant was concerned that the additional notification to customers about the availability of the LITE-UP in §25.454(g)(3)(E) is an unreasonable burden for REPs. Reliant argued that each additional message required by the commission reduces the available space for REPs to communicate to their customers and that this therefore restricts REPs' commercial speech rights within the REP's bill. As Reliant correctly acknowledged in its comments, the state can regulate commercial speech if such regulation directly advances a governmental interest and the regulation is not more extensive than necessary to serve that interest. The commission does have an interest in ensuring that customers are aware of the availability of the LITE-UP program. The commission concludes that requiring REPs to provide notice three times per year, rather than two times per year as is currently required, is reasonable and is not more extensive than necessary to advance this interest. Accordingly, the commission declines to amend the rule as requested by Reliant.

*§25.480. Bill Payment and Adjustments.*

*Subsection (h)--level and average payment plans*

*(1) and (2)*

Consumers and OPC opined that this paragraph appears to unreasonably discriminate against customers based on income by allowing the placement of a switch-hold on any customer who is eligible to receive a rate reduction under §25.454. Consumers suggested that if the intent of the rule is to require REPs to offer a level or average payment plan to a sub-category of these low-income consumers who are delinquent, then the language should be amended to reflect that intent. OPC suggested striking the language that would prevent a LITE-UP customer from being on a level or average payment plan without being subject to a switch-hold. OPC believed that the solution to the discriminatory requirement in the proposed rule is to prohibit a switch-hold for all customers on a level or average payment plan. Public Citizen believed that the proposed rule is a retreat from current levels of customer protections and that allowing a switch-hold would make the level and average payment plans less desirable or harmful to LITE-UP eligible customers.

OPC reiterated its position as being adamantly opposed to the switch-hold and opposed the REP Group's attempts to expand the switch-hold to all customers on a level or average payment plan. OPC added that there will be times when a customer on a level or average payment plan has a positive balance with the REP and they should not be prevented from switching. OPC recommended striking the language "and the customer removed from the level or average payment plan" as a condition of being allowed to change service to another provider.

Reliant recommended that the requirements related to placement of a switch-hold be stricken, because it is inappropriate to place a switch-hold on an ESI ID when the customer has entered into a level or average payment plan. Reliant reiterated its opposition to a switch-hold for any reason other than meter tampering and noted that if the commission were to adopt the switch-hold process in this proceeding, the switch-hold should not apply to level or average payment plans. Reliant commented that it would be counterproductive to attach a switch-hold disincentive to level or average payment plans that are put in place to assist customers in avoiding unmanageable balances. Reliant opined, even if the commission determines that a switch-hold is appropriate for customers who owe an outstanding amount on a deferred payment plan, that conclusion cannot be reasonably extended to a level or average payment plan, because a customer would only be in arrears for six months of the year. Reliant stated that the proposed rule would allow the switch-hold to remain in place as long as the customer is on a level or average payment plan and that the customer would have to request to be removed from the plan before a switch to another provider would be processed. Reliant argued that this additional hurdle for a customer to switch is contrary to the principles of a free market and a customer's right to choose. Reliant questioned how an "(h)(1)" level/average payment plan will be distinguished from a standardized level payment plan to which a switch-hold is not allowed in the REP's day-to-day operations or in commission enforcement activities.

The REP Group agreed with Commissioner Anderson's April 1, 2010 memo that the switch-hold process as it applies to level or average payment plans needs clarification. The REP Group argued that the language in paragraph (1) related to switch-holds for customers eligible to receive a rate reduction pursuant to §25.454 should be deleted and the concepts moved to a separate paragraph to clarify that the switch-hold process should apply to all customers in the same manner. The REP Group posited that Commissioner Anderson correctly stated that switch-holds should not apply only to low-income customers.

*Commission Response*

Commissioner Anderson's memo of April 1, 2010 noted his concern that the proposed language in subsection (h) might be interpreted to impose switch-holds on low-income customers as a condition for obtaining a payment plan. The commission agrees that the language in the proposed rule is unclear regarding the application of the switch-hold to low-income customers who are on a level or average payment plan. It is important for the commission to ensure that rules are developed and applied equally and fairly to retail customers. As such, the commission believes that it is appropriate to adopt the REP Group proposal to allow a switch-hold to be placed on accounts if a level or average payment plan is established when the customer is delinquent in payment. The commission declines to adopt the REP Group proposal that would allow a switch-hold to be placed on an account under a level or average payment plan if the account becomes delinquent. Instead, the commission modifies the proposed rule to allow the REP to place a switch-hold on a customer's account if the customer chooses to enter into a level or average payment plan under subsection (j)(2)(B)(ii) of this section rather than paying the REP the balance due. Whether the customer is receiving or is eligible to receive the low-income discount under §25.454 will not be a factor that a REP may consider when deciding to request a switch-hold. The REP is to request removal of any switch-hold from an account on a level or average payment plan once the account has either a zero or positive balance. The commission's revised language is intended to address the concerns raised by Reliant, OPC, and Consumers about having a switch-hold placed on a level or average payment plan when the account has either a zero or positive balance.

The commission also believes that it is important that the customer be provided with information about a switch-hold that may be applied as the result of entering into a level or average payment plan before a switch-hold can be applied. During meetings after publication of the rule, stakeholders reached consensus that the rule should include a "script" that a REP would provide a customer before applying a switch-hold as the result of a customer entering into a payment plan. The commission agrees with providing this information to the customer and amends the proposed rule accordingly.

*(3)*

The REP Group suggested changes and clarification to this paragraph to ensure that a plan in which the minimum payment is recalculated monthly is a type of average payment plan, rather than an "alternative" plan. The REP Group also proposed that the terms over- and under-"recovered costs" be changed to over- and under-"payments" to be reflective of the competitive market. The REP Group noted that the over or under amounts are not always "billed or credited" but may be included in the re-calculation of the new payment amount. Therefore, the REP Group recommended that the word "reconcile" be used rather than the phrase "bill or credit" to better describe how the payment plans work. The REP Group strongly recommended that the commission maintain the existing rule language that requires REPs to reconcile payment plans at least every 12 months rather than every six months. To support its position, the REP Group provided an example to demonstrate that a customer would experience more volatility under a 6-month reconciliation than under the 12-month reconciliation contained in the current rule. The REP Group also recommended that the commission maintain the existing rule modifier of "at least" with respect to frequency with which REPs are required to reconcile level and average payment plans. The REP Group suggested that the commission should continue to allow REPs flexibility in how they design level and average payment plans. Additionally, the REP Group urged the commission to restore the phrase "consistent with the REP's terms of service" to ensure that REPs provide the terms related to level and average payment plans in their terms of service document.

Consumers noted that the proposed rule requires REPs to offer deferred payment plans to LITE-UP customers, critical care customers, and chronic condition customers for bills that become due in July, August, and September and during January and February if the weather is exceptionally cold. The proposed rule also allows a customer to choose to take a level or average payment plan as an option to the deferred payment plan and requires the REP to reconcile accounts with level or average payment plans at least every six months.

In response to Consumers' recognition of the six month true-up, the REP Group reiterated its initial comments that using 12 month true-up would be better for customers. The chart in the REP Group's initial comments was intended to demonstrate how the monthly over or under balances and payment amounts would be more volatile using a six-month reconciliation as compared to a twelve-month reconciliation.

Reliant recommended that proposed subsection (h)(3) be modified to clarify that the 6-month true-up and the monthly average of the payment amount are not mutually exclusive concepts.

*Commission Response*

The commission notes that the rule allows a REP to make deferred payment plans available at any time of the year. The commission believes that the effect of requiring REPs to offer deferred payment plans only during certain times of the year is mitigated by the expansion of customer eligibility for payment plans.

The commission concurs with the REP Group's recommendation to use a 12-month reconciliation for any over- or under-payments to minimize volatility for the customer. The commission also agrees with the REP Group recommendation to use the term reconcile rather than the terms bill or credit to be consistent with how level and average payment plans are implemented by REPs. Additionally, the commission agrees with the REP Group's recommendations to restore the phrases "consistent with the REP's terms of service" and "at least" to provide REPs flexibility in the provisioning of level and average payment plans. The commission amends the rule accordingly.

During post-comment meetings, Consumers did not oppose the REP Group recommendation to require reconciliation of level or average payment plans at least every 12 months rather than every 6 months as in the proposed rule, as long as language was added to require the REP to describe the reconciliation process for a level payment plan and that REPs be required to collect any under-payments over a period no less than the reconciliation period. The commission agrees with the REP Group that the twelve month reconciliation would result in less payment volatility for the customer and the rule being adopted includes the requirement that level or average payment plans be reconciled at least every twelve months. The commission also agrees with Consumers that REPs should be required to describe the reconciliation process to customers at the time the level payment plan is established. The commission modifies the proposed rule accordingly.

*New Paragraph (4)*

The REP Group proposed an additional paragraph that would allow REPs to require customers enrolling in a level or average payment plan to pay no greater than 50% of any delinquent amount to initiate the plan. The REP Group argued that this would establish more reasonable parity between the level or average payment plan option and the deferred payment plan option. The REP Group stated that its proposed language would allow REPs to assist low-income customers by combining deferred payment and level or average payment plans. The REP Group added that Commissioner Anderson's April 1, 2010 memo indicated that this combination of plans might be a good option for some customers.

*Commission Response*

The commission does not agree with the REP Group that Commissioner Anderson's April 1, 2010 memo indicated that a combination of plans might be a good option for some customers. Rather, Commissioner Anderson's memo sought clarification of whether this was the intent of the proposal and suggested that the language be clarified before adoption. The commission appreciates the comments of the REP Group concerning the need for clarification and amends the rule accordingly.

*New Paragraph (5)*

The REP Group strongly supported a policy that allows switch-holds to apply to level or average payment plans in certain circumstances. The REP Group proposed removing the switch-hold policy provisions from paragraph (1) and moving them to this new paragraph and expanding the application of switch-holds so that REPs would be allowed to request a switch-hold when any customer who is delinquent agrees to a level or average payment plan. The REP Group rationalized that level and average payment plans result in REPs extending credit beyond the normal post-pay environment at least in some months; therefore, switch-holds should be allowed if a customer is delinquent when the level or average payment plan is established.

Cities urged the commission to reject the REP Group's proposed language that would allow a REP to implement switch-holds for a greater proportion of customers under a level or average payment plan than under the proposed rule, which limits switch-holds only to customers eligible for a rate reduction program under §25.454.

*Commission Response* The commission agrees with the REP Group recommendation to allow switch-holds to customers entering into a level or average payment plan when the customer is delinquent in payment at that time. The commission must be equitable in the application of its standards. So, if anyone, regardless of income-level, enters into a level or average payment plan while delinquent in payment, the switch-hold may be used by the REP. The commission would like to emphasize to REPs the importance of implementing the switch-hold measure in a non-discriminatory fashion. These switch-hold provisions are intended to provide a buffer against the extension of customer protections contributing to any further bad debt. The commission modifies the rule consistent with this recommendation.

*New Paragraph (6)*

The REP Group noted that under the existing rules when a customer on a level or average payment plan becomes delinquent, a REP's option for managing bad debt is to remove the customer from the plan. The customer then may be faced with a very high bill as a result of the full account balance being added to the bill. The REP Group proposed adding this new paragraph that would prohibit REPs from placing a switch-hold on customer accounts that are not delinquent when the level or average payment plan is established. The language would allow REPs to place a switch-hold on accounts that enter into a level or average payment plan if the customers incurs two late payments or is disconnected for non-payment during the first 12 months of the plan for residential customers and during the first 24 months of the plan for non-residential customers.

*Commission Response*

The commission declines to adopt the REP Group recommendation to allow a REP to place a switch-hold on a customer's account if the customer incurs two late payments or is disconnected for non-payment during the first 12 months of a level or average payment plan for residential customers and during the first 24 months of the plan for non-residential customers. Instead, based on discussions that occurred during meetings following the comment period, the commission allows a switch-hold to be placed when the customer chooses to enter into a level or average payment plan under subsection (j)(2)(B)(ii) of this section. This is a reasonable application of the switch-hold because the customer chooses a level or average payment plan instead of paying the balance due. The commission believes that it is important that a switch-hold that is applied pursuant to this para-

graph be removed upon satisfactory payment. As discussed in the commission response to comments received in Question 1, REPs shall be considered to have committed a Class B violation, which could result in a penalty up to $5,000 per day per violation if a REP erroneously places a switch-hold flag on an ESI ID that prevents a legitimate switch or fails to remove the switch-hold within the timelines specified in the rule. Additionally, the commission has established Project No. 37685 which proposes to amend §25.107(j) to classify erroneous switch-holds as a significant violation that may lead to suspension or revocation of a REP's certificate. The commission amends the rule accordingly.

*New Paragraph (7)*

The REP Group suggested that the required customer notices related to switch-holds be moved from the proposed §25.480(h)(1) to this new section. The REP Group proposal slightly modified the customer notice to acknowledge that retailers may choose not to apply a switch-hold.

*Commission Response*

The commission expects that the switch-hold will be used as a last measure to protect a REP from a probable default by a customer, not as a first response to a customer's late payment. The commission believes that the use of the switch-hold will be another means by which REPs will distinguish themselves in the market. The commission agrees with the REP Group's recommendation to put customer notices of the possibility of a switch-hold in this new paragraph and modify the customer notice to reflect that retailers may choose not to apply a switch-hold. The commission is also adopting, as part of the required notice, a specified "script" for notification of customers. During meetings held after the comment period, stakeholders reached consensus that the rule should include a "script" that a REP would provide a customer before applying a switch-hold as the result of a customer entering into a payment plan. The commission amends the rule accordingly.

*New Paragraph (8)*

The REP Group proposed moving the requirement for requesting removal of a switch-hold from subsection (l) to subsection (h). The REP Group also recommended including in subsection (h) the requirements for a REP to request removal of a switch-hold placed on an ESI ID pursuant to subsection (l). The REP Group proposal would require REPs to remove the switch-hold when the customer either pays the deferred balance owed or, if the customer entered into a level or average plan as part of the deferral plan, when the customer satisfies the terms of any deferred payment plan described in subsection (h)(4) and the customer has paid bills for 12 consecutive residential billings or for 24 consecutive non-residential billings without having been disconnected and without having more than one late payment.

Cities urged the commission to reject the REP Group proposal to add requirements that customers must meet prior to removal of a switch-hold. Cities believed that as soon as a customer completes payment on any deferred amount, a switch-hold should be removed immediately. Cities opined that the REP Group justification for the expanded requirement to be consistent with the requirements for refund of security deposits is without merit as switch-holds are an extraordinary remedy and customers should be removed from a switch-hold as soon as a customer meets the terms of the level or average payment plan.

The REP Group stated that the modifications that it has proposed for this section are important to provide a clearer overall picture of the switch-hold process as it relates to level and average payment plans and to be consistent with the requirements provisions addressing the refund of customer security deposits under §25.478.

*Commission Response*

The commission agrees with the REP Group that it is appropriate to move the requirement to request the removal of a switch-hold to subsection (h) because it believes that it will provide a clearer picture of the switch-hold process as it relates to level or average payment plans. The commission does not agree, however, with the REP Group that it would be appropriate to require the customer to pay a certain number of bills without being disconnected or receiving more than one late payment during a specified time before having the switch-hold removed. The switch-hold is only intended to protect a REP against default on payments that a customer may not be able to pay. It is not a measure to protect a REP from all possible bad debt. This request goes beyond the intention of these switch-hold provisions to provide a buffer against any further bad debt. The commission agrees with Cities that a switch-hold should be removed as soon as a customer satisfies the deferred balance of the level or average payment plan and any deferred delinquent amount from a plan entered into under paragraph (4) of this subsection. The commission amends the rule to add a paragraph consistent with this discussion.

*Subsection (j)--deferred payment plans and other alternate payment arrangements*

*Subsection (j)(1)*

Reliant noted that the commission has not proposed amending this subsection but recommended that the rule be clarified by changing the word "bill" to "balance" and add the word "online" so that REPs would have an additional option to enroll customers in deferred payment plans. Consumers agreed with Reliant to change "bill" to "balance" but did not opine on the proposal to add the word "online."

*Commission Response*

The commission agrees with Reliant and amends the rule to change the word "bill" to "balance" and adds the word "online."

*Subsection (j)(2)*

Public Citizen opined that the proposed rule would be a retreat from current customer protections. Public Citizen noted that the proposed rule would allow a REP to require 50% of the deferred amount as opposed to the current rule that limits the amount to 25% of the deferred amount. Public Citizen acknowledged that the proposed rule would ensure that LITE-UP and critical care customers would be eligible for a deferred payment plan during the months from July to August and in winters for January and February but opined that the proposed rule would restrict these customers and all other customers who express an inability to pay during the other seven to nine months of the year. Public Citizen suggested that the standard for eligibility should be expanded to include periods where winter temperatures are below 32 degrees wind chill which was the standard for winter disconnections recommended by the medical profession in 1983 when the rules were established.

OPC suggested moving several sentences from subsection (j)(2)(B)(ii) to subsection (j)(2)(B) so that customers entering into a deferred payment plan would receive the same information provided to customers entering into a level or average payment plan concerning application of the switch-hold and any balance

remaining that must be paid before the customer will be allowed to change service to another provider.

Consumers supported the proposed rule to allow customers who have not been disconnected in the past twelve months to be eligible for a deferred payment plan and disagreed with the recommendation of the REP Group and Reliant to retain the existing two disconnection notices in the past twelve months eligibility requirement. Consumers stated that often times a low-income consumer cannot obtain assistance from social services agencies until they have received a disconnection notice and that people frequently receive disconnection notices without ultimately being disconnected. Consumers stated that many customers ineligible for energy assistance may have situations where they pay after receiving a disconnection notice and it would be unfair to deny a deferred payment plan because the customer is late in paying their bill. Consumers noted that the technical feasibility of basing eligibility on actual disconnection rather than disconnection notice has been discussed and is workable in that REPs are able to identify disconnections through standard ERCOT transactions. Consumers opined that the proposed rule will financially benefit many low-and moderate-income families and referred to the most recent disconnection report filed by the PUC staff in Project No. 29760 (Item No. 2349). The report indicates that from January 2006 to September 2008 that REPs issued 909,347 disconnection notices; 140,000 disconnection orders; and that TDUs completed 100,000 disconnections. Consumers concluded that 800,000 people per month could be denied a deferred payment plan under the current rule but could qualify during the summer under the proposed rule. Consumers added that the actual disconnection is preferable because a consumer may not be aware of a disconnection order but would be aware of an actual disconnection.

Consumers opined that the discussion about consumers already on a level payment plan in the proposed §25.480(j)(2)(B)(ii) is a little confusing. Consumers suggested that if the intent is to exempt consumers already on a level or average payment plan, then the sentence should be amended to read, "A customer already on a level or average payment plan is not subject to the provisions of subsection (j)." If the intent is to include consumers already on a level or average payment plan as customers that a REP would be allowed to apply a switch-hold, then the intent should be clarified. Consumers supported the customer categories that would be subject to a mandatory REP offering of a deferred payment plan as these categories recognize these consumer groupings are in need of payment assistance. However, Consumers expressed concern that reducing the times of the year that consumers are assured of payment assistance would increase the risk of bad debt for REPs. Consumers stated that one-third of the state's population lives with no disposable income and that a financial emergency can have a domino effect throughout a family's monthly budget. Consumers added that hot summers in portions of Texas continue through September and that consumers could face high electric bills in October. Consumers suggested that it would be appropriate to require bill payment assistance for these instances. Consumers commented that the qualifier in subsection (j)(2) with respect to peak demand does not seem to have a nexus to the purpose of the rule, especially since energy efficiency program goals are to reduce peak demand. Consumers urged the commission to adopt the increased categories of consumers eligible for mandatory payment assistance but asked that the time constraints in the proposed rule be removed.

Public Policy stated that one reason driving the proposed amendments has been the health and safety of consumers who may suffer from the extreme weather temperatures experienced during hot Texas summers. While Public Policy agreed that this is a very important concern, it opined that this is already addressed by payment plans currently required under §25.29(g) and PURA §39.101(h) which prohibits disconnection of a delinquent customer when significant health issues are at stake or when the weather is expected to be too hot or too cold. Public Policy argued that the proposed rule would shift the basis for the payment plans from public health and weather to income assistance and would do little to enhance the protection of consumers' health and safety. According to Public Policy, the proposed amendments would create significant inefficiencies in the competitive retail electricity market, place a heavy debt burden on a few private companies, weaken the individual responsibility, and abridge the contractual rights of parties. Public Policy argued that concerns over the variation in REP payment plans are without merit as the variations are a sign of innovation in the competitive market. Public Policy opined that there are two legal concerns with the commission's proposed amendment:

1. PURA calls for deferred payment plans to be offered only to those customers whose bills are due during an extreme weather emergency; whereas, the proposed rule would require deferred payment plans to customers who meet a certain income or profess an inability to pay. The legislative intent is to address health and safety concerns, not income.

2. PURA requires companies to offer deferred payment plans only during extreme weather emergencies; yet, the proposed rule would require deferred payment plans during certain months. While there may be a connection to weather in the commission's proposal, Public Policy argued that the proposal goes beyond the requirements of PURA.

In addition to legal concerns, Public Policy argued that the proposal will cause harm to market participants as the result of a delinquent customer not being able to pay their debt accrued via a mandated deferred payment plan. Public Policy concluded that the best outcome for all customers would be for the commission to not adopt a rule that would require or forbid a REP to extend a deferred payment plan to any customer above what is currently required under statute.

Reliant recommended that customers who express an inability to pay and request a deferred payment plan have a minimum of six month's payment history with the REP, rather than the proposed three months, and no more than two disconnect notices during the preceding 12 months to be eligible, consistent with the existing rule. Reliant agreed with the REP Group's recommendation for subsection (j)(2) to change the trigger for winter payments from ERCOT peak demand to the occurrence of five consecutive extreme weather days during the prior month. Reliant agreed with the REP Group's proposed deletion of the word "deferred" in subsection (j)(2)(A) and the proposed deletion of subsection (j)(2)(C) as being superfluous because entry into a deferred payment plan is not one of the specific reasons for which a REP may request an additional deposit pursuant to §25.478(d)(1).

The REP Group agreed with Consumers that the proposed rule greatly expands the eligibility plans to low-income customers, critical care customers, chronic condition customers, and most customers who have not been disconnected in the prior 12 months during summer and winter months. The REP Group noted that the proposed rule also provides year-round

availability of level or average payment plans to all low-income customers, even if the customer is currently delinquent in payment at the time the level or average payment plan is established. The REP Group also pointed out that the proposed rule provides year-round access to payment plans for all customers affected by an extreme weather event and for all customers affected by a Governor's declaration of disaster. The REP Group stated that all of these expanded protections are part of a comprehensive solution that the commission and stakeholders have been working to achieve. The REP Group opined that a comprehensive solution must balance the protection of at-risk customers, especially in summer and winter months, while limiting the increases in bad debt costs that would be ultimately borne by customers who timely pay their electric bills. The REP Group strongly disagreed with the assertion by Consumers that the commission should mandate minimum payment standards for deferred payment plans voluntarily offered by REPs at any time during the year. REPs should continue to have the flexibility to work with customers to arrange deferred payment plans specific to their mutual needs and the rule should not be expanded to mandate the down payment and number of installments for deferred payment plans outside those required by the rule for summer and winter months.

The REP Group agreed with Reliant that the existing criteria for determining eligibility for deferred payment plans based on whether the customer has had no more than two disconnection notices in the previous 12 months works well and should be retained. The REP Group also agreed with Reliant that two disconnection notices in three months is a strong indicator of a poor payment pattern and that the minimum three-month requirement for a customer to have received electric service to be eligible for a deferred payment plan should be increased to six months. The REP Group opposed the other commenters' suggestion that credit worthiness should be based on a physical disconnection rather than receipt of disconnection notices. The REP Group cautioned that the statistics provided by Consumers to support its position should not be interpreted to mean that 800,000 of the 900,000 customers who received disconnection notices ultimately paid their bill before a physical disconnection was worked. The REP Group pointed to its initial comments that provided the experience of one REP where approximately 40% of its unpaid final bills were from customers in the collections path who received a disconnection notice and changed their REP before being disconnected.

The REP Group opined that REPs should not be required to proactively identify customers and offer plans to the identified customers and therefore, recommended adding the phrase "upon request" to subsection (j)(2) to be consistent with use of the phrase in subsection (j)(1)(A) and (B). The REP Group noted that proposed subsection (j)(2) and subsection (j)(2)(A)(i) and (j)(2)(B)(i) ensure that multiple payment plans are not required to be available to a customer at the same time and proposed that the rule should capture all of these requirements in one place. Accordingly, the REP Group recommended deleting the provisions in proposed subsections (j)(2)(A)(i) and (ii) and slightly modifying the proposed subsection (j)(2) to state that a REP is not required to offer a payment plan to a customer if the customer is on an existing deferred, level, or average payment plan. The REP Group recommended deleting the term "deferred" in proposed subsection (j)(2)(A) because subsection (j)(2)(B) deals with three payment types: deferred, level and average.

The REP Group urged the commission to reinstate the existing criteria of "more than two termination or disconnection notices" as the disqualification standard for a payment plan and noted that one REP's data indicated that about 55% of all residential customers who are not eligible today because of receiving at least three disconnection notices would be eligible using the proposed standard of actual disconnection in the prior 12 months.

The REP Group and Reliant opined that using the ERCOT peak demand trigger to invoke the obligation to make available special payment plans in January and February is not appropriate and recommended amending subsection (j)(2) so that invoking the payment plan obligation for January and/or February is triggered if there are at least five consecutive extreme weather days during the prior month. For organization, the REP Group recommended deleting the notice requirements in the proposed subsection (j)(2)(B)(ii) and instead including a cross-reference to the same notice requirements in subsection (h). The REP Group and Reliant recommended deletion of subsection (j)(2)(C) which states that a REP "shall not seek an additional deposit as a result of a customer's entering into a deferred payment plan under this paragraph." The REP Group and Reliant stated that the provision is superfluous since §25.478(d)(1) states the specific conditions under which a REP may request an additional deposit and does not include entering into a deferred payment plan as one of the permissible reasons for requesting an additional deposit.

*Commission Response*

Public Citizen opined that the proposed rule would be a retreat from current customer protections. The commission believes that the proposed rule expands customer protection rules and does so significantly for some vulnerable groups. The proposed rule provides greater protection for Critical Care Residential customers and establishes another protected category for Chronic Condition Residential customers. The rule also greatly enhances the debt management options available to low-income customers.

Public Policy also stated that PURA calls for deferred payment plans only during an extreme weather emergency not based on income level or during specific months of the year and that the legislative intent is to address health and safety concerns, not income. The commission disagrees with Public Policy's characterization of PURA's provisions and the intent behind them. Section 17.004(a)(4) states that the commission must protect buyers from discrimination based on income level and goes on to state that customers are entitled to programs that offer low-income customers energy efficiency programs, an affordable rate package, and bill payment assistance programs designed to reduce uncollectible accounts. Similarly, §39.101(c) reflects concerns about protecting the more vulnerable portions of our population when it states that REPs shall not refuse to provide service to a customer because the customer is located in an economically distressed area or qualifies for low-income assistance. PURA language reflects an explicit concern for the treatment of low-income customers. The commission believes that PURA does not limit the use of deferred payment plans to extreme weather emergencies. Deferred payment plans have been available upon request since the market has opened and, to the commission's knowledge, has not been challenged as a violation of PURA because the language of PURA clearly reflects the intent to protect low-income customers. It is for these very reasons that the commission has endeavored to expand the customer protections provisions of this rule for these specific types of customers.

The commission disagrees with Public Policy that requiring a 50% upfront amount is a retreat from customer protections. Initial discussions on the modifications to this rule entailed concerns about customers accumulating excessive amounts of debt. This was of particular concern in terms of the expansion of the minimum payment period from three to five months. The commission believes payment by customers of 50% of the deferred amount upfront will help ensure that a customer is not put in a position of deferring a larger amount which will still have to be paid in addition to the customer's regular monthly bill. Customers may choose to enter into a level or average payment plan as an option to a deferred payment plan. The commission has also addressed this comment in its response to Question 5.

Public Policy argued that the rule requiring REPs to offer deferred payment plans beyond what is currently required under statute will cause harm to market participants as the result of delinquent customers not being able to pay their debt accrued under the payment plan. The commission agrees with Public Policy that expanding eligibility for deferred payment plans does bring certain risks. The commission notes that customers remain responsible for paying for electricity consumed and that the REPs maintain disconnect authority when the customer does not pay. The commission believes that the switch-hold is an appropriate balance to the increased risks and will encourage customers to pay the REP for electricity consumed.

The commission agrees with OPC that customers who may have a switch-hold applied to their account as the result of entering into a deferred payment plan should be provided notice similar to that provided to customers entering into a level or average plan and amends the rule accordingly.

The commission agrees with Consumers' position that the eligibility for a deferred payment plan should be based on actual disconnections rather than disconnection notices and maintains that provision of the proposed rule.

The commission disagrees with Reliant and the REP Group that to be eligible for a deferred payment plan a customer should be required to have been with the REP for six months instead of three. The intent of these modifications is to expand eligibility for deferred payment plans and such a limitation would greatly reduce the customers that would qualify for the program. The commission does not think such a limitation is necessary given the REP's option to utilize a switch-hold if it believes that a customer will not pay their debt. The commission disagrees with the comments of Reliant and the REP Group on this point and therefore has not made changes to the rule as proposed.

The commission does not agree with Consumers that REPs should be required to provide deferred payment plans during months other than those in the proposed rule. The commission does not believe that it is necessary to expand the availability of deferred payment plans to any time of year. This rule provides low-income customers with year-round access to level or average payment plans even if the customer is delinquent in payment at the time the plan is established. The proposed rule also provides year-round access to payment plans for all customers affected by an extreme weather event and a Governor's declaration of disaster, as directed by the commission. The commission does not believe that it is necessary to expand the availability of the deferred payment plan because there are sufficient mechanisms available to customers to deal with a variety of difficult situations, regardless of the time of year. The provision of deferred payment plans are not limited to the months specified in the rule. REPs may provide deferred payment plans at any time during the year if that is a mechanism that they wish to make available to their customers year round. The commission also disagrees with Public Policy's proposal that the best outcome for all customers would be for the commission to not adopt this rule, because low-income and medically vulnerable customers are adequately protected under the current rules, particularly during the summer months. The commission declines to change the rule as proposed based on these comments.

The commission agrees with the REP Group that REPs should not be required to seek out and identify eligible customers and offer plans to the identified customers. The commission understands that REPs are not in the best position to identify which customers may need or are eligible for a deferred payment plan. Customers are in the best position to know their particular circumstances and should be the ones to request and establish their eligibility for a payment plan. However, the commission expects that REPs will offer payment plans to customers upon request without requiring the customers to use "magic words." Section 25.480(g)(1), which is not being modified by the proposed rule, already requires a REP to inform customers of all applicable payment options and payment assistance programs that are available from the REP, including deferred payment plans, together with the program's eligibility requirements and the procedures for applying for each. The commission also agrees with the REP Group request to delete the word "deferred" in subsection (j)(2)(A). The commission modifies the rule accordingly.

The commission agrees with the REP Group's recommendation to amend subsection (j)(2) so that the obligation to offer the payment plan in January and February is triggered when there are at least five consecutive extreme weather days during the prior month and amends the rule accordingly.

The commission acknowledges the REP Group position that subsection (j)(2)(C) which prohibits a REP from seeking an additional deposit when a customer enters into a deferred payment plan is duplicative of §25.478(d)(1) which states the specific conditions under which a REP may request an additional deposit. However, the commission believes that it is appropriate to retain the provision in this rule for clarity and therefore declines to adopt the REP Group's suggestion on this point.

*Subsection (j)(4)*

Reliant and the REP Group recommended deletion of "and have received a disconnection notice" so that REPs are not precluded from voluntarily offering deferred payment plans to customers who call before a disconnection notice is sent.

Consumers agreed with Reliant and the REP Group that the proposed rule should be modified to allow REPs to make deferred payment plans available to anyone expressing an inability to pay without limiting deferred payment plans to only those who have received a disconnection notice. Consumers suggested that, in fact, REPs should be required to provide deferred payment plans for all consumers that need them throughout the year, not just on a voluntary basis.

*Commission Response*

The commission agrees with Reliant, the REP Group, and Consumers that REPs should not be precluded from voluntarily offering deferred payment plans to customers who call before a disconnection notice is sent. The commission amends the rule accordingly.

The commission does not agree with Consumers that REPs should be required to provide deferred payment plans for all consumers that need them throughout the year. The commission believes that its proposal to tailor deferred payment plans to vulnerable customers during the time when the deferred payment plan is most needed is reasonable and should not be changed. Expanding deferred payment plans further would unnecessarily increase bad debt that would result in increased rates for all customers that pay on a timely basis.

*Subsection (j)(5)*

The REP Group recommended deletion of subsection (j)(5)(G) that proposed allowing either the customer or the REP to renegotiate a deferred payment plan if the customer's economic or financial circumstances change substantially during the time of the deferred payment plan. The REP Group stated that the payment plans in the proposed rules do not leave much room for renegotiation and advised against mandated renegotiation. They argued that REPs should have the flexibility to work with customers individually to determine if additional extension of credit is warranted beyond what is required by the proposed rules.

Consumers disagreed with the REP Group recommendation to delete the requirement for REPs to renegotiate deferred payment plans if the customer's economic or financial circumstances change substantially during the time of the deferred payment plan. Renegotiation would promote the goal that REPs get compensated and the minimum standard would not prevent REPs from entering into more than one renegotiation.

*Commission Response*

The commission agrees with Consumers that renegotiation of deferred payment plans would promote the goal that REPs be compensated but is persuaded by the REP Group's argument that such renegotiation should not be mandated and that REPs should have flexibility to work with customers individually to determine whether an additional extension of credit is warranted and what mechanisms could be used to better address the customers' needs. In a competitive market, the commission believes that such flexibility allows REPs to distinguish themselves in their own way and to respond to their customers in a way that is appropriate to the individual customer, the REP and the relationship between the two. The commission amends the rule to delete subsection (j)(5)(G).

*Subsection (j)(6)*

Reliant and the REP Group recommended removal of the requirement for additional notice prior to disconnection when terms of a deferred payment plan are not met consistent with the policy established in subsection (i), which states "if the customer does not fulfill the terms of the payment arrangement, service may be disconnected after the later of the due date for the payment arrangement or the disconnection date indicated in the notice, without issuing an additional disconnection notice."

The REP Group recommended modifying this paragraph to allow REPs to include notice on or with the customer's bill that failure to pay an installment payment by the due date may result in disconnection without further notice. The REP Group argued that the existing and the proposed rule would require the REP to send the customer a new notice after the customer defaults under the terms of the deferred payment plan and would cause the REP to incur the costs of providing another 11 to 15 days of electricity while the notice is provided. The REP Group stated that its proposal would allow REPs to include on or with the customer's bill a notice that the REP may pursue disconnection without additional notice if the customer fails to pay an installment payment by the installment due date similar to the disconnection process allowed by §25.478(c)(3) for initial deposits from existing customers.

Consumers and Cities strongly opposed the REP Group's recommendation to allow REPs to disconnect customers without further notice if the REP includes a statement with or on the customer's bill that failure to pay an installment payment by the due date may result in disconnection without further notice. Consumers reiterated its position that many low-income consumers cannot obtain financial assistance for their electric bill unless a disconnection notice is issued. The goal of providing people with the ability to compensate the REP for electric services provided would be frustrated without provision of the disconnect notice. Cities concluded that the REP Group failed to demonstrate that their bad debt problem justifies another extreme measure.

*Commission Response*

The commission agrees with Consumers that REPs should be required to provide a disconnect notice pursuant to §25.483 of this title before disconnecting the customer's electric service. The purpose of this rule is to provide low-income and other vulnerable customers with better bill payment assistance. As Consumers noted, many low-income consumers cannot obtain financial assistance for their electric bill unless a disconnection notice is issued. An important part of that is making sure that the rule provides the mechanisms necessary to obtain the assistance that customers require. Accordingly, the commission declines to adopt the suggestions of Reliant and the REP Group on this issue.

*New subsections (j)(7) and (j)(8)*

The REP Group noted that the proposed rule includes the requirements for adding and removing switch-holds elsewhere in the rule. However, the REP Group offered that it would provide a clearer overall picture of the switch-hold process as it relates to deferred payment plans if the requirements were included in this subsection. The REP Group proposed modified language to allow a REP to apply a switch-hold while the customer is on a deferred payment plan and require the REP to submit a request to remove a switch-hold when the terms of the deferred payment plan are satisfied.

*Commission Response*

The commission concurs with the REP Group that it would provide a clearer picture of the switch-hold process to state that a REP may apply a switch-hold while the customer is on a deferred payment plan and that the REP is responsible to submit a request to remove a switch-hold when the terms of the deferred payment plan are satisfied. The commission amends the rule accordingly.

*Subsection (l)--Switch-hold*

Authority and Policy Concerns

Public Citizen opposed the originally published rule and understood that this rulemaking was to explore new customer protections to protect vulnerable electricity customers from dangerous disconnections. Public Citizen opined that the adoption of this dangerous new policy which allows REPs to prevent customers from choosing new providers would raise the question of whether the PUC's mission is to protect customers or to pro-

tect competition. The proposal seems to reflect a stronger desire to protect the interests of electric companies over the interests of electricity customers in need of help. Public Citizen urged the commission not to adopt the proposal for publication and suggested opening two new rulemakings: one to adopt rules which provide robust protections for vulnerable Texans facing dangerous electricity disconnections, and a second to address the so-called "bad debt" issue. Public Citizen agreed with others that the commission lacks authority to establish a rule that blocks a customer from choosing a new provider. A switch-hold would prevent a customer from choosing a new provider with a lower price and would block that customer from realizing savings that could be used to pay back the initial REP. Additionally, Public Citizen stated that a switch-hold would be anti-competitive because it would restrict REPs' access to potential customers and would be dangerous for customers because customers could be disconnected for longer periods of time. Public Citizen noted that, on average, approximately 100,000 premises are disconnected each month. Some of these premises have households with older people, sick people, or children under the age of four. Public Citizen added that, according to the Center for Disease Control, these categories and others are at a higher risk of heat related illness during hot weather.

OPC strongly opposed subsection (l) in its entirety relating to switch-holds. If the commission were to approve the switch-hold process, OPC expressed its belief that REPs should have the discretion to remove a switch-hold for any reason that it deems appropriate and not be limited to removing a switch-hold only if the customer has satisfied the deferred payment plan or has been removed from the level or average payment plan after paying any balance owed.

Public Policy argued that the competitive retail electric market is quite different from the regulated monopoly markets in which a customer does not get reconnected until the bill is paid. The competitive retail electric market is similar to the general marketplace where companies employ various tactics to recover bad debt but the companies cannot stop their customers from making purchases elsewhere. The commission should not be concerned about the fact that the level of bad debt has increased because of competition. Bad debt resulting from legally mandated deferred payment plans should be addressed but not by a switch-hold. Public Policy concluded that imposition of the switch-hold and the extension of deferred payment plans is beyond the commission's statutory authority and will cause harm to the competitive retail electric market in at least four ways: 1) increase the cost structure of REPs by requiring extension of credit in contravention to fundamental credit practices, 2) introduce substantial administrative inefficiencies in the electric market, 3) jeopardize the investment of capital into the Texas market which will ultimately reduce competition and raise prices, and 4) disrupt customer choice. However, Public Policy opined that if the commission were to expand the deferred payment plans, it should not do so without the switch-hold--even though this would harm competition and increase consumer prices.

State Representatives Pierson, Turner, and Walle expressed concern about the switch-hold process and opposition to the direction being taken by the commission in this project. Representative Turner noted that this project was opened by the commission to seek a permanent solution to the summer disconnect moratoriums filed every year, not to bail REPs out of their bad debt. Representative Turner and OPC reiterated their position that the commission does not have the legal authority to impose any type of switch-block as discussed in their comments filed in Project No. 37291 on January 22, 2010 (Item No. 35). Besides being contrary to PURA, Representative Turner opined that the switch-hold process is a dangerous policy because it would likely result in Texans being disconnected for longer periods of time than they would be when compared to disconnects under current rules. While Representative Turner stated his belief that current PUC rules are woefully deficient when it comes to protecting people from dangerous disconnections, he stated that the proposed switch-hold process is even worse. He noted that his office, along with many consumer organizations, brought concessions to the table to try and address REP concerns about bad debt, but that REPs were unwilling to look at other options and held a steadfast position that switch-holds were the only solution. Representative Turner characterized the REP position as being disingenuous and a non-starter for his office and others.

Representative Walle stated that a switch-hold would disproportionately harm lower-income customers who struggle to make ends meet and would prevent a family from changing electric providers even though a better deal is available elsewhere.

State Representative Pierson disagreed specifically with the way that three points are being approached in this project:

1. The proposed rule would leave those who need electricity the most without service during hot Texas summers.

2. The commission seems to be making a decision based on the abundant amount of bad debt for REPs without releasing any specific support for the bad debt numbers. Representative Pierson suggested that the commission conduct a study or release statistics that would support the need for switch-holds based on the specific customers who will be most affected. State Representative Turner agreed with State Representative Pierson that there is a lack of information concerning how much bad debt there is and how it may affect the market. He added that the bad-debt issue does not seem to be market wide and that a large portion of the market deals with defaults of payment as part of their business model.

3. By removing the customer's ability to choose with the institution of a switch-hold, the commission will remove the whole concept and reason for deregulation. State Representative Pierson opined that the switch-hold contradicts the idea of shopping around in order to find the lower price. State Representative Turner agreed and noted that it would be hard to heed the advice of the commission to shop the market for lower prices while the commission is simultaneously attempting to tie the hands of customers and force them to stay with their provider.

State Representative Pierson concluded that the commission should leave the issue of switch-holds for legislators to decide based on what is best for their constituents after there has been an opportunity to discuss and debate the issue on the House floor.

Consumers adamantly opposed the use of the switch-hold process as a means of reducing bad debt in the competitive electricity market and argued that the commission lacks statutory authority to implement the process. Consumers stated that there is no study and no evidence presented that the switch-hold process will be effective in mitigating bad debt or that this level of commission interference into the competitive market is the only alternative for controlling bad debt. Consumers stated that the commission has not done a study concerning REP debt collection and underwriting practices, and therefore the commission does not have any knowledge of why current market

mechanisms cause some REPs to have significant amounts of bad debt and others significantly less. Consumers stated that several questions should be answered prior to implementing the switch-hold process in answer to a bad debt problem. They opined that the answers could reveal that current bill payment plans contribute to large levels of REP debt or could reveal that REPs are taking huge risks and would be rewarded by a provision such as the one proposed here. Consumers characterized bad debt as being a cost of doing business in a competitive market and that a switch-hold process should not be adopted that would compromise access to the retail competitive market.

In addition, Consumers opined that there is no provision in PURA that provides the commission authority to restrict consumer and REP access to the retail electric market through the anti-competitive practice of tying a competitive retail electric service with a monopoly service. While Consumers acknowledged that there may be some implied authority in PURA, any implied authority must be consistent with PURA's legislative intent as defined by the plain language of the Act. PURA's plain language speaks of bill payment plans as part of a REP's services to be offered consumers and requires the commission to implement a retail market that provides for full and fair competition among all providers of electricity and ensures that consumers will have access to a provider of last resort. Consumers stated that the Legislature directed the commission to ensure consumers have the power to choose in several sections of PURA (PURA §§17.004(a)(2), 39.001(b)(1), and 39.101(b(2)) and implied within the consumer's power to choose is the power to quit. The Legislature also directed the commission to ensure that all buyers and sellers of electricity have access to the transmission and distribution systems. Consumers stated that a switch-hold provision would restrict consumers and sellers access to the transmission and distribution systems contrary to PURA §39.151. Consumers argued that allowing a REP to place a switch-hold on a consumer's access to the competitive retail market would be like "placing a regulatory thumb upon the scales of the competitive market." The proposed switch-hold process would allow REPs to exploit the consumer by charging fees and prices that are anti-competitive because the consumer would be placed in a monopoly position without the benefit of price protection. This would allow REPs to set any rate it wishes without fear of competing with other REP price offers and allow REPs to exploit the most vulnerable customers because they are financially fragile and hampered in their abilities to pay off a debt for which they needed a deferred payment plan. Consumers argued that a switch-hold is not a regulatory tool the commission was provided by the Legislature, is contrary to PURA, is not an enumerated duty or power of the commission, and goes beyond the commission's authority. The switch-hold is contrary to PURA §39.106 and §25.43 which require the provider of last resort (POLR) to provide electric service "to any requesting customer in the territory for which it is the provider of last resort." The commission cannot over ride that category by blocking consumer access to POLR.

Consumers found it ironic that the REP Group stated that "[c]losing the switching loophole would restore balance to the market using the model that existed before market opening" because the model that existed before marketing opening was a monopoly one. In a monopoly market, the consumers are held captive but the company's services are regulated to ensure that the captive customers are protected against poor service and excessive rates. Consumers opined that the proposed rule would create a captive customer without provisions to protect consumers against excessive rates. Consumers stated that the REP Group has succinctly described what a switch-hold provision is--a component of a monopoly market and as such is antithetical to the competitive model intended by the legislature in de-regulating the Texas electric market.

Consumers noted that the commission authorized REPs to use late penalty fees to address REP collection costs in Project No. 22255 in 2001 and that the commission added the tool of disconnection to the REPs' tools to address the costs in Project No. 27084 (Rulemaking to Revise Customer Protection Rules, §§25.486 - 24.490) in 2004. Consumers recalled that in the preamble to the order promulgating the amendments to the customer protection rules in Project No. 27084 that the commission stated, "[t]he Commission declines to adopt a policy allowing all REPs the right to prevent a customer from switching to another REP until the customer pays all outstanding balances. The commission agrees with RRI (Reliant Resources, Inc.) that there are numerous tools allowable under the customer protection rule which would provide sufficient protection for the REPs. REPs may require that a customer with bad credit or poor payment history to pay a deposit. In addition, REPs may assess late fees and disconnect customers who fail to make timely payments and develop other billing strategies that will minimize their risk (for example, direct debit from credit cards or bank accounts)." Consumers commented that since the conclusion of these two projects, the REPs added disconnection and reconnection fees, insufficient check fund charges, and the filing of bad credit reports with credit reporting agencies as additional tools to address bad debt. Consumers agreed with Reliant that these tools are effective in mitigating bad debt and the commission should investigate if REPs are using these existing tools effectively. REPs should be required to work with the customer and the secondary contact to arrange workable payment arrangements and assist in providing information on available bill payment assistance resources rather than being allowed to place a switch-hold on the customer's account.

Consumers added that the proposed switch-hold process would extend the consumer's deferred payment plan with their existing REP by one business day until the switch-hold could be removed. This delay of a business day would cause consumers, who paid deferred payment plans in a timely manner, to not gain access to the market for twenty-four hours which can cause them to miss a price offering that may be materially less than the prices posted the next day.

Reliant stated that subsection (l) is unnecessary and should be stricken. They reiterated their position that the costs to the market far outweigh the benefits of implementing a switch-hold process, especially for REPs that responsibly employ the measures allowed by current commission rules and use other commercially viable tools to manage and mitigate exposure to bad debt. Reliant added that the proposed §25.480(j)(2)(B)(i) strengthens these available measures by allowing a REP to require a 50% initial payment in order for a customer to enter into a deferred payment plan. The proposed rule also allows REPs to consider insufficient fund payment in determining whether to extend credit via a deferred payment plan. Reliant not only opposed the switch-hold as proposed in this rule but it also opposed any expansion of the switch-hold as proposed by the REP Group.

The REP Group disagreed with other stakeholder positions that stated the commission lacks authority to implement the proposed switch-hold process and noted that PURA clearly authorizes the

commission to adopt and enforce rules relating to the extension of credit, level billing programs, and termination of service *(e.g.,* PURA §17.004(b) and §39.101(e)). For additional support, the REP Group added that the commission recently rejected identical and similar arguments concerning lack of authority in Project No. 37291 (Meter Tampering Rule, §25.126). The REP Group noted that the switch-hold language approved in Project No. 37291 requires placement of a switch-hold once meter tampering has been determined; whereas, the switch-hold language in this proceeding allows a REP to place a switch-hold. The REP Group noted that in adopting the switch-hold process in Project No. 37291, the commission reasoned that the interest of a small segment of customers who do not pay their bills are outweighed by the interest of all customers in the competitive market to receive reasonably priced electricity, a customer protection entitlement cited in PURA §39.101(a)(1). The REP Group concluded that the same reasoning to justify implementation of a switch-hold equally applies in this project and added that the bad debt that accumulates when customers fail to fulfill their financial obligations would increase the price of retail electric service to the detriment of the universal customer interest. The REP Group suggested that the switch-hold process is a first step that will assist REPs in closing a problematic loophole of bad debt but that it will not address the problem completely as customers who are not on a payment plan can still switch providers without paying outstanding balances and final bills. The REP Group stated that the TDU tariff changes adopted in Project No. 36536 (Rulemaking to Expedite Customer Switch Timelines, §25.214 and §25.474), which allow customers to switch to a new provider in seven business days, will exacerbate the bad debt problem by making it even easier for some customers to switch away from unpaid accounts. Specifically, when the seven day switching process is combined with the existing ten days disconnect notice, a customer can switch before a disconnection can be effectuated. The REP Group opined that REPs are constrained in addressing bad debt issues by PURA §17.008(d) that prohibits REPs from denying service to an applicant based on the applicant's credit history, credit score, or utility payment data. The REP Group recognized that PURA §17.008(d) allows REPs to deny service based on the applicant's electric bill payment but stated that previous efforts to investigate the possibility of creating a customer payment database for use by REPs in the competitive retail market have failed to progress to any meaningful stage. The REP Group added that REPs are also constrained from addressing the bad debt issue by certain customer protection requirements imposed by various commission rules. The REP Group rejected the comparisons made by Consumers between bad debt in the competitive electric service industry and other competitive service industries because the competitive industries are not subject to the same type of credit extension and customer deposit requirements as the competitive electric service industry. The REP Group stated that provisions in PURA §17.004(b) and §39.101(c) limit a REP's discretion to address credit and customer deposit issues to limit or mitigate bad debt exposure. The REP Group added that many of the industries cited by Consumers for comparison *(e.g.,* mobile phone, cable TV, and Internet) bill in advance, not in arrears as is the common practice in the electric industry. The REP Group pointed out that while PURA §39.001(d) directs the commission to use competitive rather than regulatory methods to achieve the goals of PURA and to adopt practical rules that impose the least impact on competition, §25.480 provides only limited avenues for competitive solutions to resolve bad debt. The REP Group argued that the right of a customer to choose a REP, embodied in PURA §§17.004(a)(2), 39.101(b)(2), and 39.102, is not absolute, contrary to argument of other stakeholders opposing the switch-hold process in Project No. 37291 and in this proceeding. The REP Group opined that the right to choose a REP is not the same as the right to switch retail electric service without condition and that PURA §39.101(b)(2) expressly conditions the exercise right of customer choice on consistency with Chapter 39 of the statute. According to the REP Group, the switch-hold provisions proposed in this proceeding are specifically within the commission's authority to adopt and enforce rules relating to the extension of credit, level billing programs, and termination of service under PURA §17.004(b) and §39.101(e). The REP Group stated that PURA §§17.004(a)(1), 39.101(b)(6), and 39.101(e) authorize the commission to adopt and enforce rules to protect retail electric customers from fraudulent, unfair, misleading, deceptive, and competitive practices. As noted in Project No. 37291, such practices are not limited to REP actions but may also encompass the actions of retail electric customers. The REP Group added that §25.27(f)(1)(E) requires customers in areas where customers have the option to switch outside of ERCOT to pay a switchover fee and any other outstanding charges prior to initiating service with another provider. The REP Group opined that the objective underlying this requirement is no different from the objective underlying the switch-hold process in this project which is to ensure that the departing customer has satisfied its payment obligations to its current service provider prior to receiving electric service from another provider. The REP Group opposed the suggestion of AARP, Public Citizen, State Representative Pierson, and Consumers that the commission should conduct additional studies of the bad debt issue and noted that the commission has already examined these issues as early as the year 2003 in Project No. 27084.

The REP Group rejected Consumers' assertion that the switch-hold mechanism would allow REPs to exploit the consumer by charging fees and prices that are anti-competitive. The REP Group noted that the switch-hold does not in any way abrogate the commission's customer protection rules. The REP of record is required to provide non-discriminatory service and abide by all other customer protection rules while a customer's ESI ID is on a switch-hold. The REP Group noted that the commission considered whether a switch-hold would disadvantage a customer with respect to price in the meter tampering rule. The commission determined that a REP should have the discretion to place a customer whose fixed price contract expires while on a switch-hold on a default month-to-month product and that the terms of the default product are mandated by §25.475(e)(1). The REP Group also added that the commission's complaint process would be available to any customer who believes that the REP has taken inappropriate actions.

*Commission Response*

The commission disagrees with commenters that the commission lacks authority to implement a switch-hold. PURA §17.004(b) and §39.101(e) grant the commission the authority to adopt and enforce rules necessary or appropriate to establish standards for REPs relating to extension of credit and termination of service. PURA §17.004(a)(11) also entitles low-income customers to an affordable rate package and bill payment assistance programs designed to reduce uncollectible debts. PURA §39.101(a)(1) requires the commission to ensure that retail customer protections are established that entitle a customer to reasonably priced electricity. The rule is an expansion of the REP's responsibility to undertake significant risks of non-payment by customers by extending additional credit

to customers that under the current rules would not qualify. Allowing REPs to employ switch-holds in conjunction with the increased costs of extending credit to customers is consistent with this requirement as it helps protect customers from higher prices that may result from the increased risk of non-payment associated with the extension of additional credit. A REP's ability to mitigate the risk of bad debt is limited by law. PURA §17.008(d) provides that a REP may not deny an applicant's request to become a residential electric service customer on the basis of the applicant's credit history, credit score, or utility payment data. Although this provision allows a REP to use an applicant's electric bill payment history, this information is usually not readily available. As previously discussed, the commission lacks the ability to require REPs to pay for the type of database that would allow REPs to use customer electric bill payment history in a meaningful way. The commission does not have the authority to set rates for electricity in competitive areas nor does it have the authority to require REPs to provide electricity at no cost to their customers.

The commission disagrees with the Public Citizen's statement that the proposed rule reflects a stronger desire to protect the interests of electric companies over the interests of electricity customers. The role of the commission is to protect the overall public interest, which includes consumers, utilities and retail electric providers. The goal of the commission is to balance the interest of all the stakeholders in a way that protects their respective interests without compromising the integrity of the state's electric system or the market. As evidenced by the many summer moratorium requests over the last ten years, some stakeholders have expressed concern that the commission's existing rules may not have adequately protected some of the most vulnerable. This rulemaking project has been undertaken to address that concern. The commission believes that this rule balances the needs of low-income and other vulnerable customers with the need to ensure that customer defaults on deferred payment plans do not result in bad debt that would be reflected in higher overall rates for customers. Public Citizen also suggested opening a rulemaking to adopt rules which provide robust protections for vulnerable Texans and another to address the so-called electric company "bad debt" issues. This rule accomplishes the goal of the first suggested rulemaking by expanding debt management options for low-income and other vulnerable customers and addresses the second suggested rulemaking to address bad debt issues by limiting REPs' credit exposure.

Public Citizen and others believe that the commission lacks authority to establish a rule that blocks a customer from choosing a new provider. The commission agrees with the comments of the REP Group that the commission does have the authority to adopt a switch-hold process in this rule. As correctly noted by the REP Group, the commission rejected identical and similar arguments regarding lack of authority in Project No. 37291 (Meter Tampering Rule, §25.126). The commission agrees with the REP Group which noted that the switch-hold language approved in Project No. 37291 requires placement of a switch-hold once meter tampering has been determined; whereas, the switch-hold language being adopted in this rule merely allows, but does not require, a REP to place a switch-hold. The REP Group noted that in adopting the switch-hold process in Project No. 37291, the commission reasoned that the interest of a small segment of customers who do not pay their bills are outweighed by the interest of all customers in the competitive market to receive reasonably priced electricity, a customer protection entitlement cited in PURA §39.101(a)(1). The commission agrees with the REP Group that the same reasoning to justify implementation of a switch-hold applies equally in this project in that the bad debt that accumulates when customers fail to fulfill their financial obligations would increase the price of retail electric service to the detriment of all electric customers. As the REP Group also noted, the switch-hold process is not a universal solution to the bad debt problem as customers who are not on a payment plan can still switch providers without paying outstanding balances and final bills. The REP Group further noted that there are other limitations on the REPs' ability to address the bad debt problem and that this rule is an important step in assisting REPs with this issue. The commission agrees and believes that this rule provides an appropriate balance between the interests of customers and REPs.

The commission agrees with the comments of the REP Group that the comparisons made by other commenters between bad debt in the competitive electric service industry and other competitive service industries are not valid because other competitive industries are not subject to the same type of credit extension and customer deposit requirements as the competitive electric service industry. PURA §39.101(c) limits a REP's ability to refuse to serve a customer based on race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, familial status, location in an economically distressed geographic area or qualification for low-income affordability or energy efficiency services. PURA §17.008(d) limits a REPs ability to deny an applicant's request for service on the basis of the applicants credit history, credit score or utility payment data. These limitations are not present in many of the industries cited for comparison by some of the commenters representing the public interest groups. The commission believes that these limitations reduce the ability of REPs to address their bad debt problems.

The commission also agrees with the REP Group that the right of a customer to choose a REP, as reflected in PURA §§17.004(a)(2), 39.101(b)(2), and 39.102, is not absolute, contrary to arguments made by commenters opposing the switch-hold process in this rule as well as the switch-hold process adopted in Project No. 37291.

The commission concludes that the right to choose a REP is not the same as the right to switch retail electric service without condition and that PURA §39.101(b)(2) expressly conditions the exercise right of customer choice on consistency with Chapter 39 of the statute. The switch-hold provisions adopted in this rule are within the commission's authority to adopt and enforce rules relating to the extension of credit, level billing programs, and termination of service under PURA §17.004(b) and §39.101(e). Moreover, PURA §§17.004(a)(1), 39.101(b)(6), and 39.101(e) authorize the commission to adopt and enforce rules to protect retail electric customers from fraudulent, unfair, misleading, deceptive, and competitive practices. As noted by the commission in Project No. 37291, such practices are not limited to REP actions but may also encompass the actions of retail electric customers. As the commission also noted in Project No. 37291, §25.27(f)(1)(E) requires customers in areas where customers have the option to switch outside of ERCOT to pay a switchover fee and any other outstanding charges prior to initiating service with another provider. The commission believes that the objective underlying this requirement is no different from the objective underlying the switch-hold process adopted in this rule which is to ensure that the departing customer has satisfied its payment obligations to its current service provider prior to receiving electric service from another provider.

The commission disagrees with the suggestion of AARP, Public Citizen, State Representative Pierson, and Consumers that the commission should conduct additional studies of the bad debt issue as the commission has already examined these issues as early as the year 2003 in Project No. 27084 (Rulemaking to Revise Customer Protection Rules, §§25.486 - 24.490). In Project No. 27084, the commission noted that one of the goals of competition is for the industry to offer better prices and that retail prices for other customers are adjusted upward to recover costs associated with uncollectibles from customers that do not pay their bills. The commission concluded that a market structure that provides little or no consequence for the small subset of customers who do not timely pay their REP for service rendered will increase the costs of providing service to all customers, and ultimately result in higher rates for all customers. The commission considered the REP request for "hard disconnect" authority but ultimately concluded that there was no mechanism in place to handle "hard disconnections" and that the customer protection rules adopted in that project would be adequate to address REP concerns about uncollectible debt. The commission also decided that if the tools proved to be inadequate the commission might entertain proposals for a "hard disconnect" or "switch-hold" in the future.

The commission also disagrees with the assertions by Consumers that the switch-hold mechanism will allow REPs to exploit the consumer by charging fees and prices that are anti-competitive. The switch-hold process adopted in this rule in no way abrogates the commission's customer protection rules. The REP of record remains obligated to provide non-discriminatory service and abide by all other customer protection rules while a customer's ESI ID is on a switch-hold. Additionally, the commission's complaint process (both informal and formal) will be available to any customer who believes that the REP has taken inappropriate actions under this rule.

Public Citizen also raised concerns that a switch-hold would prevent a customer from switching to another REP and using the realized savings to pay back the initial REP and that the switch-hold would restrict REPs' access to potential customers. The commission appreciates the concerns but believes that a customer will always have the option to switch so long as they pay off their debts to their current provider. The commission believes that the institution of the switch-hold is a fair trade off for the increase in debt management options that this rule will provide to vulnerable customers.

Consumers argued that the switch-hold is contrary to PURA §39.106 which requires the provider of last resort (POLR) to provide electric service "to any requesting customer in the territory for which it is the provider of last resort" and to §25.43 which requires POLRs to "ensure that its service is available to any requesting retail customer." The commission reads these requirements as a directive to POLRs that their service should be made available to any requesting retail customer. The switch-hold process does not impinge upon that directive as POLRs are still required to ensure availability of their service. The switch-hold does require the customer to pay for credit extended by the existing REP for electric service consumed prior to switching to any other provider, including a POLR. If the REP exercises its rights to disconnect service pursuant to §25.483, the switch-hold shall continue to remain in place and the customer will not be able to choose another provider until the customer's obligation to the REP related to the switch-hold is satisfied. It is essential for continued success of the competitive market that customers pay REPs for electric service and any deferred amounts. The customer's freedom of choice is not limited by the switch-hold so long as that customer pays off the credit extended by the REP. As discussed in detail in the Authority and Policy Concerns section of the preamble regarding §25.480(l) below, the customer's right to choose a REP in the competitive market is not an unconditional right.

OPC made a point that REPs should have the discretion to remove a switch-hold for any reason. This suggestion is in keeping with maintenance of a competitive market and the commission believes that the rule would not prevent a REP from doing so. The commission believes that this is another opportunity for REPs to distinguish themselves in the market from other REPs by limiting their use of the switch-hold.

Public Policy argued monopoly markets are different than competitive retail electric markets: there is no price protection for customers and companies must employ various tactics to recover their bad debt, and companies cannot stop their customers from making purchases elsewhere. Public Policy stated that the commission should not be concerned about REP bad debt because the level of bad debt has increased from the levels before the market opened. The commission accepts that bad debt is part of the market and must be dealt with as each REP sees fit for itself. The switch-hold is not an attempt to solve the bad debt problem. The commission understands that the modification of these rules increases REP risk by expanding the eligibility of low-income customers for deferred payment plans and level or average payment plans. Therefore, the commission is adopting the switch-hold process in an effort to minimize or reduce the contribution of these regulations to the growth of the bad debt problem. Public Policy agrees that bad debt resulting from legally mandated deferred payment plans should be addressed but not by use of a switch-hold. It also stated that if the commission expanded deferred payment plans, it should not do so without the switch-hold. The commission disagrees with Public Policy that the proposed rule will harm the competitive retail electric market. The competitive market is strengthened when the competitive companies have the tools to incent the customer to pay for electricity consumed. REPs should not be required to provide free electricity.

Representative Turner and Public Citizen noted that the switch-hold process is a dangerous policy because it would likely result in Texans being disconnected for longer periods of time than they would be when compared to disconnects under current rules. The commission appreciates Representative Turner and Public Citizen's concerns; however, the commission cannot predict whether customers will be disconnected for longer periods of time than they would be when compared to current rules. The commission has instituted reporting requirements to monitor the processes set forth in this rulemaking.

Representative Walle stated that a switch-hold would disproportionately harm lower-income customers and would prevent a family from changing electric providers even though a better deal is available elsewhere. The commission is not persuaded that low-income customers would be disproportionately harmed by this rule. On the contrary, the REP Group's stated that LITE-UP customers that accepted a deferred payment plan defaulted 45% of the time as compared to other customers that defaulted 52% of the time. Since a customer who pays bills on time will not be subject to a switch-hold and will not be prevented from changing providers, these customers should not be significantly impacted by the amendments adopted in this rulemaking.

Representative Pierson disagreed with the commission's approach because the proposed rule would leave those who need electricity the most without service during summers. Representative Pierson also raised concerns about the commission making a decision on the switch-hold based on information that has not been released. Representative Pierson suggested that the commission conduct a study or release the statistics that would support the need for switch-holds based on the specific customers who will be most affected. Specific statistics and examples have been provided in comments which indicate that there is a problem with bad debt, whatever its causes. The commission has summarized these statistics and examples and responded to similar comments in the Discussion of REP Bad Debt section of the preamble above. For the above-stated reasons the commission does not believe that it is necessary to conduct a study.

Some commenters stated that the switch-hold process will remove the whole concept and reason for deregulation which they opined was to provide customers with the ability to choose an electric service provider. Representative Pierson noted that the switch-hold would contradict the idea of shopping around in order to find the lower price. Representative Turner agreed and noted that it would be hard to heed the advice of the commission to shop the market for lower prices while the commission is simultaneously instituting the switch-hold provisions. The commission disagrees and believes that the competitive market was established on the concept that customers could choose providers and pay for the service. In cases where customers do not pay for service consumed, then the competitive market is put at risk. It is not unique to the electric market that a person consuming a good or service is responsible for paying for the good or service. The commission believes that the rules, as adopted, strike an appropriate and reasonable balance between the interests of REPs and consumers.

Technical Issues with Switch-Hold

ERCOT estimated that with the adoption of this rule that there could be an additional 24,000 MarkeTrak issues each month. ERCOT noted that it has implemented short-term solutions to reduce MarkeTrak degradation and is in the process of identifying a long-term solution to prevent MarkeTrak degradation in the future. ERCOT stated that it believes that MarkeTrak will be able to handle manual switch-holds until the market develops the automated TX Set transactions beginning on June 1, 2011 as proposed in §25.480(l)(3). Without taking a position, ERCOT noted that the REP Group proposed that the switch-hold process should become effective on December 1, 2010 and ERCOT stated it could handle the switch-hold transactions on that date. ERCOT noted that the changes would be bundled with additional TX SET changes resulting from other approved rule changes and market improvements. ERCOT pointed out that TX SET changes require at least a 14-month implementation timeline and that the proposed changes under this rule would be ready in the first half of 2012.

ERCOT requested that the proposed rule be modified to remove the last sentence of §25.480(l)(3)(B) that would require ERCOT to list ESI IDs with switch-holds on a secure area of the ERCOT website. ERCOT does not have access to customer billing information. The REP Group agreed that the last sentence of §25.480(l)(3)(B) should be deleted because the level of specificity could limit the options for delivery of information when the stakeholders develop the process to implement the rule. For consistency, ERCOT urged the commission to adopt the Joint TDUs' suggested language for §25.497(g) in Project No. 37622 for proposed subsection (l)(3)(A) - (C) in this project to provide ERCOT and stakeholders with more flexibility to develop the automated TX SET transaction. Consistent with its recommendation to adopt the Joint TDU suggested language in Project No. 37622, ERCOT proposed deleting subsection (l)(3)(A) - (C) in this project and replacing the language in subsection (l)(3) with the following: "In the TX SET release after the effective date of this rule, market transactions shall be developed to address the requirements of this rule."

To help avoid customer confusion and decrease the possibility of errors, the Joint TDUs urged the commission to ensure that any switch-hold process adopted in this rule does not conflict with the process adopted in Project No. 37291 and that the terms used in the proposed rule in this project be the same as the defined terms from the proposed §25.497 in Project 37622. ERCOT agreed with the Joint TDUs that any switch-hold process adopted in this proceeding should not conflict with the process adopted in Project No. 37291 (meter tampering rule). The switch-hold process, especially as it relates to the treatment of move-in, move-out, and switch transactions, needs to be consistent between the two rules to help ensure successful implementation and reduce problems or confusion for customers.

The REP Group agreed with ERCOT that the timeline for a TDU to remove a switch-hold in subsection (l)(3)(C) should be the same timeline as the one in the new meter tampering rule and offered that ERCOT's concern is addressed in subsection (l)(1)(E) that refers directly to the meter tampering rule. The REP Group disagreed with ERCOT's recommendation to modify subsection (l)(3)(C) because it is intended to ensure that in the next TX SET release, when a switch-hold is in place on an ESI ID and there is a move-in transaction, the move-in transaction can be held in the system, rather than being initially rejected. The REP Group recommended that the language "sent by ERCOT" should be stricken from proposed subsection (l)(3)(F) to be consistent with the staff's proposal in Project No. 37291.

The REP Group proposed removing the requirements for adding and requesting removal of switch-holds in subsection (l) and instead suggested including appropriate references to other subsections consistent with their proposal in subsections (h) and (j) that included these requirements in those subsections. The REP Group also proposed deletion of the June 1, 2011 effective date consistent with their discussion in response to preamble question 6 that proposed switch-holds be allowed on the same effective date as the overall rule. The REP Group opined that the switch-hold process is an important component to a workable comprehensive solution to expand protections for vulnerable customers who have difficulty paying electric bills, especially in the summer and winter months, while limiting further bad debt costs that would ultimately increase prices to customer who timely pay their bills. The REP Group argued that the proposed switch-hold process would not prevent customers from switching to a provider of choice but would require customers to pay back a no-interest loan before switching.

*Commission Response*

The commission agrees with the recommendation of ERCOT and the REP Group to delete the last sentence of §25.480(l)(3)(B) and modifies the rule accordingly. The commission also agrees with ERCOT and the Joint TDUs that the switch-hold process in this proposed rule should not conflict with the switch-hold process adopted in Project No. 37291 (Meter Tampering) and modifies the rule to require development of

market transactions in the first TX SET release after January 1, 2011.

*Subsection (l)(2)--effective date December 1, 2010*

The REP Group argued that it is very important that the switch-hold process become effective at the same time the REPs are required to expand customer eligibility to help mitigate the potential increased bad debt that may result from greatly expanding the application of payment plans to those customers who are unable to pay. Accordingly, the REP Group proposed deleting the June 1, 2011 effective date in §25.480(l)(2) and modifying §25.480(n) so that the December 1, 2010 effective date applies to the entire section.

Cities urged the commission to reject the REP Group's recommendation to implement the switch-hold provision of the rule beginning in December 2010 and to maintain the proposed effective date of June 1, 2011. Cities stated that a switch-hold process represents a major change in how REPs interact with their customers and that the additional time is needed for consumers to carefully evaluate the new risks and benefits of deferred payment plans under the new rule. Cities added that the additional time will help ensure the accuracy and reliability of the REPs' systems and reduce the risk that unauthorized switch-holds will occur.

*Commission response*

In post-comment period meetings with the commission, the stakeholders reached consensus that it would be appropriate to make the effective dates the same and that the effective date in this subsection should be deleted and the effective date in subsection (n) should be changed to June 1, 2011 so that the switch-hold process will be effective on the same date that REPs are required to expand customer eligibility. The commission concurs that the switch-hold process should go into effect at the same time that the additional customer protections go into effect and modifies the rule accordingly.

*Subsection (m)--Unauthorized Placement or Continuation of a Switch-hold*

Reliant stated that subsection (m) is unnecessary and should be stricken. Reliant noted that this subsection is labeled "Unauthorized placement or continuation of a switch-hold", but only paragraph (3) addresses "erroneous" placement of a switch-hold flag. Reliant opined that the subsection does not address continuation of a switch-hold. If the commission should adopt a switch-hold process, then this subsection should be clarified. Reliant commented that the first paragraph is superfluous and should be deleted as it does not authorize a switch-hold. Reliant suggested that the timeline for the REPs responsibility to request removal of the switch-hold in paragraph (2) be relocated to §25.480(l) since it applies to switch-holds generally, not to unauthorized switch-holds exclusively.

The REP Group noted that subsection (m)(2) would allow the REP only four hours to assimilate all the payments received in a day from thousands of payments and submit a file to the TDU requesting that switch-holds be removed. They contrasted this with the proposal that would provide TDUs twenty hours to remove the switch-holds based on files received from less than 100 REPs. The REP Group stated that it is essential to change the timelines so that if the customer's obligation to the REP is satisfied by 10:00 PM on a business day, the REP shall send a request to the TDU to remove the switch-hold by Noon the next business day and recommended that the TDU should be required to remove the switch-hold by 8:00 PM of the same business day that it receives the request from the REP.

Cities urged the commission to reject the REP Group's request for additional time to remove switch-holds. Due to the extremely severe nature of the switch-hold, REPs should be as expeditious as possible in removing switch-holds.

OPC appreciated the inclusion of subsection (m) and offered minor edits to strengthen the rule and provide clear guidance for the REPs. OPC proposed replacing "erroneously places a switch-hold flag on an ESI ID" with "places a switch-hold flag without meeting the requirements of subsection (l) of this title." OPC also proposed adding language that a REP will be considered to have committed a Class B violation if the REP does not remove a switch-hold within the timeline described in subsection (m)(2).

*Commission Response*

The commission disagrees with Reliant that this subsection is unnecessary and should be stricken. Reliant suggested that the timeline for the REPs' responsibility to request removal of the switch-hold in paragraph (2) be relocated to §25.480(l) since it applies to switch-holds generally, not to unauthorized switch-holds exclusively. The commission has retitled subsection (m) to relate generally to the placement and removal of switch-holds so movement of the language is not necessary.

The REP Group raised concerns about the timeline within which a REP must remove a switch-hold. The REP Group stated that it is essential to change the timelines so that it is in keeping with the realities of business practices in the industry. Cities urged the commission to reject the request for additional time to remove switch-holds. The commission appreciates Cities' concerns about expeditious removal of any switch-holds but believes that the timeline offered by the REPs is not unduly burdensome on customers and is a reasonable timeline for the competitive market. Therefore, the commission has modified the timeline to reflect the REP Group's comments and to further specify that a TDU must remove the switch-hold by 8:00 p.m. on the same business day that it receives the request if the REP notifies the TDU by 1:00 p.m. If the TDU receives the request to remove a switch-hold after 1:00 p.m., then the TDU must remove the switch-hold by 8:00 p.m. of the next business day.

OPC suggested that the commission replace language concerning a REP "erroneously" placing a switch-hold with language that would make it a violation if the REP places a "switch-hold flag without meeting the requirements of subsection (l) of this title." OPC also proposed expanding the rule to state that REPs failing to remove a switch-hold within the prescribed timeline shall be considered to have committed a Class B violation. The commission believes that "erroneously" is sufficient and perhaps more encompassing than referring to subsection (l). The commission agrees with OPC's suggestion to include failure to remove a switch-hold as part of the consideration of a Class B violation and modifies the proposed rule accordingly.

*§25.483. Disconnection of Service.*

*Subsection (g)--disconnection of critical care or chronic condition residential customer*

Authority to Disconnect Critical Care or Chronic Condition Residential Customers

AARP, OPC, and Consumers opposed disconnecting critical care residential customers under any circumstances and opined

that it would conflict with PURA §39.l01(a) that contains a mandatory requirement to ensure that medically vulnerable consumers remain in-service and do not lose electric service. AARP and Consumers disagreed with OPC's proposed language that would ensure that only chronic condition residential customers are eligible for disconnection for non-payment, rather than both critical care and chronic condition residential customers. AARP and Consumers argued that PURA §39.101(a) would also prohibit disconnection of chronic condition customers that have been found to need electricity to prevent the impairment of a major life function or sustain life. Consumers opined that disconnection of electricity service for a person on life support or a person incapable of tolerating temperature changes and maintaining life functions is a case of medical emergency and cannot be condoned under PURA.

Consumers stated that the Low Income Energy Assistance Program (LIHEAP) Clearing House reports that critical care customers are never disconnected in New York, Ohio, and Massachusetts. According to Consumers, the Maine commission must approve the disconnection of service for any residential customer. Consumers noted that other states are not so generous: Oklahoma allows a critical care disconnection to be delayed for sixty days, Wyoming allows a thirty day delay; and Alaska allows a fifteen day delay. Instead of being an example for other states to follow for customer protections, Consumers stated that adoption of the proposed rule would place Texas among the states with the weakest protections for critical care customers and there will be even more states that are doing a better job of protecting critical care customers.

The REP Group opposed Consumers' claim that this rule put Texas among those states with the weakest protections for critical care customers and noted that Consumers' citation to six states is not sufficient support for Consumers' conclusion. The REP Group submitted that limited comparisons should not be used to diminish the significance of the protections offered by the proposed rule. The REP Group noted that PURA and the commission's rules prohibit disconnection in cases of extreme weather and that the proposed rule would add additional protection to help customers avoid disconnection during the summer and winter months; include year-round protections in the case of a declared disaster; and would provide year-round availability of level or average payment plans to all low-income customers. The REP Group shared the sentiment of Consumers that all customers should pay for the electricity they use but stated it is not always possible and agreed that efforts should be made to protect critical care customers from disconnection while making as much assistance available as possible.

Consumers believed that a rule that clearly allows for the disconnection of a medically vulnerable customer is cruel and inhumane; not in the public interest; does not comport with practices in other jurisdictions; and that the deregulated electric industry must face responsibility for protecting people that are incapable of protecting themselves. Consumers pointed out that the REP Group's initial comments raised concerns that if this rule is adopted as proposed, disconnection will become the REPs' number one collection tool. Consumers opined that the commission should be required to review and approve any disconnection of a critical care or chronic condition customer.

The REP Group disagreed with commenters that implied that PURA §39.101(a)(1) completely prohibits disconnection of critical care customers. The REP Group stated that the commission has already correctly interpreted its authority under PURA §39.101 to allow for the disconnection of critical care customers, so long as such disconnections are performed with proper precautions. The REP Group stated that the commission's current disconnection rules allow for the disconnection of critical care customers subject to certain guidelines. The REP Group opined if PURA were interpreted as the commenters suggest, then it would lead to the erroneous conclusion that critical care customers do not have any obligations with respect to electric service because, regardless of their actions, they could not be disconnected. The REP Group noted that this interpretation has already been specifically rejected by the commission in adopting the current version of §25.497(c) that states that critical care customers are still obligated to pay their REPs for service received and "may qualify for deferral of disconnection." The REP Group added that deferral of disconnection is very different from the complete exclusion from the competitive market's disconnection process.

*Commission Response*

AARP, OPC, and Consumers argued that PURA §39.l01(a) contains requirements to ensure that medically vulnerable consumers not lose electric service. Consumers argued that a person on life support or a person incapable of maintaining major life functions without electricity is a case of medical emergency. The commission disagrees with this characterization. The commission agrees that PURA protects anyone from disconnection during a medical emergency. The commission does not agree, however, that it is a guarantee against any disconnection for anyone who is medically vulnerable, particularly for those with a chronic condition that does not require electricity for a device to sustain life. While the commission believes that it has the authority to establish standards to protect vulnerable customers, it does not agree that the legislature intended to allow anyone to use electricity without paying for it. Nor does the commission believe that it has the authority to require REPs to discount or offer electric services for free, even if it is for critical care or chronic condition customers. PURA §14.005 specifically permits the commission to "establish criteria and guidelines with the utility industry relating to industry procedures used in terminating services to the elderly and disabled." The commission has provided for significant notice to these vulnerable customers and allowed for the customer to provide a secondary contact to be notified prior to the REP authorizing disconnection of service.

The commission believes that it is evident in PURA that the legislature intended for the commission to address low-income and other vulnerable customers with a higher standard of care. PURA includes specific provisions to protect vulnerable customers. Section 17.004(a)(4) states that the commission must protect buyers from discrimination based on income level and goes on to state that customers are entitled to programs that offer low-income customers energy efficiency programs, an affordable rate package, and bill payment assistance programs designed to reduce uncollectible accounts. Similarly, PURA §39.101(c) reflects concerns about protecting the more vulnerable portions of our population when it states that REPs shall not refuse to provide service to a customer based on disability, because the customer is located in an economically distressed area or qualifies for low-income assistance. PURA also specifies that the commission shall require a provider to comply with these limitations. Further, in PURA §17.004(b) and §39.101(e) the commission is given the authority to adopt and enforce rules for minimum service standards relating to the extension of credit, levelized billing programs, and termination of service.

The language in PURA clearly reflects an explicit concern for the treatment of low-income and disabled customers and grants the commission the necessary powers to implement rules to protect those vulnerable customers. Section 39.903 provides a system benefit fund to, among other things, provide one-time bill payment assistance to electric customers with a seriously ill or disabled low-income customer who has been threatened with disconnection for nonpayment. The commission has not, however, received an appropriation of funds for this purpose.

Consumers stated that the proposed rule is not equal to the standards for critical care customers in other states and believed that allowing the disconnection of a medically vulnerable customer is cruel and inhumane; not in the public interest; and does not comport with practices in other jurisdictions. Consumers also believed that the deregulated electric industry must face responsibility for protecting vulnerable customers. Consumers opined that the proposed rule provides for possible disconnection of critical care customers but does not specify any special measures that must be taken to protect a critical care customer. The commission disagrees with this and notes that the proposed rule provides a mechanism for avoiding disconnection of critical and chronic condition customers and also clearly establishes what measures must be taken if a REP seeks a disconnection. Specifically, the provisions in this rule preserve the protective measures of the current rule that allow a critical care customer to seek a 63 day delay from disconnection of service, longer than several of the examples from other states provided by Consumers. The market in Texas is very different than markets elsewhere. Texas has gone even further than some other states to create a second protected class by expanding the protective measures for the disconnection of service to chronic condition customers.

While the commission appreciates Consumers' concerns that disconnection will become the REPs' number one collection tool, the commission does not believe that disconnections or threats of disconnections will necessarily increase as a result of this rule. The commission is confident that the protective measures included in this rule will greatly limit the ability of REPs to abuse the disconnect provisions. First, the rule provides that critical care customers can receive a 63 day extension from being disconnected by establishing that disconnection of service will cause some person at that residence to become seriously ill or more seriously ill. Second, the rule provides for special notice requirements prior to a REP requesting disconnection of a critical care or chronic condition customer. These notice requirements require a REP to contact the customer and the secondary contact prior to disconnection. The rule also requires that the disconnection notice be sent by the REP at least 21 days before disconnection. The commission also believes that in a competitive market REPs will judiciously disconnect customers, as excessive use of disconnections may lead customers to choose other REPs. Ultimately, the commission is more concerned about the vagueness of the current rules which address the critical care customers and believes that the modification of the rules is necessary to clearly establish standards for protecting critical care and chronic condition customers. The commission believes that these rules strike an appropriate and reasonable balance between the interests of vulnerable customers and REPs.

Consumers opined that the commission should be required to review and approve any disconnection of a critical care or chronic condition customer. The commission believes that such a process would be unworkable and lead to greater confusion by requiring the customer and REP to prepare and present information to the commission for a decision. The commission has included customer protections in the rule that require REPs to provide additional notice and allows critical care customers to receive up to a 63 day extension before disconnection by establishing that a person at the residence will become ill or more seriously ill if service is disconnected. Additionally, customers have the right to file a complaint under §25.485.

Public Interest

Consumers believe that all consumers should be responsible for paying for the electricity used but noted that this is not always possible and that efforts should be made to protect these vulnerable customers while making as much assistance available as possible. Consumers noted that utilities in California have special lower rates for critical care customers. The REPs and the TDUs can take similar steps in Texas to lower costs for critical care customers and thereby reduce their uncollectible amounts. In addition to establishment of reduced rate programs for critical care customers, Consumers stated that weatherization service and billing assistance programs should be made available to help these customers better manage their bills.

Houston noted that at the November 2009 workshop TDUs indicated that once customers are on the critical care list, their systems automatically reject disconnect notices for nonpayment. While REPs have the opportunity to pursue disconnection, they rarely do. Houston urged that the current process for disconnection should continue and that the commission should not adopt the new rule as the proposed process would be too complex and confusing. The increased complexity would increase the potential that electric service would be disconnected for an at-risk customer resulting in a life threatening situation because necessary medical equipment cannot be operated. Houston argued that the proposed rule lacks safeguards and accountability to protect critical care customers from disconnection. Houston stated that Chairman Smitherman clarified at the joint public hearing held in these projects on May 17, 2010 that the intent of the rulemaking was to establish critical care qualification standards. Based on that clarification, Houston opined that the commission did not intend to change the level of protection for critical care customers or how critical care customers are handled in this proposed rule. Houston raised its concern that elimination of the "ill and disabled" definition in existing §25.483(g) that allows customers to avoid disconnection for up to 63 days will significantly lower current protections for medically indigent customers temporarily unable to pay their bills.

The REP Group disagreed with Houston's belief that the proposed rule would lower protections for critical care customers and argued that the proposed rule would actually provide stronger protections for critical care customers by providing the following: (1) the use of two designations (critical care and chronic condition) would increase the number of customers eligible for protection; (2) critical care designation would last for two years rather than one; (3) critical care customers would receive an extended disconnection notice period of 21 days; (4) all critical care and chronic condition residential customers would be eligible for extended deferred payment plans and level or average payment plans; and (5) secondary emergency contacts would be contacted prior to disconnection to ensure that proper accommodations are made for the affected customer. The REP Group also noted that the City of Houston did not come forward with government assistance to address the societal issue and provide bill payment assistance to financially-challenged critical care customers in its municipal area.

The REP Group referred to existing commission rules and tariff provisions that protect these critical care customers and noted that those provisions are not changing in this proposed rule. Section 25.480(g) requires REPs to inform customers who express an inability to pay about all payment options and payment assistance programs. Critical care customers may be eligible for such assistance and §25.483(h) prohibits REPs from authorizing disconnection when a pledge is received from an energy assistance agency and requires REPs to give the agency 45 days to honor the pledge. The REP Group pointed out that the standard retail delivery tariff applicable to all TDUs also provides additional stopgap protections to medically vulnerable customers. Section 4.3.9.1 requires the TDUs and REPs to ensure that a customer's critical care designation is properly identified in the competitive market's systems. Section 5.3.7.4 prohibits TDUs from disconnecting electric service when such disconnection will cause a dangerous or life-threatening condition, without prior notice of reasonable length so that the customer can ameliorate the condition. In the event service is disconnected, Section 5.3.7.3 requires that these customers have their service restored as soon as possible following the alleviation of the cause of disconnection. The REP Group anticipated that these tariff sections will need to be revised once the new rules are adopted.

The REP Group shared the sentiment of Consumers that all customers should be responsible for paying for electricity they use but that is not always possible and that efforts should be made to protect critical care customers from disconnection while making as much assistance available as possible. The REP Group noted that Consumers proposed that billing assistance programs be targeted toward critical care customers. The REP Group added that Consumers' statements highlight the important task of addressing service to critical care customers. The REP Group maintained that a long-term solution for service to this vulnerable group can only be achieved through market-wide efforts, coupled with a legislatively-approved assistance program. The REP Group noted that REPs and consumer groups have tirelessly advocated in every Legislative session that the System Benefit fund be used for what it was intended. Absent a legislative solution, the REP Group opined that the commission has appropriately taken responsibility for addressing the needs of vulnerable customers within the context of a comprehensive solution that balances the need for protections with the financial exposure to REPs.

*Commission Response*

The commission appreciates Consumers' comments regarding reduced rates for critical care customers and the implementation of weatherization services and bill assistance programs. Many of these programs are currently available. LITE-UP provides rate reductions for low-income customers, including critical care customers, and several utilities have weatherization programs that are available for customers to reduce their electric bills. Of course, the commission expects that the expansion of billing assistance opportunities under these rules will provide additional options for low-income or critical care customers to manage their bills. The commission disagrees with Houston that the rule will provide lower protections for critical care customers. Rather, as correctly noted by the REP Group, the commission believes that the rule as adopted will provide stronger protections for these customers. The commission also agrees with the REP Group that there are existing commission rules and tariff provisions that protect critical care customers that are not changing in this rule.

Notice of Intent to Disconnect

Consumers supported including a secondary contact that could monitor the account of critical care or chronic condition customers but never intended to include the secondary contact to justify a disconnection process for critical care customers.

The MS Society opposed including any procedures in the rules to disconnect critical care customers and opined that they should not be disconnected. OPC supported the MS Society's tiered notification system to provide disconnect notice to chronic condition customers and the secondary contact with written intent to disconnect followed by an auto-dialer call to the customer and the secondary contact, if they are not responsive to the written notice. If the customer or secondary contact does not respond to the auto-dialer, then the MS Society stated that the REP should have a person call both. If there is still no response, then the REP could issue a disconnect order. After the REP has issued the disconnect order, the MS Society proposed that the TDU contact the customer and the secondary contact. If contact is not made by phone, then the TDU should be required to visit the premise, and if there is no response, the TDU should leave a door hanger containing the pending disconnection information and information on how to contact the REP and TDU. OPC opined that it is appropriate to require the REP to make that customer contact, since the REP has the established customer relationship and is the party requesting the customer disconnection.

Consumers noted that the preamble concluded that this rule will provide benefits to the public and will have no fiscal impact on state or local government and asked what the benefit to the public would be of disconnecting critical care customers. Consumers stated that in order to ensure the customer's safety, a critical care customer who is disconnected would likely be moved from home to a public facility and, whether on a temporary or permanent basis, and this would represent a cost to either state or local governments. The proposed rule should recognize the costs on other entities and the public-at-large that will be caused by REP actions to minimize their bad debt. Consumers stated that a cost benefit analysis of this disconnection alternative should be undertaken to justify the determination of net benefits from the proposed rule. The costs of the alternative accommodations and REP actions should be compared to the cost of the individual's utility bills.

The Joint TDUs suggested that subsection (g)(1) and (3) be modified to waive the secondary contact notice requirement for customers who are grandfathered into a Critical Care Residential Customer status during the first year, as the secondary contact information will not be available for these customers until they reapply. The Joint TDUs disagreed with the recommendation of OPC and the MS Society that the notice requirements applicable to disconnection of chronic condition residential customers should increase. The Joint TDUs stated that the 21 day advance written notice to the chronic condition residential customer and secondary contact is sufficient notice if there is a need to make arrangements to deal with the pending disconnection. The Joint TDUs added that if increased notification is required, then the MS Society suggestion that the REP take primary responsibility for the process is appropriate.

The REP Group and Reliant noted an inconsistency in that subsection (g)(1) requires disconnection notices be sent by mail but subsection (k)(2) allows the customer to agree to receive a disconnection notice by email. The REP Group and Reliant proposed deleting the requirement in subsection (g)(1) that would require disconnection notices be sent by mail. The REP Group

also suggested modifying subsection (k)(2) to allow secondary contacts to agree to receive notices by email.

*Commission Response*

The commission appreciates Consumers' support for a secondary contact for critical care and chronic condition customers. The commission included the requirement for a secondary contact in this rule to place an additional check on the disconnection of a critical care customer that is not in the current rules.

MS Society and OPC suggested providing chronic condition customers with written notice as well as an automated phone call to the customer and the secondary contact. If the customer or secondary contact does not respond to the auto dialer then the REP would have a staff person call the customer and secondary contact. The Joint TDUs opposed expanding notice requirements. While the commission appreciates the MS Society and OPUC's concerns about notice regarding disconnect to chronic condition customers, the commission believes that the proposed rules are sufficiently protective. The purpose of these rules is to provide a high level of protection to critical care customers who have properly established that disconnection is a threat to their lives. The rules being adopted provide chronic condition customers with a level of protection that is higher than it is for other customers. The commission does not believe, however, that the level of threat to a chronic condition customer rises to the level of notice that must be given to a critical care customer, because the level of disability is likely not as severe and the result of disconnection of service will not be as severe. The commission concludes that a 21-day advance written notice to a chronic condition residential customer and secondary contact is reasonable and sufficient notice to allow a chronic condition customer to make arrangements to deal with a pending disconnection.

The Joint TDUs suggested modifying the notice requirements for critical care and chronic condition customers to waive the requirement that notice be provided to secondary contacts during the first year, as the secondary contact information will not be available for these customers until they reapply. The commission appreciates the Joint TDU concerns and agrees that notice cannot be provided to secondary contacts if the information is not available. However, the commission does not believe that the rule needs to be modified to specifically waive notice. If secondary contact information is available, then notice should be provided to the secondary contact.

The commission agrees with the REP Group and Reliant that subsection (g)(1) requiring that disconnection notices be sent by mail is inconsistent with subsection (k)(2) that allows the customer to agree to receive disconnection notices by email. As discussed further in the commission's response in subsection (k)(2) below, the commission believes that the wishes of the customer and secondary contact that elect to receive communications by email should be honored and the commission modifies the rule accordingly. However, to protect critical care and chronic condition customers, the commission modifies subsection (g)(2)(A) and subsection (h) of this section to allow email as an additional form of notice for these customers and their secondary contacts, but does not allow email as the only form of contact.

TDU Charges

The Joint TDUs recommended deletion of subsection (g)(4) which requires the TDU to stop billing the REP for TDU charges if the TDU refuses to disconnect a Critical Care Residential Customer. To support its position, the Joint TDUs pointed to PURA §39.107(d) that states the TDU "shall bill a customer's retail electric provider for non-bypassable delivery charges" and that the REP "must pay these charges." The Joint TDU's stated that non-bypassable delivery charges include transition charges and tariffed utility charges under PURA §39.201(b). The Joint TDUs noted that Financing Orders adopted by the commission for CenterPoint Energy, Oncor, and AEP require the REP to pay the transition charges whether or not it has collected the charges from the customer. In addition, the Joint TDUs contended that the right to bill and collect transition charges is considered a property right that is transferred to the bonding company. If the TDU fails to serve as the agent to bill and collect for these charges, another billing agent may be selected to do so. The Joint TDU's urged the commission not to adopt any rule that is inconsistent with those Financing Orders and contrary to the non-bypassable nature of transition charges. The Joint TDUs opined that requiring TDUs to stop billing the REP for TDU charges if the TDU refuses to disconnect a critical care residential customer, does not address the larger issue of the costs of carrying these customers.

The Joint TDUs questioned the financial impact of the TDU charges on REPs and pointed out that the market was designed for REPs to bear these costs. REPs are free to adjust the price of their offerings to recover costs and, as detailed by Reliant, REPs have many tools for preventing and dealing with bad debt. The Joint TDUs added that the Financing Orders contain a hold-back and reimbursement provision that provides relief to REPs who do not collect transition charges from their customers, so not paying the TDU would not provide any additional benefit to REPs.

The Joint TDUs, Consumers and OPC were concerned that subsection (g)(4) would create a perverse incentive for REPs to order disconnections of critically ill customers as quickly as possible rather than working with the customer on a payment plan, knowing that the TDU will resist actually performing the disconnection. These commenters contended that the proposed rule would drive the REP to consider solely its financial interests, rather than the needs of the customer, and it would punish the TDU for considering the need of the customer first. OPC was also concerned that limiting TDU recovery of their charges would prompt TDUs to disconnect critical care customers in a less thoughtful way. OPC stated that it is important that the entity disconnecting the customer has no financial incentive to either disconnect or leave a line energized. Consumers raised concerns that the rule could force a TDU worker to decide between mistreating a sick person and job security. Consumers urged the commission to direct the industry to never disconnect critical care customers and to handle the debt incurred as they do any other cost of doing business.

The Joint TDUs stated that if subsection (g)(4) is adopted, the TDU should be provided a mechanism to recover its costs without waiting for a base rate case. Accordingly, the Joint TDUs recommended that language similar to that adopted in the Expedited Switch rule be added to subsection (g)(4) that would allow TDUs to create a regulatory asset for recovery of these costs. Additionally, the Joint TDUs requested that the language be clear that the TDU charges would be suppressed only in the very limited situation of a disconnection request for a critical care residential customer and would not have the wider applicability to chronic condition customers. The Joint TDUs opposed the recommendation that the TDU charges stop if the disconnection of the critical care customer does not occur on a normal timeline--that is, within three days after the REP issues the disconnection order. The Joint TDUs stated that the discon-

nection process for a critical care customer has nothing to do with the normal disconnection timeline. For critical care customers, the initial transaction will automatically be rejected and a process of consultation with the REP and customer will begin. The rules require the TDU to take extraordinary steps to notify critical care customers and even make a trip to the home before performing the disconnection and additional time is required for the customer to respond after receiving notice. The Joint TDUs concluded that this process will take more than three days and opined that the REP Group's recommendation is simply meant to reduce the financial exposure of the REP, with little to no consideration for the customer or the process which the rule requires the TDUs to follow before disconnection.

The Joint TDUs noted that it is in no one's interest to disconnect service to a customer if it would jeopardize the life of the customer, but it would not be appropriate to penalize the TDU for refusing do so. The Joint TDUs stated their understanding that this is a difficult societal issue and suggested that the commission bring this matter before the 2011 Legislature and request relief for such customers. The Joint TDUs noted that this issue was considered by the Sunset Advisory Commission in 2004 and that the Sunset Commission recommended that the System Benefit Fund be used to assist the payment of electricity bills for needy patients on life support or with serious health problems when threatened with disconnection for nonpayment, but the Legislature did not act on the recommendation. The Joint TDUs suggested that the commission bring this issue before the 2011 Legislature and request relief for these customers.

The REP Group agreed with the Joint TDUs that the continuous provision of electric service to critical care customers is a difficult societal issue that should be considered by the Texas Legislature and that it is in no one's interest to disconnect service to a customer if doing so may jeopardize the customer's life but maintained that in the meantime, TDUs and REPs should share financial responsibility for these vulnerable customers when disconnections cannot be performed. The REP Group disagreed with TDUs and Consumers that penalizing TDUs for refusing to disconnect a critical care customer would provide a wrong or perverse incentive for TDUs and noted that subsection (g)(4) is about sharing responsibility for serving vulnerable customers.

The REP Group reiterated its initial comments that proposed subsection (g)(4) should reference timelines set forth in the Delivery Services Tariff to determine when cessation of charges should commence, rather than referring to a TDU's refusal to disconnect. The REP Group noted that the tariff includes language instructing TDU's not to disconnect a customer, if the disconnection will cause a dangerous or life-threatening condition on the customer's premises, without reasonable prior notice so that a customer has time to ameliorate the condition,

*Commission Response*

The commission appreciates the concerns raised by OPC and Consumers that disallowing TDUs from recovering their charges where the TDU does not disconnect service at the premises of a Critical Care Residential Customer may prompt the TDUs to disconnect the service in a less thoughtful way. The commission's intent in this rule is to provide more protections for a particularly vulnerable class of customers, not to encourage REPs and TDUs to disconnect critical care customers. Nevertheless, the commission concludes that it is not appropriate to permit the TDUs to continue collecting delivery charges from a REP, if the customer fails to pay the REP for the service and the TDU fails to disconnect the customer after having received a disconnection order from the REP.

The Joint TDU's urged the commission not to adopt any rule that is inconsistent with Financing Orders and the status of transition charges under those orders. The commission agrees with the TDU's position and modifies the rule accordingly.

*Subsection (k)(2)--disconnection notices*

Cities opined that disconnection notices are serious in nature and proposed that the commission require REPs to send disconnection notices both by 1) mail or hand deliver notice and 2) through a separate email, if the customer has agreed to receive communications from the REP by email. Cities pointed out that email may not be a feasible means of notifying customers, as customers having difficulty paying their electric bills may also have problems paying for internet service and, as a result, may have either cancelled their internet service or may have had their internet service disconnected.

Reliant and the REP Group urged the commission to modify this paragraph to allow disconnect notices to be sent to the secondary contact by email if the secondary contact has elected to receive communications by email. The REP Group disagreed with Cities' assertion that customers should receive disconnection notices by both email and a separate mailing or hand delivered letter. The REP Group argued that many customers elect to receive communications by email do so with the explicit understanding and desire not to receive paper copies of notices or bills. By telling the REP that they want communications by email, the customer is telling the REP that email is the best method to make contact about important matters such as billing notices and disconnection notices. The REP Group opined that Cities' arguments about email accessibility are overstated since there are a myriad of ways to check one's email: at work, at the library, at an apartment's business center, at a friend's house, and even on one's cell phone.

*Commission Response*

The commission believes that the wishes of the customer and secondary contact that elect to receive communications by email should be honored. Should a customer or secondary contact desire or require information in a different format, they can request the REP to provide communications in a different format. As technology grows, so have customers' dependence on it. Many customers select REPs that utilize the same technologies that the customer uses because it is convenient for the customer. If the customer or secondary contact specifies that the REP communicate by email, the commission does not believe that communicating in another method will be effective in notifying the customer of a pending disconnect. Therefore, the commission modifies the disconnect notice to allow a REP to provide disconnection notice via email if the customer and the secondary contact have so agreed. However, to provide further protection for critical care and chronic condition customers, the commission modifies subsection (g)(2)(A) and subsection (h) to allow email as an additional form of notice for these customers and their secondary contacts, but does not allow email as the only form of contact.

*Subsection (n)--effective date*

The Joint TDUs argued that it is premature to require implementation of this rule on December 1, 2010 and suggested striking the effective date from this subsection. According to the TDUs, market participants cannot fully evaluate what will be required to

implement procedures to carry out the rules until the rules are final. The Joint TDUs added that ERCOT has made it clear that new transactions will not be ready on December 1, 2010 and the TDUs believed that a substitute temporary process would have to be developed and put in place. The Joint TDUs stated that the market should be provided assurance of ERCOT's ability to effectively implement the rule before requiring implementation due to the potential important impacts on customers.

*Commission Response*

As the result of post-comment period meetings with stakeholders, consensus was reached that the effective date of the disconnection rule should be the same as the proposed rule in Project No. 37622 which is January 1, 2011. Therefore, the commission has changed the effective date of this rule to January 1, 2011.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting these amendments, the commission makes other minor modifications for the purpose of clarifying its intent.

## SUBCHAPTER Q. SYSTEM BENEFIT FUND

### 16 TAC §25.454

The amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and §17.004 and §39.101, which authorize the commission to adopt and enforce rules that ensure various retail electric customer protections.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.004 and 39.101.

*§25.454. Rate Reduction Program.*

(a) Purpose. The purpose of this section is to define the low-income electric rate reduction program, establish the rate reduction calculation, and specify enrollment options and processes.

(b) Application. This section applies to retail electric providers (REPs) that provide electric service in an area that has been opened to customer choice, or an area for which the commission has issued an order applying the system benefit fund or rate reduction. This section also applies to municipally owned electric utilities (MOUs) and electric cooperatives (Coops) on a date determined by the commission, but no sooner than six months preceding the date on which an MOU or a Coop implements customer choice in its certificated area unless otherwise governed by §25.457 of this title (relating to Implementation of the System Benefit Fee by Municipally Owned Utilities and Electric Cooperatives).

(c) Funding. The rate reduction requirements set forth by this subchapter are subject to sufficient funding and authorization to expend funds. In the event that funding and authorization to expend funds are not sufficient to administer the rate reduction program or fund rate reductions for customers, the following shall apply:

(1) The requirements of subsections (e), (f) and (g) of this section are suspended until sufficient funding and spending authority are available.

(2) The requirements of the following sections of this title, insofar as they relate to the rate reduction benefit, are suspended when sufficient funding and spending authority are not available:

(A) §25.451(j) of this title (relating to Administration of the System Benefit Fund);

(B) §25.457(i) - (j) of this title;

(C) §25.475(g)(4)(L) of this title (relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers); and

(D) §25.43(d)(3)(D), (q)(1)(A) - (B), (q)(2)(A), and (q)(3)(A) of this title (relating to Provider of Last Resort (POLR)).

(3) The requirements of §25.480(c) of this title (relating to Bill Payments and Adjustments), insofar as they relate to the rate reduction benefit, are suspended if an eligibility list is not available as provided in subsection (i) of this section.

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

(1) Discount factor--The amount of discount an eligible low-income customer must be provided by any REP, or MOU or Coop, when applicable, in the customer's area, expressed as cents per kilowatt-hour (kWh).

(2) Discount percentage--The percentage of discount established by the commission and applied to the lower of the price to beat (PTB) or minimum provider of last resort (POLR) rate in a particular service territory.

(3) Low-Income Discount Administrator (LIDA)--A third-party vendor with whom the commission has a contract to administer the rate reduction program.

(4) Rate reduction--The total discount to be deducted from a customer's electric bill. This reduction is derived from the discount factor and total consumption in accordance with subsection (e)(3) of this section.

(5) REP--For the purposes of this section, a retail electric provider and an MOU or Coop that provides retail electric service in an area that has been opened to customer choice.

(6) Minimum POLR rate--For the purposes of this section, the minimum POLR rate shall be the POLR rate posted on the commission's website on the Electricity Facts Label for each service territory for 1,000 kWh of usage.

(e) Rate reduction program. In each month for which funds are available for the low-income discount, all eligible low-income customers as defined in §25.5 of this title (relating to Definitions) are to receive a rate reduction, as determined by the commission pursuant to this section, on their electric bills from their REP.

(1) Discount factors shall be determined in accordance with this paragraph, as the lower of the PTB or minimum POLR rate for each service territory multiplied by the approved discount percentage.

(A) The commission shall periodically establish the discount percentage. The discount percentage may be set at a level no greater than 20%.

(B) The commission staff shall calculate a discount factor for each service territory and post the discount factors on the commission website (www.puc.state.tx.us).

(C) Each discount factor based on the minimum POLR rate shall be in effect from May through October or November through April, subject to revision pursuant to paragraph (2) of this subsection.

(D) Each discount factor based on the PTB shall be recalculated when the PTB rate changes or the commission revises the

discount percentage. The discount factor based on the PTB shall reflect any seasonal variation in the PTB.

(2) The commission may revise the discount factors set pursuant to paragraph (1) of this subsection through a change to the discount percentage because of one of the following occurrences:

(A) The commission staff determines that there are sufficient remaining appropriations for the fiscal year to support an increase in the discount percentage without exceeding available appropriations for the fiscal year. This determination may be triggered by the routine review by commission staff of disbursements and remaining appropriations, or by a fluctuation of five percent or more of the minimum POLR rate.

(B) The commission staff determines that there are insufficient remaining appropriations for the fiscal year, and a decrease to the discount percentage is necessary to ensure that funds spent do not exceed appropriations for the fiscal year.

(C) The commission determines that a change in the discount percentage is consistent with the objectives of this section and the public interest.

(3) All REPs shall provide the rate reduction to eligible low-income customers.

(A) The discount factors posted on the commission's website shall be used to calculate the rate reduction for each eligible low-income customer's bill. If the discount factor changes for any area, REPs shall implement the resulting change in the discount factor in their billings to customers within 30 calendar days of the date the commission posts the revised discount factor to its website, or on the effective date of the discount factor, whichever is later.

(B) The rate reduction shall be calculated by multiplying the customer's total consumption (kWh) for the billing period by the discount factor (in cents/kWh) in effect during the billing cycle in which the bill is rendered. If an eligible customer is rebilled, the discount that was in effect during the affected billing cycle will be applied.

(C) The customer's discount amount shall be clearly identified as a line item on the electric portion of the customer's bill, including the description "LITE-UP Discount." If a monthly bill is not issued as provided by §25.498 of this title (relating to Retail Electric Service Using a Customer Prepayment Device or System), the customer's receipt or confirmation of payment, or detailed information accessed by confirmation code, as described by §25.498 of this title, shall indicate that the discount was applied to the customer's charges with the words "LITE-UP" or "LITE-UP Discount."

(D) REPs are entitled to reimbursement under §25.451(j) of this title for rate reductions they provide to eligible low-income customers.

(f) Customer enrollment. Eligible customers may be enrolled in the rate reduction program through automatic enrollment or self-enrollment.

(1) Automatic enrollment is an electronic process to identify customers eligible for the rate reduction by matching client data from the Texas Health and Human Services Commission (HHSC) with customer-specific data from REPs.

(A) HHSC shall provide client information to LIDA in accordance with subsection (g)(1) of this section.

(B) REPs shall provide customer information to LIDA in accordance with subsection (g)(3) of this section.

(C) LIDA shall compare the customer information from HHSC and REPs, create files of matching customers, enroll these customers in the rate reduction program, and notify the REPs of their eligible customers.

(2) Self-enrollment is an alternate enrollment process available to eligible electric customers who are not automatically enrolled and whose combined household income does not exceed 125% of federal poverty guidelines or who receive food stamps or medical assistance from HHSC. The self-enrollment process shall be administered by LIDA. LIDA's responsibilities shall include:

(A) Distributing and processing self-enrollment applications, as developed by the commission, for the purposes of initial self-enrollment, and for re-enrollment of self-enrolled and automatically enrolled customers;

(B) Maintaining customer records for all applicants;

(C) Providing information to customers regarding the process of enrolling in the low-income discount program;

(D) Determining customers' eligibility by reviewing information submitted through self-enrollment forms and determining whether the applicant meets the program qualifications; and

(E) Matching customer information submitted through self-enrollment forms with customer data provided by REPs, creating files of matching customers, enrolling matching customers in the rate reduction programs, and notifying the REPs of their eligible customers.

(3) In determining customers' eligibility in the self-enrollment process, LIDA shall require that customers submit with a self-enrollment form proof of income in the form of copies of tax returns, pay stubs, letters from employers, or other pertinent information and shall audit statistically valid samples for accuracy. If a person who self-enrolls claims to be eligible because of participation in a qualifying program, LIDA shall require the customer to submit a copy of proof of enrollment or eligibility letter that indicates enrollment of the applicant in the qualifying program.

(4) The following procedures govern a customer's re-enrollment.

(A) A self-enrolled customer may re-enroll by submitting a completed self-enrollment form.

(B) A customer who was formerly, but is no longer, automatically enrolled may re-enroll through self-enrollment.

(C) LIDA shall send a customer who is eligible to re-enroll a self-enrollment form which specifies a date for submitting the completed form that is not more than 30 days after the date the form is mailed. If the customer submits a completed form before the date specified on the form and LIDA determines that the customer is eligible for re-enrollment, the customer shall receive the rate reduction without interruption.

(D) If a customer does not return a properly completed form before the time specified by LIDA, the customer's rate reduction may be interrupted until LIDA determines that the customer is eligible.

(5) The eligibility period of each customer will be determined by the customer's method of enrollment.

(A) The eligibility period for self-enrolled customers is seven months from the date of enrollment.

(B) Automatically enrolled customers will continue to be eligible as long as the customers receive HHSC benefits. Once a customer no longer receives HHSC benefits, the customer will continue

to receive the rate reduction benefit for a period of no more than 60 days, during which the customer may self-enroll.

(6) A customer who believes that a self-enrollment application has been erroneously denied may request that LIDA review the application, and the customer may submit additional proof of eligibility.

(A) A customer who is dissatisfied with LIDA's action following a request for review under this paragraph may request an informal hearing to determine eligibility by the commission staff.

(B) A customer who is dissatisfied with the determination after an informal hearing under subparagraph (A) of this paragraph may file a formal complaint pursuant to §22.242(e) of this title (relating to Complaints).

(g) Responsibilities. In addition to the requirements established in this section, program responsibilities for LIDA may be established in the commission's contract with LIDA; program responsibilities for tasks undertaken by HHSC may be established in the memorandum of understanding between the commission and HHSC.

(1) HHSC shall:

(A) assist in the implementation and maintenance of the automatic enrollment process by providing a database of customers receiving HHSC benefits as detailed in the memorandum of understanding between HHSC and the commission; and

(B) assist in the distribution of promotional and informational material as detailed in the memorandum of understanding.

(2) LIDA shall:

(A) receive customer lists from REPs on a monthly basis through data transfer;

(B) retrieve the database of clients from HHSC on a monthly basis;

(C) conduct the self-enrollment, automatic enrollment, and re-enrollment processes;

(D) establish a list of eligible customers, by comparing customer lists from the REPs with HHSC databases and identifying customer records that reasonably match;

(E) make available to each REP, on a date prescribed by the commission on a monthly basis, a list of low-income customers eligible to receive the rate reduction;

(F) notify customers that have applied for the rate reduction through the self-enrollment process of their eligibility determination and notify automatically enrolled and self-enrolled customers of their expiration of eligibility, and opportunities for re-enrollment in the rate reduction program;

(G) answer customer inquiries regarding the rate reduction program, and provide information to customers regarding enrollment for the rate reduction program and eligibility requirements;

(H) resolve customer enrollment problems, including issues concerning customer eligibility, the failure to provide discounts to customers who believe they are eligible, and the provision of discounts to customers who do not meet eligibility criteria; and

(I) protect the confidentiality of the customer information provided by the REPs and the client information provided by HHSC.

(3) A REP shall:

(A) provide residential customer information to LIDA through data transfer on a date prescribed by the commission on a monthly basis. The customer information shall include, to the greatest extent possible, each full name of the primary and secondary customer on each account, billing and service addresses, primary and secondary social security numbers, primary and secondary telephone numbers, Electric Service Identifier (ESI ID), service provider account number, and premise code;

(B) retrieve from LIDA the list of customers who are eligible to receive the rate reduction;

(C) upon commission request, monitor high-usage customers to ensure that premises are in fact residential and maintain records of monitoring efforts for audit purposes. A customer with usage greater than 3000 kWh in a month shall be considered a high-usage customer;

(D) apply a rate reduction to the electric bills of the eligible customers identified by LIDA within the first billing cycle in which it is notified of a customer's eligibility, if notification is received no later than seven days before the end of the billing cycle, or, if not, apply the rate reduction within 30 calendar days after notification is received from LIDA;

(E) notify customers three times a year about the availability of the rate reduction program, and provide self-enrollment forms to customers upon request;

(F) assist LIDA in working to resolve issues concerning customer eligibility, including the failure to provide discounts to customers who believe they are eligible and the provision of discounts to customers who may not meet the eligibility criteria; this obligation requires the REP to employ best efforts to avoid and resolve issues, including training call center personnel on general LITE-UP processes and information, and assigning problem resolution staff to work with LIDA on problems for which LIDA does not have sufficient information to resolve; and

(G) provide to the commission copies of materials regarding the rate reduction program given to customers during the previous 12 months upon commission request.

(h) Confidentiality of information.

(1) The data acquired from HHSC pursuant to this section is subject to a HHSC confidentiality agreement.

(2) All data transfers from REPs to LIDA pursuant to this section shall be conducted under the terms and conditions of a standard confidentiality agreement to protect customer privacy and REP's competitively sensitive information.

(3) LIDA may use information obtained pursuant to this section only for purposes prescribed by commission rule, including use in determining eligibility for assistance under §25.455 of this title (relating to One-Time Bill Payment Assistance Program).

(i) Eligibility List for Continuation of Late Penalty Waiver Benefits.

(1) In the event that funding and authorization to expend funds are not sufficient to provide rate reductions for low-income customers that can be reimbursed from the system benefit fund, the commission may, in its discretion, require LIDA to maintain a list of low-income customers who would otherwise be eligible for automatic enrollment in the rate reduction program under subsection (f)(1) of this section if funds were available. The procedures set forth in subsection (f)(1) of this section will be used to the extent practicable. In addition to the requirements in this section, program responsibilities for LIDA may

be established in the commission's contract with LIDA; and program responsibilities for tasks undertaken by HHSC may be established in a memorandum of understanding between the commission and HHSC. To assist the commission in implementing this provision, REPs shall upon request:

(A) provide residential customer information to LIDA through data transfer on a date prescribed by the commission on a monthly basis. The customer information shall include, to the greatest extent possible, each full name of the primary and secondary customer on each account, billing and service addresses, primary and secondary social security numbers, primary and secondary telephone numbers, ESI ID, service provider account number, and premise code;

(B) retrieve from LIDA the list of customers who would be eligible for automatic enrollment in the rate reduction program if funds were available;

(C) monitor high-usage customers to ensure that premises are in fact residential and maintain records of monitoring efforts for audit purposes. A customer with usage greater than 3,000 kWh in a month shall be considered a high-usage customer;

(D) assist LIDA in working to resolve issues concerning customer eligibility; this obligation requires the REP to employ best efforts to avoid and resolve issues, including training call center personnel on general processes and information, and assigning problem resolution staff to work with LIDA on problems for which LIDA does not have sufficient information to resolve; and

(E) provide other information and assistance, upon request of the commission, to assist in implementation of this section.

(2) If funding is available to include self-enrollees in the list of eligible customers, the commission may, in its discretion, require LIDA to include self-enrollees in the list of eligible customers consistent with subsection (f)(2) of this section or set forth processes for determining eligibility in a procedural guide. The processes, to the extent feasible, will be consistent with subsections (f) and (g) of this section.

(3) If pursuant to subsection (i) of this section, the commission, through the LIDA or other means, provides the REPs with a list of eligible customers §25.480(c) of this title, which requires that a customer receiving a low-income discount pursuant to the Public Utility Regulatory Act §39.903(h) may not be assessed a late penalty, shall be continued based on the customer's eligibility for the discount, rather than the customer's receipt of the discount.

(j) Deposit Installment Benefits.

(1) If LIDA is maintaining a list of eligible customers as described in subsection (f) or subsection (i) of this section, then a customer or applicant who qualifies for the rate reduction program is eligible to pay deposits over $50 in two installments, pursuant to §25.478(e)(3) of this title (relating to Credit Requirements and Deposits).

(A) A REP who requires a customer or applicant to provide sufficient information to the REP to demonstrate that the customer or applicant qualifies for the rate reduction program may request the following information:

*(i)* a letter from the customer's or applicant's current or prior REP stating that the applicant is on the list of customers who would be eligible for the rate reduction if funds were available;

*(ii)* a bill from the current or prior REP that demonstrates that the customer or applicant is enrolled in the rate reduction program; or

*(iii)* other documentation that the REP determines to be appropriate and requests on a non-discriminatory basis.

(B) Upon the request of a customer, a REP shall provide a letter stating that the customer is on the list of customers who would be eligible for the rate reduction if funds were available. This letter may be combined with a letter issued to a customer regarding bill payment history.

(2) If LIDA is not maintaining a list of eligible customers as described in subsection (f) or subsection (i) of this section, a REP shall extend the option to pay deposits over $50 in two installments to any residential customers or applicants who qualify for the rate reduction program. The REP may, on a non-discriminatory basis, require the customer or applicant to provide documentation of eligibility that the REP determines to be appropriate. The REP shall provide notice of this option in any written notice requesting a deposit from a customer. This paragraph supersedes the provisions of §25.478(c)(3) and (d)(3) of this title that require payment of the entire amount of a deposit within ten days.

(k) Voluntary Programs. Nothing in this section is intended to impair a REP's ability to voluntarily provide a low-income discount or other benefits to low-income customers.

(1) The list of low-income customers who would be eligible for the rate reduction if funds were available, or other non-discriminatory criteria, may be utilized by a REP as evidence of a customer's eligibility for the REP's voluntary low-income program, if offered.

(2) In the event a REP chooses to voluntarily offer a discount or other benefits to low-income customers, the REP shall treat any information obtained regarding the customer's financial status or enrollment in a government program as confidential information and shall not disclose the information to any other party or use the information for any purpose other than enrollment in a voluntary low-income program.

(l) Effective date. The effective date of this section is December 1, 2010.

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 September 29, 2010.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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## SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE

### 16 TAC §25.480

The amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and §17.004 and §39.101, which authorize the commission to

adopt and enforce rules that ensure various retail electric customer protections.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.004 and 39.101.

*§25.480. Bill Payment and Adjustments.*

(a) Application. This section applies to a retail electric provider (REP) that is responsible for issuing electric service bills to retail customers, unless the REP is issuing a consolidated bill (both energy services and transmission and distribution services) on behalf of an electric cooperative or municipally owned utility. In addition, this section applies to a transmission and distribution utility (TDU) where specifically stated. This section does not apply to a municipally owned utility or electric cooperative issuing bills to its customers in its own service territory.

(b) Bill due date. A REP shall state a payment due date on the bill which shall not be less than 16 days after issuance. A bill is considered to be issued on the issuance date stated on the bill or the postmark date on the envelope, whichever is later. A payment for electric service is delinquent if not received by the REP or at the REP's authorized payment agency by the close of business on the due date. If the 16th day falls on a holiday or weekend, then the due date shall be the next business day after the 16th day.

(c) Penalty on delinquent bills for electric service. A REP may charge a one-time penalty not to exceed 5.0% on a delinquent bill for electric service. No such penalty shall apply to residential or small commercial customers served by the provider of last resort (POLR), or to customers receiving a low-income discount pursuant to the Public Utility Regulatory Act (PURA) §39.903(h). The one-time penalty, not to exceed 5.0%, may not be applied to any balance to which the penalty has already been applied.

(d) Overbilling. If charges are found to be higher than authorized in the REP's terms and conditions for service or other applicable commission rules, then the customer's bill shall be corrected.

(1) The correction shall be made for the entire period of the overbilling.

(2) If the REP corrects the overbilling within three billing cycles of the error, it need not pay interest on the amount of the correction.

(3) If the REP does not correct the overcharge within three billing cycles of the error, it shall pay interest on the amount of the overcharge at the rate set by the commission.

(A) Interest on overcharges that are not adjusted by the REP within three billing cycles of the bill in error shall accrue from the date of payment by the customer.

(B) All interest shall be compounded monthly at the approved annual rate set by the commission.

(C) Interest shall not apply to leveling plans or estimated billings.

(4) If the REP rebills for a prior billing cycle, the adjustments shall be identified by account and billing date or service period.

(e) Underbilling by a REP. If charges are found to be lower than authorized by the REP's terms and conditions of service, or if the REP fails to bill the customer for service, then the customer's bill may be corrected.

(1) The customer shall not be responsible for corrected charges billed by the REP unless such charges are billed by the REP within 180 days from the date of issuance of the bill in which the underbilling occurred The REP may backbill a customer for the amount that was underbilled beyond the timelines provided in this paragraph if:

(A) the underbilling is found to be the result of meter tampering by the customer; or

(B) the TDU bills the REP for an underbilling as a result of meter error as provided in §25.126 of this title (relating to Adjustments Due to Non-Compliant Meters and Meter Tampering in Areas Where Customer Choice Has Been Introduced).

(2) The REP may disconnect service pursuant to §25.483 of this title (relating to Disconnection of Service) if the customer fails to pay the additional charges within a reasonable time.

(3) If the underbilling is $50 or more, the REP shall offer the customer a deferred payment plan option for the same length of time as that of the underbilling. A deferred payment plan need not be offered to a customer when the underpayment is due to theft of service.

(4) The REP shall not charge interest on underbilled amounts unless such amounts are found to be the result of theft of service (meter tampering, bypass, or diversion) by the customer. Interest on underbilled amounts shall be compounded monthly at the annual rate, as set by the commission. Interest shall accrue from the day the customer is found to have first stolen the service.

(5) If the REP adjusts the bills for a prior billing cycle, the adjustments shall be identified by account and billing date or service period.

(f) Disputed bills. If there is a dispute between a customer and a REP about the REP's bill for any service billed on the retail electric bill, the REP shall promptly investigate and report the results to the customer. The REP shall inform the customer of the complaint procedures of the commission pursuant to §25.485 of this title (relating to Customer Access and Complaint Handling).

(g) Alternate payment programs or payment assistance.

(1) Notice required. When a customer contacts a REP and indicates inability to pay a bill or a need for assistance with the bill payment, the REP shall inform the customer of all applicable payment options and payment assistance programs that are offered by or available from the REP, such as bill payment assistance, deferred payment plans, disconnection moratoriums for the ill, or low-income energy assistance programs, and of the eligibility requirements and procedure for applying for each.

(2) Bill payment assistance programs.

(A) All REPs shall implement a bill payment assistance program for residential electric customers. At a minimum, such a program shall solicit voluntary donations from customers through the retail electric bills.

(B) In its annual report filed pursuant to §25.107 of this title (relating to Certification of Retail Electric Providers (REPs)), each REP shall summarize:

*(i)* the total amount of customer donations;

*(ii)* the amount of money set aside for bill payment assistance;

*(iii)* the assistance agency or agencies selected to disburse funds to residential customers;

*(iv)* the amount of money disbursed by the REP or provided to each assistance agency to disburse funds to residential customers; and

*(v)* the number of customers who had a switch-hold applied during the year.

(C) A REP shall obtain a commitment from an assistance agency selected to disburse bill payment assistance funds that the agency will not discriminate in the distribution of such funds to customers based on the customer's race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, familial status, location of customer in an economically distressed geographic area, or qualification for the low-income discount program or energy efficiency services.

(h) Level and average payment plans. A REP shall make a level or average payment plan available to its customers consistent with this subsection. A customer receiving service from a provider of last resort (POLR) may be required to select a competitive product offered by the POLR REP to receive the level or average payment plan.

(1) A REP shall make a level or average payment plan available to a residential customer receiving a rate reduction pursuant to §25.454 of this title (relating to Rate Reduction Program), even if the customer is delinquent in payment to the REP.

(2) A REP shall make a level or average payment plan available to a customer who is not currently delinquent in payment to the REP. A customer is delinquent in payment in the following circumstances:

(A) A customer whose normal billing arrangement provides for payment after the rendition of service is delinquent if the date specified for payment of a bill has passed and the customer has not paid the full amount due.

(B) A customer whose normal billing arrangement provides for payment before the rendition of service is delinquent if the customer has a negative balance on the account for electric service.

(3) A REP shall reconcile any over- or under-payment consistent with the applicable terms of service, which shall provide for reconciliation at least every twelve months. For a customer with an average payment plan, a REP may recalculate the average consumption or average bill and adjust the customer's required minimum payment as frequently as every billing period. A REP may collect under-payments associated with a level payment plan from a customer over a period no less than the reconciliation period or upon termination of service to the customer. A REP shall credit or refund any over-payments associated with a level payment plan to the customer at each reconciliation and upon termination of service to the customer. A REP may initiate its normal collection activity if a customer fails to make a timely payment according to such a level or average payment plan. All details concerning a level or average payment program shall be disclosed in the customer's terms of service document.

(4) If the customer is delinquent in payment when the level or average payment plan is established, the REP may require the customer to pay no greater than 50% of the delinquent amount due. The REP may require the remaining delinquent amount to be paid by the customer in equal installments over at least five billing cycles unless the customer agrees to fewer installments or may include the remaining delinquent amount in the calculation of the level or average payment amount. If the REP requires installment payments, the REP shall provide the customer a copy of the deferred payment plan in writing as described in subsection (j)(5) of this section.

(5) If the amount of the deferred balance does not appear on each bill the customer receives, the REP shall inform the customer that the customer may call the REP at any time to determine the amount that must be paid to be removed from the level or average payment plan.

(6) If the customer is delinquent in payment when the level or average payment plan is established, the REP may apply a switch-hold at that time.

(7) Before the REP applies a switch-hold to a customer on a level or average payment plan, the REP shall provide orally or in writing a clear explanation of the switch-hold process to the customer, prior to the customer's agreement to the plan. The explanation shall inform the customer as follows: "If you enter into this plan concerning your past due amount, we will put a switch-hold on your account. A switch-hold means that you will not be able to buy electricity from other companies until you pay the total deferred balance. If we put a switch-hold on your account, it will be removed after your deferred balance is paid and processed. While a switch-hold applies, if you are disconnected for not paying, you will need to pay {us or company name}, to get your electricity turned back on."

(8) If the customer is not delinquent in payment when the level or average payment plan is established, a switch-hold shall not be applied unless the plan is established pursuant to subsection (j)(2)(B)(ii) of this section.

(9) The REP, through a standard market process, shall submit a request to remove the switch-hold, pursuant to subsection (m) of this section, when the customer satisfies either subparagraph (A) or (B) of this paragraph, whichever occurs earlier. On the date the REP submits the request to remove the switch-hold, the REP shall notify or send notice to the customer that the customer has satisfied the obligation to pay any deferred balance owed and the removal of the switch-hold is being processed.

(A) The customer's deferred balance, including any deferred delinquent amount described in paragraph (4) of this subsection, is either zero or in an over-payment status.

(B) The customer satisfies the terms of any deferred delinquent amount described in paragraph (4) of this subsection and has paid bills for 12 consecutive billings without having been disconnected and without having more than one late payment.

(i) Payment arrangements. A payment arrangement is any agreement between the REP and a customer that allows a customer to pay the outstanding bill after its due date, but before the due date of the next bill. If the REP issues a disconnection notice before a payment arrangement was made, that disconnection should be suspended until after the due date for the payment arrangement. If a customer does not fulfill the terms of the payment arrangement, service may be disconnected after the later of the due date for the payment arrangement or the disconnection date indicated in the notice, without issuing an additional disconnection notice.

(j) Deferred payment plans and other alternate payment arrangements.

(1) A deferred payment plan is an agreement between the REP and a customer that allows a customer to pay an outstanding balance in installments that extend beyond the due date of the current bill. A deferred payment plan may be established in person, by telephone, or online, but all deferred payment plans shall be confirmed in writing by the REP in accordance with paragraph (5) of this subsection. Before the REP applies a switch-hold to a customer on a deferred payment plan, the REP shall provide a clear explanation of the switch-hold process to the customer. The explanation shall inform the customer as follows: "If you enter into this plan concerning your past due amount, we will put a switch-hold on your account. A switch-hold means that you will not be able to buy electricity from other companies until you pay the total deferred balance. If we put a switch-hold on your account, it will be removed after your deferred balance is paid and processed. While

a switch-hold applies, if you are disconnected for not paying, you will need to pay {us or company name}, to get your electricity turned back on."

(A) A REP shall offer a deferred payment plan to customers, upon request, for bills that become due during an extreme weather emergency, pursuant to §25.483(j) of this title.

(B) As directed by the commission, during a state of disaster declared by the governor pursuant to Texas Government Code §418.014, a REP shall offer a deferred payment plan to customers, upon request, in the area covered by the declaration.

(C) A REP shall offer a deferred payment plan to a customer who has been underbilled, pursuant to subsection (e) of this section.

(2) A REP shall make a payment plan available, upon request, to a residential customer that meets the requirements of subparagraph (A) of this paragraph for a bill that becomes due in July, August, or September. A REP shall make a payment plan available, upon request, to a residential customer that meets the requirements of subparagraph (A) of this paragraph for a bill that becomes due in January or February if in the prior month a TDU notified the commission pursuant to §25.483(j) of this title of an extreme weather emergency for the residential customer's county in the TDU service area for at least five consecutive days during the month. A REP is not required to offer a payment plan to a customer pursuant to this paragraph if the customer is on an existing deferred, level, or average payment plan.

(A) The following residential customers are eligible for a payment plan under this paragraph:

*(i)* customers receiving the LITE-UP discount pursuant to §25.454 of this title;

*(ii)* customers designated as Critical Care Residential Customers or Chronic Condition Residential Customers under §25.497 of this title (relating to Critical Load Industrial Customers, Critical Load Public Safety Customers, Critical Care Residential Customers, and Chronic Condition Residential Customers); or

*(iii)* customers who have expressed an inability to pay unless the customer:

*(I)* has been disconnected during the preceding 12 months;

*(II)* has submitted more than two payments during the preceding 12 months that were found to have insufficient funds available; or

*(III)* has received service from the REP for less than three months, and the customer lacks:

(-a-) sufficient credit; or

(-b-) a satisfactory history of payment for electric service from a previous REP or utility.

(B) The REP shall make available, at the customer's option, the plans described in clauses (i) and (ii) of this subparagraph.

*(i)* A deferred payment plan with the initial payment amount no greater than 50% of the amount due. The deferred amount shall be paid by the customer in equal installments over at least five billing cycles unless the customer agrees to fewer installments.

*(ii)* A level or average payment plan instead of requiring the balance due to be paid. The level or average payment plan shall be offered subject to the requirements of subsection (h) of this section.

(C) The REP shall not seek an additional deposit as a result of a customer's entering into a deferred payment plan under this paragraph.

(3) A REP shall not refuse customer participation in a deferred payment plan on any basis set forth in §25.471(c) of this title (relating to General Provisions of Customer Protection Rules).

(4) A REP may voluntarily offer a deferred payment plan to customers who have expressed an inability to pay.

(5) A copy of the deferred payment plan shall be provided to the customer and:

(A) shall include a statement, in a clear and conspicuous type, that states "If you are not satisfied with this agreement, or if the agreement was made by telephone and you feel this does not reflect your understanding of that agreement, contact (insert name and contact number of REP).";

(B) if a switch-hold will apply, shall include a statement, in a clear and conspicuous type, that states "By entering into this agreement, you understand that {company name} will put a switch-hold on your account. A switch-hold means that you will not be able to buy electricity from other companies until you pay this past due amount. The switch-hold will be removed after your final payment on this past due amount is processed. While a switch-hold applies, if you are disconnected for not paying, you will need to pay {us or company name}, to get your electricity turned back on.";

(C) where the customer and the REP's representative or agent meets in person, the representative shall read the statements in subparagraph (A) and, if applicable, subparagraph (B) of this paragraph to the customer;

(D) may include the one-time penalty in accordance with subsection (c) of this section but shall not include a finance charge;

(E) shall state the length of time covered by the plan;

(F) shall state the total amount to be paid under the plan;

(G) shall state the specific amount of each installment;

(H) shall state whether the amount of the deferred balance will appear on each bill the customer receives and that the customer may call the REP at any time to determine the amount that must be paid to satisfy the terms of the deferred payment plan; and

(I) shall state whether there may be a disconnection of service if the customer does not fulfill the terms of the deferred payment plan, and shall state the terms for disconnection.

(6) A REP may pursue disconnection of service if a customer does not meet the terms of a deferred payment plan. However, service shall not be disconnected until appropriate notice has been issued, pursuant to §25.483 of this title, notifying the customer that the customer has not met the terms of the plan. The requirements of paragraph (2) of this subsection shall not apply with respect to a customer who has defaulted on a deferred payment plan.

(7) A REP may apply a switch-hold while the customer is on a deferred payment plan.

(8) The REP, through a standard market process, shall submit a request to remove the switch-hold, pursuant to subsection (m) of this section, after the customer's payment of the deferred balance owed to the REP. On the day the REP submits the request to remove the switch-hold, the REP shall notify or send notice to the customer that the customer has satisfied the obligation to pay any deferred balance owed and the removal of the switch-hold is being processed.

(k) Allocation of partial payments. A REP shall allocate a partial payment by the customer first to the oldest balance due for electric service, followed by the current amount due for electric service. When there is no longer a balance for electric service, payment may be applied to non-electric services billed by the REP. Electric service shall not be disconnected for non-payment of non-electric services.

(l) Switch-hold.

(1) A REP may request that the TDU place a switch-hold on an ESI ID to the extent allowed by subsection (h) or (j) of this section, which shall prevent a switch transaction from being completed for the ESI ID and shall prevent a move-in transaction from being completed pending documentation that the applicant for electric service is a new occupant not associated with the customer for which the switch-hold was imposed. If the REP exercises its right to disconnect service for non-payment pursuant to §25.483 of this title, the switch-hold shall continue to remain in place. The TDU shall create and maintain a secure list of ESI IDs with switch-holds that REPs may access. The list shall not include any customer information other than the ESI ID and date the switch-hold was placed. The list shall be updated daily, and made available through a secure means by the TDU. The TDU may provide this list in a secure format through the web portal developed as part of its AMS deployment.

(A) The REP via a standard market process may request a switch-hold.

(B) The REP shall submit a request to remove the switch-hold as required by subsections (h)(9) and (j)(8) of this section.

(C) When the REP of record issues a move-out request for the flagged ESI ID, the REP of record's relationship with the ESI ID is terminated and the switch-hold shall be removed.

(D) At the time of a mass transition, the TDU shall remove the switch-hold flag for any ESI ID that is transitioned to a provider of last resort (POLR) provider.

(E) When the applicant for electric service is shown to be a new occupant not associated with the customer for which the switch-hold was imposed using the switch-hold process described in §25.126 of this title (relating to Adjustments Due to Non-Compliant Meters and Meter Tampering in Areas Where Customer Choice Has Been Introduced), the switch-hold flag shall be removed.

(F) For a move-in transaction indicating that the ESI ID is subject to a continuous service agreement, the TDU shall remove any switch-hold on that ESI ID and complete the move-in.

(2) In the first TX SET release after January 1, 2011, market transactions shall be developed that support the following requirements.

(A) REPs may request a switch-hold as allowed by subsection (h) or (j) of this section.

(B) TDUs shall provide indication of which ESI IDs have switch-holds so that during a move-in enrollment a REP can identify whether a switch-hold applies and that specific documentation must be submitted to have the switch-hold removed.

(C) A move-in subject to a switch-hold can be submitted for processing when the customer initially requests the move-in and such transaction will be held in the system for final processing depending on the approval or rejection of the move-in documentation. The TDU shall notify the submitting REP that there is a switch-hold on the ESI ID.

(3) The requirements of §25.475 of this title (relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers) shall continue to apply while a customer is subject to a switch-hold. The notice required by §25.475(e) of this title shall include a statement reminding the customer that if a switch-hold is in effect, the balance deferred must be paid in full before the customer will be able to change to a new provider.

(4) A customer who is subject to a switch-hold shall not be charged any separate fees for a switch-hold or any customer service or administrative fees related to the switch-hold.

(5) A REP shall not discriminate against any customer that is on a switch-hold in the provision of services or pricing of products. A customer on a switch-hold shall be eligible for all services and products generally available to the REP's other customers.

(6) If a REP applies a switch-hold to a customer account and the customer's contract expires while under the switch-hold, the REP shall provide notice of the contract expiration as required by §25.475 of this title. Unless a customer affirmatively chooses a different product with the REP, a customer whose term product expires while the customer is subject to a switch-hold shall be moved to the lowest priced month-to-month product currently offered by the REP to new applicants, or, if the REP does not offer month-to-month products to new applicants, shall be served on a month-to-month basis at the price equivalent to the lowest price of the shortest term fixed product currently offered by the REP to new applicants. Otherwise, the REP shall request the removal of the switch-hold in compliance with subsection (m) of this section. The offers shall include those made on www.powertochoose.com. If the customer does not affirmatively choose a product, the customer shall not be required by the REP to enter into another contract term so long as the switch-hold remains on the customer account and no early termination fees shall be applied to the customer's account.

(m) Placement and Removal of Switch-Holds.

(1) A REP may request a switch-hold only as allowed under this section.

(2) A REP shall be responsible for requesting that the TDU remove a switch-hold after the customer's obligation to the REP related to the switch-hold is satisfied. If a customer's obligation to the REP is satisfied by 10:00 p.m. on a business day, the REP shall send a request to the TDU to remove the switch-hold by Noon (12:00 p.m.) of the next business day. If the TDU receives the request by 1:00 p.m. on a business day, the TDU shall remove the switch-hold by 8:00 p.m. of the same business day in which it receives the request to remove the switch-hold from the REP.

(3) The REP shall submit a request to remove a switch-hold pursuant to subsection (l)(6) of this section to the TDU, such that the TDU will remove the switch-hold on or before the customer's contract expiration date.

(4) If a REP erroneously places a switch-hold flag on an ESI ID, thus preventing a legitimate switch, or does not remove the switch-hold within the timeline described in paragraph (2) of this subsection, the REP shall be considered to have committed a Class B Violation (as defined in §25.8(b) of this title (relating to Classification System for Violations of Statutes, Rules, and Orders Applicable to Electric Service Providers)) for purposes of any administrative penalties imposed by the commission.

(n) Effective date. The effective date of this section is June 1, 2011.

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 September 29, 2010.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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Proposal publication date: April 16, 2010
For further information, please call: (512) 936-7223

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**16 TAC §25.483**

The amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and §17.004 and §39.101, which authorize the commission to adopt and enforce rules that ensure various retail electric customer protections.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.004 and 39.101.

*§25.483. Disconnection of Service.*

(a) Disconnection and reconnection policy. Only a transmission and distribution utility (TDU), municipally owned utility, or electric cooperative shall perform physical disconnections and reconnections. Unless otherwise stated, it is the responsibility of a retail electric provider (REP) to request such action from the appropriate TDU, municipally owned utility, or electric cooperative in accordance with that entity's relevant tariffs, in accordance with the protocols established by the registration agent, and in compliance with the requirements of this section. If a REP chooses to have a customer's electric service disconnected, it shall comply with the requirements in this section. Nothing in this section requires a REP to request that a customer's service be disconnected.

(b) Disconnection authority.

(1) Any REP may authorize the disconnection of a medium non-residential or large non-residential customer, as that term is defined in §25.43 of this title (relating to Provider of Last Resort (POLR)).

(2) Except as provided in subsection (d) of this section, all REPs shall have the authority to authorize the disconnection of residential and small non-residential customers pursuant to commission rules. Prior to authorizing disconnections for non-payment in accordance with this paragraph, a REP shall:

(A) test all necessary electronic transactions related to disconnections and reconnections of service; and

(B) file an affidavit from an officer of the company, in a project established by the commission for this purpose, affirming that the REP understands and has trained its personnel on the commission's rule requirements related to disconnection and reconnection, and has adequately tested the transactions described in subparagraph (A) of this paragraph.

(c) Disconnection with notice. A REP having disconnection authority under the provisions of subsection (b) of this section, including the POLR, may authorize the disconnection of a customer's electric service after proper notice and not before the first day after the disconnection date in the notice for any of the following reasons:

(1) failure to pay any outstanding bona fide debt for electric service owed to the REP or to make deferred payment arrangements by the date of disconnection stated on the disconnection notice. Payment of the delinquent bill at the REP's authorized payment agency is considered payment to the REP;

(2) failure to comply with the terms of a deferred payment agreement made with the REP;

(3) violation of the REP's terms and conditions on using service in a manner that interferes with the service of others or the operation of nonstandard equipment, if a reasonable attempt has been made to notify the customer and the customer is provided with a reasonable opportunity to remedy the situation;

(4) failure to pay a deposit as required by §25.478 of this title (relating to Credit Requirements and Deposits); or

(5) failure of the guarantor to pay the amount guaranteed, when the REP has a written agreement, signed by the guarantor, which allows for disconnection of the guarantor's service.

(d) Disconnection without prior notice. Any REP or TDU may, at any time, authorize disconnection of a customer's electric service without prior notice for any of the following reasons:

(1) Where a known dangerous condition exists for as long as the condition exists. Where reasonable, given the nature of the hazardous condition, the REP, or its agent, shall post a notice of disconnection and the reason for the disconnection at the place of common entry or upon the front door of each affected residential unit as soon as possible after service has been disconnected;

(2) Where service is connected without authority by a person who has not made application for service;

(3) Where service is reconnected without authority after disconnection for nonpayment;

(4) Where there has been tampering with the equipment of the transmission and distribution utility, municipally owned utility, or electric cooperative; or

(5) Where there is evidence of theft of service.

(e) Disconnection prohibited. A REP having disconnection authority under the provisions of subsection (b) of this section shall not authorize a disconnection for nonpayment of a customer's electric service for any of the following reasons:

(1) Delinquency in payment for electric service by a previous occupant of the premises;

(2) Failure to pay for any charge that is not for electric service regulated by the commission, including competitive energy service, merchandise, or optional services;

(3) Failure to pay for a different type or class of electric service unless charges for such service were included on that account's bill at the time service was initiated;

(4) Failure to pay charges resulting from an underbilling, except theft of service, more than six months prior to the current billing;

(5) Failure to pay disputed charges, except for the amount not under dispute, until a determination as to the accuracy of the charges has been made by the REP or the commission, and the customer has been notified of this determination;

(6) Failure to pay charges arising from an underbilling due to any faulty metering, unless the meter has been tampered with or unless such underbilling charges are due under §25.126 of this title (relating to Adjustments Due to Non-Compliant Meters and Meter Tampering in Areas Where Customer Choice Has Been Introduced); or

(7) Failure to pay an estimated bill other than a bill rendered pursuant to an approved meter-reading plan, unless the bill is based on an estimated meter read by the TDU.

(f) Disconnection on holidays or weekends.

(1) A REP having disconnection authority under the provisions of subsection (b) of this section shall not request disconnection of a customer's electric service for nonpayment on a holiday or weekend, or the day immediately preceding a holiday or weekend, unless the REP's personnel are available on those days to take payments, make payment arrangements with the customer, and request reconnection of service.

(2) Unless a dangerous condition exists or the customer requests disconnection, a TDU shall not disconnect a customer's electric service on a holiday or weekend, or the day immediately preceding a holiday or weekend, unless the personnel of the TDU are available to reconnect service on all of those days.

(g) Disconnection of Critical Care Residential Customers. A REP having disconnection authority under the provisions of subsection (b) of this section shall not authorize a disconnection for nonpayment of electric service at a permanent, individually metered dwelling unit of a delinquent Critical Care Residential Customer when that customer establishes that disconnection of service will cause some person at that residence to become seriously ill or more seriously ill.

(1) Each time a Critical Care Residential Customer seeks to avoid disconnection of service under this subsection, the customer shall accomplish all of the following by the stated date of disconnection:

(A) Have the person's attending physician (for purposes of this subsection, the "physician" shall mean any public health official, including medical doctors, doctors of osteopathy, nurse practitioners, registered nurses, and any other similar medical professional) contact the REP to confirm that the customer is a Critical Care Residential Customer;

(B) Have the person's attending physician submit a written statement to the REP confirming that the customer is a Critical Care Residential Customer; and

(C) Enter into a deferred payment plan.

(2) The prohibition against service disconnection of a Critical Care Residential Customer provided by this subsection shall last 63 days from the issuance of the bill for electric service or a shorter period agreed upon by the REP and the customer, secondary contact, or attending physician. If the Critical Care Residential Customer does not accomplish the requirements of paragraph (1) of this subsection:

(A) The REP shall provide written notice to the Critical Care Residential Customer and the secondary contact listed on the commission-approved application form of its intention to disconnect service not later than 21 days prior to the date that service would be disconnected. Such notice shall be a separate mailing or hand delivered notice with a stated date of disconnection with the words "disconnection notice" or similar language prominently displayed. If the REP has offered and the customer has agreed for the customer and/or secondary contact to receive disconnection notices from the REP by email, a separate email with the words "disconnection notice" or similar language in the subject line shall be sent in addition to the separate mailing or hand delivered notice. Except as provided in this subsection, the notice shall comply with the requirements of subsections (l) and (m) of this section; and

(B) Prior to disconnecting a Critical Care Residential Customer, a TDU shall contact the customer and the secondary contact listed on the commission-approved application form. If the TDU does not reach the customer and secondary contact by phone, the TDU shall visit the premises, and, if there is no response, shall leave a door hanger containing the pending disconnection information and information on how to contact the REP and TDU.

(3) If, in the normal performance of its duties, a TDU obtains information that a customer scheduled for disconnection may qualify for delay of disconnection pursuant to this subsection, and the TDU reasonably believes that the information may be unknown to the REP, the TDU shall delay the disconnection and promptly communicate the information to the REP. The TDU shall disconnect such customer if it subsequently receives a confirmation of the disconnect notice from the REP. Nothing herein should be interpreted as requiring a TDU to assess or to inquire as to the customer's status before performing a disconnection when not otherwise required.

(4) If a TDU refuses to disconnect a Critical Care Residential Customer pursuant to this subsection, it shall cease charging all transmission and distribution charges and surcharges, except securitization-related charges, for that premises to the REP.

(h) Disconnection of Chronic Condition Residential Customers. A REP having disconnection authority under the provisions of subsection (b) of this section shall not authorize a disconnection for nonpayment of electric service at a permanent, individually metered dwelling unit of a delinquent customer when that customer has been designated as a Chronic Condition Residential Customer pursuant to §25.497 of this title (relating to Critical Load Industrial Customers, Critical Load Public Safety Customers, Critical Care Residential Customers, and Chronic Condition Residential Customers), except as provided in this subsection. The REP shall notify the Chronic Condition Residential Customer and the secondary contact listed on the commission-approved application form with a written notice of its intention to disconnect service not later than 21 days prior to the date that service would be disconnected. Such notice shall be a separate mailing or hand delivered notice with a stated date of disconnection with the words "disconnection notice" or similar language prominently displayed. If the REP has offered and the customer has agreed for the customer and/or secondary contact to receive disconnection notices from the REP by email, a separate email with the words "disconnection notice" or similar language in the subject line shall be also be sent in addition to the separate mailing or hand delivered notice. Except as provided in this subsection, the notice shall comply with the requirements of subsections (l) and (m) of this section.

(i) Disconnection of energy assistance clients.

(1) A REP having disconnection authority under the provisions of subsection (b) of this section shall not authorize a disconnection for nonpayment of electric service to a delinquent residential customer for a billing period in which the REP receives a pledge, letter of intent, purchase order, or other notification that the energy assistance provider is forwarding sufficient payment to continue service provided that such pledge, letter of intent, purchase order, or other notification is received by the due date stated on the disconnection notice, and the customer, by the due date on the disconnection notice, either pays or makes payment arrangements to pay any outstanding debt not covered by the energy assistance provider.

(2) If an energy assistance provider has requested monthly usage data pursuant to §25.472(b)(4) of this title (relating to Privacy of Customer Information), the REP shall extend the final due date on

the disconnection notice, day for day, from the date the usage data was requested until it is provided.

(3) A REP shall allow at least 45 days for an energy assistance provider to honor a pledge, letter of intent, purchase order, or other notification before submitting the disconnection request to the TDU.

(4) A REP may request disconnection of service to a customer if payment from the energy assistance provider's pledge is not received within the time frame agreed to by the REP and the energy assistance provider, or if the customer fails to pay any portion of the outstanding balance not covered by the pledge.

(j) Disconnection during extreme weather. A REP having disconnection authority under the provisions of subsection (b) of this section shall not authorize a disconnection for nonpayment of electric service for any customer in a county in which an extreme weather emergency occurs. A REP shall offer residential customers a deferred payment plan upon request by the customer that complies with the requirements of §25.480 of this title (relating to Bill Payment and Adjustments) for bills that become due during the weather emergency.

(1) The term "extreme weather emergency" shall mean a day when:

(A) the previous day's highest temperature did not exceed 32 degrees Fahrenheit, and the temperature is predicted to remain at or below that level for the next 24 hours anywhere in the county, according to the nearest National Weather Service (NWS) reports; or

(B) the NWS issues a heat advisory for a county, or when such advisory has been issued on any one of the preceding two calendar days in a county.

(2) A TDU shall notify the commission of an extreme weather emergency in a method prescribed by the commission, on each day that the TDU has determined that an extreme weather emergency has been issued for a county in its service area. The initial notice shall include the county in which the extreme weather emergency occurred and the name and telephone number of the utility contact person.

(k) Disconnection of master-metered apartments. When a bill for electric service is delinquent for a master-metered apartment complex:

(1) The REP having disconnection authority under the provisions of subsection (b) of this section shall send a notice to the customer as required by this subsection. At the time such notice is issued, the REP, or its agents, shall also inform the customer that notice of possible disconnection will be provided to the tenants of the apartment complex in six days if payment is not made before that time.

(2) At least six days after providing notice to the customer and at least four days before disconnecting, the REP shall post a minimum of five notices in English and Spanish in conspicuous areas in the corridors or other public places of the apartment complex. Language in the notice shall be in large type and shall read: "Notice to residents of (name and address of apartment complex): Electric service to this apartment complex is scheduled for disconnection on (date), because (reason for disconnection)."

(l) Disconnection notices. A disconnection notice for nonpayment shall:

(1) not be issued before the first day after the bill is due;

(2) be a separate mailing or hand delivered notice with a stated date of disconnection with the words "disconnection notice" or similar language prominently displayed or, if the REP has offered and the customer has agreed to receive disconnection notices from the REP by email, be a separate email with the words "disconnection notice" or similar language in the subject line. The REP may send the disconnection notice concurrently with the request for a deposit;

(3) have a disconnection date that is not a holiday, weekend day, or day that the REP's personnel are not available to take payments, and is not less than ten days after the notice is issued; and

(4) include a statement notifying the customer that if the customer needs assistance paying the bill by the due date, or is ill and unable to pay the bill, the customer may be able to make some alternate payment arrangement, establish a deferred payment plan, or possibly secure payment assistance. The notice shall also advise the customer to contact the provider for more information.

(m) Contents of disconnection notice. Any disconnection notice shall include the following information:

(1) The reason for disconnection;

(2) The actions, if any, that the customer may take to avoid disconnection of service;

(3) The amount of all fees or charges which will be assessed against the customer as a result of the default;

(4) The amount overdue;

(5) A toll-free telephone number that the customer can use to contact the REP to discuss the notice of disconnection or to file a complaint with the REP, and the following statement: "If you are not satisfied with our response to your inquiry or complaint, you may file a complaint by calling or writing the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas, 78711-3326; Telephone: (512) 936-7120 or toll-free in Texas at (888) 782-8477. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. Complaints may also be filed electronically at www.puc.state.tx.us/ocp/complaints/complain.cfm;"

(6) If a deposit is being held by the REP on behalf of the customer, a statement that the deposit will be applied against the final bill (if applicable) and the remaining deposit will be either returned to the customer or transferred to the new REP, at the customer's designation and with the consent of both REPs;

(7) The availability of deferred payment or other billing arrangements, from the REP, and the availability of any state or federal energy assistance programs and information on how to get further information about those programs; and

(8) A description of the activities that the REP will use to collect payment, including the use of consumer reporting agencies, debt collection agencies, small claims court, and other remedies allowed by law, if the customer does not pay or make acceptable payment arrangements with the REP.

(n) Reconnection of service. Upon a customer's satisfactory correction of the reasons for disconnection, the REP shall request the TDU, municipally owned utility, or electric cooperative to reconnect the customer's electric service as quickly as possible. The REP shall inform the customer of the approximate reconnection time in accordance with this subsection. If a REP submits a reconnection order with no priority or same day reconnect request and the TDU completes the reconnect the same day, the TDU shall not assess a priority reconnect fee. A TDU may assess a priority reconnect fee only when the customer expressly requests it. A customer's service shall be reconnected no later than the timelines set forth in paragraphs (1) - (7) of this subsection:

(1) For payments made between 8:00 a.m. and 12:00 p.m. on a business day, a REP shall send a reconnection request to the TDU

no later than 2:00 p.m. on the same day. The TDU shall reconnect service to that customer that day if possible, but no later than the end of the next utility field operational day after the reconnection request was received by the TDU.

(2) For payments made after 12:00 p.m., but before 5:00 p.m. on a business day, a REP shall send a reconnection request to the TDU by 7:00 p.m. on the same day. The TDU shall reconnect service to that customer the next day if possible, but no later than the end of the next utility field operational day after the reconnection request was received by the TDU.

(3) For payments made after 5:00 p.m., but before 7:00 p.m. on a business day, a REP shall send a reconnection request to the TDU by 9:00 p.m. The TDU shall reconnect service to that customer as soon as possible, but no later than the end of the next utility field operational day after the reconnection request was received by the TDU.

(4) For payments made after 7:00 p.m., but before 8:00 a.m. on the next business day, a REP shall send a reconnection request to the TDU by 2:00 p.m. on the next business day. The TDU shall reconnect service to that customer no later than the end of the next utility field operational day after the reconnection request was received by the TDU.

(5) For payments made on a weekend day or a holiday, a REP shall send a reconnection request to the TDU by 2:00 p.m. on the first business day after the payment was made. The TDU shall reconnect service to that customer no later than the end of the next utility field operational day after the reconnection request was received by the TDU.

(6) In no event shall a REP fail to send a reconnection notice within 48 hours after the customer's satisfactory correction of the reasons for disconnection as specified in the disconnection notice.

(7) In no event shall a TDU fail to reconnect service within 48 hours after a reconnection request is received.

(o) Effective date. The effective date of this section is January 1, 2011.

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 September 29, 2010.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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## SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE

The Public Utility Commission of Texas (commission) adopts the repeal of §25.497, relating to Critical Care Customers, and new §25.497, relating to Critical Load Industrial Customers, Critical Load Public Safety Customers, Critical Care Residential Customers, and Chronic Condition Residential Customers. The new section is adopted with changes to the proposed text as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2915). The text of the rule will be republished. The repeal is adopted without changes and will not be republished. The new rule provides uniform requirements regarding residential customers with certain medical conditions who face disconnection of electric service by a transmission and distribution utility (TDU). Previous commission rules included a critical care and an ill and disabled category, which were not defined. In this rule the ill and disabled category is eliminated, and two categories of critical care customers with different protections are adopted. There were also differences in the procedures for qualifying customers as critical care customers from one utility to another that will be eliminated with the adoption of this rule. This rule is a competition rule subject to judicial review as specified in PURA §39.001(e). This repeal and new section are adopted under Project Number 37622.

A public hearing on the proposed new section was held at commission offices on May 17, 2010 at 1:00 p.m. Representatives from American Association of Retired Persons (AARP); National Multiple Sclerosis Society: Lonestar (MS Society); One Voice Texas; Public Citizen; Smart UR Citizens; State Representative Sylvester Turner's staff; State Representative Lon Burnam and his staff; Texas Legal Services Center (TLSC); Texas Organizing Project (TOP); and Texas Ratepayers' Organization to Save Energy (TX ROSE) attended the hearing and provided comments related to the proposed critical care rulemaking. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received comments on the proposed new section from AARP; AEP Texas Central Company, AEP Texas North Company, CenterPoint Energy Houston Electric, LLC, Oncor Electric Delivery Company LLC, and Texas-New Mexico Power Company (collectively Joint TDUs); Alliance for Retail Markets, CPL Retail Energy LP, Direct Energy LP, Texas Energy Association for Marketers, TXU Retail Electric Company LLC, and WTU Retail Energy LP (collectively, REP Group); Steering Committee of Cities Served by Oncor (Cities); City of Houston, Texas (Houston); the Electric Reliability Council of Texas (ERCOT); MS Society; Office of Public Utility Counsel (OPC); Public Citizen; Reliant Energy Retail Services, LLC; TLSC and TX ROSE (TLSC/TX ROSE); TOP; TLSC/TX ROSE noted that its Reply Comments are joined and supported by State Representatives Lon Burnam, Sylvester Turner, and Rafael Anchía; Texas One Voice; The Senior Source; TOP; Smart UR Citizens; and Mr. Bert Walsh.

*General Comments*

Houston noted that during the November 20, 2009 workshop, the utilities reported that a relatively small number of customers had a critical care designation. All utilities reported that, once customers are on the critical care list, the utilities' systems automatically reject disconnect notices for nonpayment, and REPs rarely protest those rejections. In general, as discussed at the commission's workshop in November, the existing critical care rule seems to be working as intended, with the exception of practices that only CenterPoint Energy employs. Houston pointed out that while there were several suggestions on how to improve the commission's existing Critical Care Eligibility Form, it appears that most of these suggestions (such as including a physician identification number) could be handled with changes to the form, without the need to adopt a new rule.

*Commission Response*

The commission believes that the expansion of the definitions, standardizing the application of those definitions among TDU territories, and requiring uniform processes among TDU territories is important and therefore adopts changes to the rule.

*(1) This proposal includes two designations: chronic condition and critical care residential customers. Some parties have suggested only one category. Please provide feedback on the benefits of each approach.*

Joint TDUs, Public Citizen, AARP, OPC, MS Society, Reliant, Texas One Voice, and the REP Group supported the two designations.

OPC argued that when customers who may lose their life if their electricity is disconnected, a medical emergency is created, and therefore the disconnection protections in PURA §39.101 apply. OPC went on to state that the real difference in treatment of the two categories is addressed in PUC Project No. 36131, *Rulemaking Relating to Disconnection of Electric Service and Deferred Payment Plans,* regarding §25.483 relating to disconnection of service and notice of disconnection.

TLSC/TX ROSE strongly supported having any person qualify for critical care status who is dependent on medical equipment that uses electricity or who requires heating and/or cooling to maintain life functions. TLSC/TX ROSE stated that how this is accomplished is less important than broadening the definition of critical care beyond those customers dependent on life support equipment powered by electricity. TLSC/TX ROSE also suggested that the current terminology of critical care and ill and disabled could still be used as set forth in current rules, with critical care lasting for one year, and ill and disabled lasting for up to 90 days. TLSC/TX ROSE suggested that using the same terms used today may reduce customer confusion that is always present when programs and terminology change.

The REP Group stated that the proposed rule appropriately defines the two categories of customers with health issues and affords the right protections for each category. The REP Group expressed its concern with ensuring that the most vulnerable customers are afforded sufficient protections under the rule. Specifically, if the customer or someone who resides with the customer depends on an electric-powered device to sustain life, the customer will qualify for critical care designation. The REP Group advocated that when a loss of electricity results in a loss of life for someone at the premises, that the customer should be provided the highest priority treatment. In contrast, while there are a significant number of individuals who use medical devices that consume electricity, a loss of electricity does not necessarily mean that most of them face imminent loss of life. Therefore, the REP group supported the two designations.

*Commission Response*

The commission adopts a rule with the two designations as proposed - critical care residential customer and chronic condition residential customer. The commission believes that these modified definitions eliminate the prior confusion experienced in the market with an ill and disabled category that was not defined in the commission's rules. The commission agrees with the REP Group that the proposed rule appropriately defines the two categories of customers with health issues and affords reasonable protections for each category. The commission therefore declines to adopt the suggestion by TLSC/TX ROSE that the terminology of ill and disabled as set forth in current rules be retained.

*(2) If the commission proceeds with two designations, what is the proper treatment or transition mechanism for customers currently on the critical care list prior to their regular renewal date? Which protections should they be afforded? Should they be required to reapply before their regular renewal date?*

Joint TDUs, Public Citizen, AARP, OPC, TLSC/TX ROSE, and MS Society, did not support language that would require customers to re-apply for designation following adoption of this rulemaking. REP Group, Reliant, TLSC/TX ROSE and AARP all suggested some form of a transition letter be sent by the TDU to critical care customers. AARP specifically suggested that the commission develop a transition letter that should be mailed to all current critical care customers explaining the new rule, including any necessary steps that must be taken to apply or renew for a chronic condition or critical care designation. AARP suggested this mailing should also include the new critical care and chronic condition application form, and added that the TDU should follow up with a second letter if no response is provided by the customer. OPC suggested that the TDUs should follow the procedures for notification of expiration under the proposed §25.497(e)(9).

TLSC/TX ROSE stated that there would be little value in having customers designated as critical care re-apply, as their information would be essentially the same, except for the one difference on the application - the secondary contact. TLSC/TX ROSE commented that the requirement of the customer to provide a secondary contact, and requiring the REP to notify the secondary contact when there are problems is a positive change that will benefit both the consumer and the REP. Many times people with serious health problems get confused or lack the energy to cope with paperwork and problems. Having a secondary contact that is notified by the TDU and the REP when there is a problem should provide for better maintenance of problem accounts. TLSC/TX Rose commented that information needed to comply with the secondary contact requirements could be obtained through a letter mailed directly to the customer and could be accomplished without having to complete the application process through a physician's office. Having to repeat the application process unnecessarily, is overly burdensome to the consumer and appears to be unnecessary, TLSC/TX ROSE opined.

TLSC/Texas Rose also suggested that the TDUs solicit secondary contact information from the patient at the time the rule is adopted. The Joint TDUs did not support this idea, and explained that the customer is unlikely to respond to a solicitation from the TDU solely on that issue, and if this suggestion is adopted, then such communication should come from the customer's REP. Joint TDUs added there can be no assurance that secondary contact information will be provided by all current critical care customers.

Reliant recommended that the TDUs send a renewal notice to all existing critical care customers, with an explanation of the changes to the rule, including the new requirement for secondary contact information. Reliant added that if the customer has submitted physician verification of critical care during the last 12 months, additional physician verification should not be required for this renewal. Joint TDUs responded that this suggestion that the renewal not be accompanied by physician verification is unworkable. The physician must designate which category the patient qualifies for and the new procedure requires that the application come from the physician. Joint TDUs added that without

the physician's input, the application will be incomplete, and the TDU will be unable to classify the customer.

The REP Group commented that the best process would be for the TDU to send a notice to each existing critical care customer 45 days before the effective date of this section of the adopted rule. The notice should inform the customer about the rule changes, include a certification form, and instruct the customer to recertify under the new rule. The REP Group stated that re-certification is important so that secondary contact information, for example, is obtained. The REP Group suggested that if the customer fails to take action on the re-certification notice within the 45 days, the TDU should send a letter to the customer informing the customer of removal of the critical care designation.

The REP Group added that re-certification is especially important given that the modified rule requires TDUs to contact not only the critical care customer before working a disconnect order, but also a designated secondary contact. This secondary contact can best help the affected customer resolve the situation *(e.g.,* paying an unpaid balance to the REP or finding new accommodations for the affected customer). Thus, it is important that the TDUs obtain secondary contact information for the most vulnerable customers as soon as possible and re-certification is the most appropriate means for obtaining the customer's secondary contact information.

Public Citizen suggested that the commission develop a transition letter that should be mailed to all currently designated critical care customers and their designated representatives, in the event there are issues with medical competency during their illness, explaining the new §25.497, including any necessary steps that must be taken to apply or renew for a chronic condition or critical care designation. Public Citizen recommended that this mailing also include the new critical care and chronic condition application form. They added that since the protections these designations provide are essential to protect the health and well-being of current critical care customers, the TDU should also mail a follow up letter to the customer and the customer's designated representative, and also place a door hanger both at the customer's premises if no response is received, within a reasonable time.

Joint TDUs recommended that all residential customers currently designated as critical care be designated as "Critical Care Residential Customers," but only until the renewal date is reached that would otherwise apply to them under the old rule. Joint TDUs argued that it would be burdensome to require all customers to reapply, and that the current designation lasts for at most a year. Joint TDUs added that the customer should be given the most protective classification during that time to avoid misclassification if the customer needs the highest level of protection.

*Commission Response:*

The commission agrees with the Joint TDUs, Public Citizen, AARP, OPC, TLSC/TX ROSE and MS Society that customers who are currently designated as critical care should not have to re-apply for designation following adoption of this rule. Those customers should be afforded the protections they enjoy today, and shall be allowed to re-apply on a schedule consistent with the current renewal cycle. The commission agrees with TLSC/TX ROSE that requiring customers to repeat the application process is overly burdensome and is therefore unnecessary. The commission does not agree with commenters that the TDU should send a transition letter to customers following adoption of the rule. The commission notes that important information regarding the new form, the new rule and associated processes can be provided by the TDU when it sends out the renewal letter as scheduled to existing critical care customers. The commission therefore includes language to this effect in subsection (e)(9). The commission declines to adopt the recommendation by TLSC/Texas ROSE to require the TDUs to solicit secondary contact information from a currently-enrolled critical care customer at the time the rule is adopted. The commission agrees with the Joint TDUs that the customer is unlikely to respond to a solicitation from the TDU solely on that issue.

*(3) In the proposal, customers who are dependent upon an electric-powered medical device to sustain life and have battery back-up available are not classified as critical care. Should this provision be reconsidered? Please provide alternative recommendations.*

Joint TDUs and Houston agreed that a panel of medical experts should be consulted to determine whether this is a workable criterion for physicians to implement. Joint TDUs added that it is appropriate that the definitions be vetted by medical professionals given that the stakeholders agree that electric service providers should not be in the business of determining which customers have conditions that qualify.

OPC commented that it undertook the task of identifying any other state that uses a similar restriction to their critical care equivalent category of residential electricity customers. OPC was unable to find any other state that would reject a customer based on the availability or even actual possession of a battery. MS Society also commented that in its limited review of U.S. utility companies' policies, they could not find a utility that uses battery backup as a criterion for disqualifying potential life support customers from such a designation.

TLSC/TX ROSE stated that the question is inconsistent with the wording in the proposed rule. The proposed rule states "If a medical device has battery back-up available in the marketplace, the device is not considered to require electric service." TLSC/TX ROSE commented that the proposed language is far more restrictive than the preamble question suggests. Denying critical care status to customers using life support equipment with battery backup available in the marketplace is contrary to the intent of the rule to assure a continuous supply of electricity.

Texas One Voice expressed concern for the battery-back up language as well as the proposed disconnection procedures. Texas One Voice explained that a blanket exclusion of anyone whose medical equipment could use battery backup would be a weakening of the protections that currently exist. Ms. Wattner, Mr. Adair and Mr. Jackson also expressed concern over the battery back-up proposal. Mr. Smith noted that the batteries that are for medical backup have a life span of two or three years. Mr. Smith stated from personal experience that if they are frequently used, they may not work in an emergency. Mr. Smith added they are never meant to be a replacement for power.

AARP, Cities, Public Citizen, MS Society, TLSC/TX ROSE and OPC opposed the concept of battery back-up as a defining criterion between the two designations. They argued that all consumers dependent on a life saving device should be eligible for critical care designation, regardless of battery availability. MS Society stated that the qualification is irrelevant, as someone's health status (dependent on electricity to sustain life) does not

change if they have access to a battery. Cities argued this proposed restriction contravenes the purposes of the rule, which are to protect the lives of critical care customers as well as to provide REPs with the tools to deal with customers who have not paid their bills. Houston strongly urged the commission to seek input from medical professionals before adopting such a restrictive definition. Houston noted that battery backup affords only limited assurance if the battery itself cannot readily be re-charged.

Texas One Voice, OPC, AARP, Public Citizen, MS Society, Cities and TLSC/TX ROSE pointed out many concerns with the battery back-up language. They stated that while knowing that battery backups are available and can bring temporary protection, they are no more than what they claim to be - a temporary battery back-up power supply. Texas One Voice argued that battery back-ups do not negate the need for a permanent power supply, and their limitations must be recognized and validated. In addition, these commenters noted that battery back-up devices available in the marketplace might be at prices well out of the reach of a medically-needy person. The availability of such a device, if unaffordable, is of no help to a medically-needy person facing a disconnection. Cities noted that the proposed restriction also poses practical problems for REPs, commission staff and critical care customers, particularly with respect to who is responsible for identifying if a battery back-up is available. OPC pointed out that many customers may not have access to battery backup even if it is available in the marketplace, and that Medicare, Medicaid, and private insurance companies may not cover the costs for the battery backup for life sustaining equipment. It is also unclear from the proposed rule who would be responsible to verify whether a battery exists for a particular medical device, the doctor, the customer, or the TDU. Cities opined that determining the commercial availability of medical equipment is clearly not within the expertise of electric and regulatory professionals.

MS Society recommended that alternatively, the rule could ensure that language is included on qualifying forms or other materials readily available to the customer which state that the customer is responsible for preparing for an outage or emergency, not the REP. Joint TDUs agreed with this suggestion. MS Society also recommended that for each qualifying life support customer, the notification sent to customers should outline the customer's entitlements, as well as the expectations of the REP and TDU.

Joint TDUs commented that this discussion highlights the need for the commission to first articulate the goal of the rule and the benefits that qualifying customers receive in order that appropriate criteria can be developed for matching the patient to the level of protection provided. Joint TDUs opined that the higher the level of protection, the more important it is that the definitions be correct. Joint TDUs added that customers should have battery back-up for their own safety regardless of issues identified by commenters in this rulemaking, because continuous electric service can never be guaranteed and the battery allows time for the patient to make other arrangements when service is unavailable.

OPC also recalled the workshop held in 2009, in which CenterPoint stated it was applying a different standard of scrutiny regarding critical care applications than the other TDUs. During the workshop CenterPoint offered to begin applying the same scrutiny as the other TDUs. OPC commented that the commissioners seemed appreciative of the utility's offer and agreed that the CenterPoint standards were too strict. The commissioners also appeared concerned that CenterPoint judged the critical care applications based on the need for a life saving device without consideration of whether a lack of electricity would create a dangerous condition as the current rule provides. OPC stated that it is perplexing that the Commissioners previously wanted CenterPoint to raise its standards to those of the other TDUs that approved all complete forms, and now the proposed rule will lower the standards to those of CenterPoint.

Joint TDUs and the REP Group agreed that where battery back-up is available for a medical device, the customer should not be classified as a Critical Care Residential Customer on the basis of the need for the equipment. Joint TDUs argued that the proposed rule points out that if battery back-up is available, the customer is not dependent upon electric service to keep the equipment running. This designation is appropriately reserved for those who have no other option than to rely on electric service. The REP Group commented that the availability of battery-powered backup is an important consideration to ensure the highest level of protection to those critical care residential customers unable to rely on battery-powered backup.

The REP Group stated that maintaining the back-up battery provision in the definition encourages customers to take primary responsibility for themselves. Those customers who are most in need of electricity should receive the highest level of protection. The REP Group added that many at-home medical devices, including ventilators and heart pumps, have internal batteries. Battery back-up provides time for customers to implement more permanent back-up plans. The REP Group opined that devices that do not have battery back-ups available clearly pose a higher risk of mortality to a patient if loss of life is imminent without the electric-powered medical device.

The REP Group emphasized that the critical care designation serves three primary purposes: (1) prioritized restoration in the case of unplanned outages, like hurricanes; (2) advance notification in the case of planned outages, like regular maintenance work; and (3) specific advance contact by the TDU if the customer is subject to disconnection for non-payment. The REP Group suggested that none of these purposes guarantees the customer an uninterrupted power flow. The primary protection afforded to customers who meet the proposed definition of critical care is advance notification of a loss of power, and advance notification will occur before a disconnection for non-payment.

*Commission Response*

The commission declines to adopt definitions that use temporary battery back-up as a criterion to differentiate between the critical care and chronic condition categories. The commission agrees with commenters that the battery back-up is temporary, may be unaffordable for customers, and may not be reliable, and including this criterion would be administratively burdensome to apply in the market. The commission agrees that the critical care customers should receive the highest level of protection. The commission recognizes the comments by the REP Group that the critical care designation and its benefits do not guarantee the customer an interrupted power flow. The commission agrees with MS Society and Joint TDUs that it is the customer's responsibility to prepare for an outage or an emergency, not the REP's responsibility. The commission also agrees with MS Society that the critical care form could include language to state that the customer is responsible for preparing for an outage or emergency, and not the REP, and it will address this requirement within the compliance project, to be opened up following the adoption of this rule.

*Subsection (a)*

Houston urged the commission to rely on informed medical expert testimony before it adopts changes that could adversely impact the health or safety of at risk customers. Adoption of a rule containing confusing or variably interpretable language will arguably produce no more desirable results than the differing definitions electric utilities currently use.

Joint TDUs recommended that the rule create defined terms for types of customers covered by the rule, that the defined terms be capitalized, and that they be used in full each time that group of customers is referred to in the rule; for example, critical care customers should be referred as "Critical Care Residential Customers." Joint TDUs suggested that if these definitions are not made clear, that there is a danger that the rule will be interpreted incorrectly. Joint TDUs also recommended that the definition of a "Critical Care Industrial Customer" be removed. They argued it is redundant to the definition of "Critical Load Industrial Customer," and creates uncertainty when the commission refers to critical care customers. Alternatively, if the definition remains, Joint TDUs argued that it is particularly important that the rule clearly state what kind of critical care customer is being referred to in other sections of the rule.

TIEC stated that the current process for qualifying industrial customers for critical care designation has worked well, and the commission should ensure that the proposed revisions to §25.497 do not change this process. Joint TDUs agreed, and recommended the better approach is to bring forward most of the language from the existing rule that covers these customers. TIEC commented the current rule provides that critical care industrial customers qualify for protection through a collaborative process between the REP, customer, and the TDU.

The definition of critical care industrial customer also specifies that these customers qualify for notification of interruptions or suspensions of service as provided in certain sections of the TDU's tariff. This process should be maintained in the proposed revisions to the rule. TIEC therefore recommended that the definition of a critical care industrial customer contained in the current version of §25.497 be restored. TIEC further recommended removing the definition of a critical load customer as it is unnecessary if the critical care industrial customer definition is reinstated, and neither the proposed rule nor §25.483 provides any protections for critical load customers. TIEC clarified that the proposed revisions will maintain the status quo for critical care industrial customers and will not impact the commission's goal to create uniform standards for the designation of critical care residential customers.

Joint TDUs recommended that industrial customers be referred to as "Critical Load Industrial Customers" rather than "Critical Care Industrial Customers."

Cities commented that they and other local governments provide essential public safety functions to their citizens. Fire and police services, water and wastewater facilities are all crucial to the health of the citizens served by cities and other local governments and cannot function in the event of electric service disconnection. The current rule defines the process by which crucial public safety loads receive critical care designation. However, the proposed rule entirely removes the language defining that designation process. The proposed rule also removes key references to the transmission and distribution utility (TDU) tariff. The language omitted from the proposed rule defined how disconnection of public health and safety facilities would occur.

Houston commented that as the largest city in Texas, it receives many calls on electricity issues and has developed experience on how the commission's rules affect its citizens, particularly citizens with serious medical conditions. Houston believes that the proposed definitions for critical care residential customer and chronic condition residential customer will confuse and potentially unduly restrict the persons defined. Further, Houston expressed concern that if the definition of ill and disabled contained in existing §25.483(g) were eliminated, customers temporarily unable to pay their bills due to a medical condition would see their current protections significantly lowered. Houston believes that, with one exception, the current treatment of critical care customers in §25.497 and ill and disabled customers in §25.483(g) is superior to language contained in the proposed rules and urged the commission not to adopt either provision. Houston recommended more work be done before adopting these definitions to determine how they impact existing critical care customers and whether these definitions may be overly restrictive. Houston suggested that commission staff should undertake an analysis of how these existing critical customers could be impacted by the new definitions and whether customers who need critical care status would be removed because of the overly restrictive definitions contained in the proposed rule.

The REP Group responded that the proposed designations are anything but overly restrictive as they will permit more customers than are currently allowed to receive extended notice of disconnection of service. It is appropriate to distinguish between critical care and chronic condition customers to ensure each group of customers receives the appropriate protections. As to the City of Houston's request for additional study, the REP Group noted the numerous stakeholder meetings with commission Staff, Commissioner Nelson's office, and others regarding these designations. The critical care and chronic condition paradigm has been fully vetted.

*Commission Response*

The commission does not agree with Houston that the proposed designations are narrow, overly restrictive or confusing. Rather, the commission concludes that the adoption of the critical care residential customer and critical care chronic condition customer should eliminate previous confusion in the market due to inconsistent application of the critical care category across TDUs. Professional medical personnel will be applying the definitions in deciding whether to sign a form on behalf of a customer, and the commission is confident that they have the knowledge and training to apply them appropriately. The commission agrees with the REP Group that the numerous stakeholder meetings and discussions at workshops and public hearings have provided the opportunity to fully review the two designations. The commission acknowledges the comments by the Cities regarding the critical load and public safety customer language, as well as references to the Tariff, and has included those provisions in the definitions. The commission has also restored the language for industrial customers, as noted by TIEC and Joint TDUs. The suggestions regarding the wording for chronic condition and critical care residential customers made by the Joint TDUs are adopted by the commission as well for consistency.

*Subsection (a)(3)*

OPC suggested striking the 90 day designation provision and allowing the treating physician to fill in a specified period of time, up to one year, for the designation of chronic care. This will allow the doctor some flexibility in addressing the patient's condition. MS Society agreed with OPC, and added that conversations related

to the length of time necessary for this designation is one that takes place between the doctor and the patient, and not with the TDU or REP. MS Society recommended that the length of one year is appropriate for those who have been diagnosed with a life-long illness. Joint TDUs strongly recommended against this concept because the level of complexity it would create in implementation and the disparity it would create between customers. Joint TDUs suggested alternatively that if 90 days is too short for patients who do not have a "life-long" condition, a more workable solution would be to apply the one year designation to all customers qualifying for this status, rather than creating numerous classifications that must be maintained on an ongoing basis.

TLSC/TX ROSE supported the chronic condition category, as those customers who currently qualify for "Ill and Disabled" status would qualify in the proposed rule under chronic condition for at least 90 days. TLSC/TX ROSE clarified that its support for the proposed definitions is based on the understanding that the ill and disabled protection is not eliminated, but subsumed under the chronic condition category.

*Commission Response*

The commission adopts a definition for Chronic Condition Residential Customers in this rule. As noted by TLSC/TX ROSE, the commission believes that many, if not all, customers currently receiving disconnection protection through the "ill and disabled" language will be subsumed under this chronic condition category. The commission does not agree with the recommendations by OPC and Joint TDUs regarding the time the designation may last for customers under this designation, and adopts a definition that allows the physician to designate the condition as a life-long condition, in which case the protection lasts for one year (unless the customer no longer resides in the home). Otherwise, the designation by the physician will last for 90 days.

Reliant commented that use of the word "customer" in the proposed rule is inconsistent with the use of that word in other commission rules. Joint TDUs agreed with Reliant. Section 25.471(d)(3) defines "customer" as "A person who is currently receiving retail electric service from a REP in the person's own name or the name of the person's spouse..." In contrast, both proposed §25.497(a)(5) and (6) can be read to include a "person who currently resides and has been in residence with that customer for the most recent three consecutive months" as a customer. Reliant argued that no other commission rule confers the rights or responsibilities of a customer upon any person residing in the household; therefore these rights and responsibilities are limited to the account-holder and the account-holder's spouse. Reliant recommended that principle be retained in proposed §25.497.

Reliant agreed that residential critical care or chronic condition status should be limited to homes where the person with the serious medical condition is a long-term resident, and not a short-term visitor. TLSC/TX ROSE agreed with Reliant. Reliant argued, however, that the three-month *prior residency* requirement is not an appropriate standard for that determination; one could easily envision a scenario where the onset of a serious medical condition causes a person to take up residence with a family member. Public Citizen agreed. In that case, Reliant commented the person in question would not have been in residence for "the most recent three consecutive months" but would still be in need of the critical care (or chronic condition) protections. Joint TDUs and Public Citizen agreed.

The REP Group recommended that the phrase "is diagnosed by the customer's physician" should be changed to "is diagnosed by a physician", and explained that in practice it will be the physician of the person meeting the definition, which may not be the customer, who makes the diagnosis.

*Commission Response*

The commission agrees with the REP Group that the phrase in this definition should be modified to state "is diagnosed by a physician". The commission further agrees with the comments by Public Citizen, Reliant, TLSC/TX ROSE and Joint TDUs that the rule should state that the definition of "customer" should apply to a residential customer who has a person permanently residing in his or her home - and strikes the language referring to the three-month prior residency.

*Subsection (b)*

Joint TDUs suggested changes to this subsection, to clarify that the process requires the physician to submit the application, not the customer, and REP Group agreed. Additional language was proposed by Joint TDUs, making it clear that not only must an application be submitted, but that it must be done in accordance with all of the requirements of the rule. Joint TDUs provided these changes in order to prevent misunderstanding among customers who otherwise might assume that they could submit an application in a variety of ways.

*Commission Response*

The commission agrees with the suggested changes by the Joint TDUs and the REP Group that clarify the process for the physician's submittal of the application, and modifies this subsection accordingly.

*Subsection (c)*

OPC suggested this section include a provision in the rule that, in the event of a Governor declared emergency or disaster such as a hurricane or flooding, the utilities be required to provide the list of critical care customers to the first responders. OPC also suggested that the application form include a notice explaining to the customer that in such events, the utility will disclose the customer's name and service address to the first responders. OPC explained that including this direction in the rule as well as retaining the customers' consent on the application form will hopefully open the door for the utilities to provide that information to emergency crews that can assist the customers during emergencies. Joint TDUs agreed that this could be helpful to patients in the event of emergencies such as storms, but suggested that there may be confidentiality concerns with this approach. Joint TDUs recommended this issue be carefully explored before adopting such a requirement.

Texas One Voice asked that an information sharing agreement be established between the commission and other government agencies that act as first responders in times of disaster. Texas Once Voice pointed out that after a disaster such as Hurricane Ike, customers may go weeks without power while the TDUs work diligently to repair damaged power lines and restore electricity. Texas One Voice explained that if the names and contact information of individuals on the critical care list are shared after a disaster, emergency responders will be able to either evacuate people to a safe place or provide them with potentially life-saving generators. Cities, counties and the state have spent millions of dollars establishing highly trained, professional and competent first responder programs that are charged with prioritizing and meeting the needs of the community in times of disaster. Utiliz-

ing these programs is a way to ensure that customers who are known to have severe health problems are protected in times of disaster, Texas Once Voice explained.

*Commission Response*

The commission declines to adopt the proposed language that would require TDUs to provide the critical care lists to first responders as recommended by Texas One Voice and OPC. However, the commission agrees that this is a reasonable recommendation, and clearly will benefit critical care residential customers during an emergency situation. OPC suggested that customers' consent to this practice should be addressed in the creation of the critical care form, and the commission agrees. Because of the logistical concerns as well as customer privacy and confidentiality concerns, noted by the Joint TDUs, the commission concludes that the process for turning lists over to first responders should be more thoroughly considered in the compliance project, to be opened following adoption of this rulemaking. The commission is concerned that the current substantive rules addressing proprietary customer information, most notably §25.272(g)(1), relating to privacy of customer information, may prohibit a TDU from providing the list. Therefore, the commission finds that the upcoming project to develop the critical care form shall address these issues, as well Joint TDUs' concerns relating to how this information would be provided to the correct people.

TLSC/TX ROSE stated that the intent of this rule is to assure a continuous supply of electricity to critical care customers. Joint TDUs responded that the assumption seems to be that the power will never go out for those on the critical care list. No one can guarantee an uninterrupted or continuous power supply as outages occur, storms take down power lines, and equipment malfunctions. Joint TDUs commented there is a distinction between a "disconnection" of service that occurs intentionally, perhaps as a result of a failure to pay, and disruption of service caused by an outage or other uncontrollable event. Joint TDUs opined this needs to be made clear and customers need to understand the need to prepare for these events.

*Commission Response*

The commission does not agree with TLSC/TX ROSE that the intent of this rule is to assure a continuous supply of electricity to critical care customers. The intent of this rule is to establish clear and reasonable rules for customers to be protected from disconnections of electric service that pose a threat to their life and health as a consequence of serious medical conditions, ensure consistent application of the standards across TDU territories, and standardize the application process for customers' applying for these protections. The commission agrees with the Joint TDUs that no one can guarantee an uninterrupted or continuous power supply as outages, storms and equipment malfunctions occur, and the primary impact of this amendment will be to afford protections from disconnection or additional notices, related to disconnections for non-payment, by virtue of amendments that the commission is adopting to §25.483, relating to Disconnection of Service. Further, a customer's designation as a critical care or chronic condition customer, consistent with this rule, does not relieve the customer of the responsibility to pay the bills for electric service. The REP is not required to provide power to these customers without payment, and a REP may pursue disconnection for these customers, consistent with §25.483, in the event of non-payment.

Joint TDUs stated that because of the four proposed definitions, readers of this subsection will be looking for the portions of the rule that apply to those customers. Rules of construction applicable to statutes and rules allow for meaning to be implied when not otherwise stated, and therefore, this section should expressly state the benefits that apply to industrial public safety customers in order to avoid misinterpretation. Joint TDUs added that the tariff sections that apply to Critical Load Customers should be identified and that it should be made clear that the remainder of the rule does not apply to these customers. Joint TDUs also recommended the rule reference Sections 4.3.8.1 and 5.3.7.1 of the TDU Tariff, as well as those named in the Proposal for Publication.

REP Group and MS Society both noted that one of the benefits of being on the critical care list is priority service restoration. While MS Society recognized that priority restoration is not guaranteed, Joint TDUs responded that they are very concerned that mention of this as a benefit of critical care status sets up a dangerous and incorrect expectation. Joint TDUs explained that with expansion of the critical care lists, the ability to provide priority restoration is severely compromised because there could be a critical care customer on every feeder. Thus, not only can priority restoration not be guaranteed, it should not be expected, and it should certainly not be promised. Moreover, it needs to be clear that to the extent priority restoration is possible, it only applies to outages, not restoration after disconnection of service at the request of the REP. Joint TDUs requested clarification of this in the preamble.

Joint TDUs further recommended that this part of the rule should also clearly state that critical care status does not guarantee continuous electric service in order to avoid any confusion or misunderstanding. This will protect customers who might otherwise assume that they are not at risk for interruptions of service which, the Joint TDUs pointed out, as is recognized in the Tariff, cannot always be avoided. Joint TDUs commented that those customers need to be made aware that they must continue to take responsibility for their electrical needs.

*Commission Response*

The commission adopts language in subsection (c)(4) to specify that designation as a Critical Load Customer, Critical Care Residential Customer, or Chronic Condition Residential Customer does not guarantee the uninterrupted supply of electricity. The commission agrees that customers need to be made aware that they must continue to take responsibility for their electricity needs. The commission further agrees with the Joint TDUs that priority restoration cannot be guaranteed. The commission notes that with the installation of advanced meters in the TDU territory, the ability to prevent disconnection no longer needs to be done at the feeder level - it can be managed at the meter level, with enhancements to the TDU's back-office operations. The commission concludes that this is an important benefit of advanced meter deployment, and expects this functionality to be developed during the deployment period.

The commission also adopts the non-substantive clarifications suggested by the Joint TDUs, and also adds the additional references to the Tariff in subsection (c)(1) and (c)(2).

*Subsection (d)*

TLSC/TX ROSE supported the proposed procedure regarding notice to customers in this section. The Joint TDUs recommended that the defined terms be used consistently in this

section and throughout the rule, and made suggested wording changes to that effect.

Reliant commented that the notice required by a REP three times per year regarding the availability of critical care and chronic condition designations is overly burdensome, and should be stricken from the proposed rule. Reliant argued that there are already numerous other customer notifications required of REPs, and requiring a notice to be sent three times per year to every residential customer about a designation for which a relatively small number of people are qualified is an inefficient use of resources. Reliant calculated that with all of the existing requirements, this additional requirement would mean that during the five months of June through October, a REP will display nine mandated messages on its customer bills.

Lastly, Reliant argued that limited space exists on a customer bill and within a billing envelope to display messages and provide bill inserts. Case law provides that billing envelopes are the property of the provider sending the bill, and therefore each additional message required by the commission serves to reduce the space available for the REP to communicate with its customers, restricting commercial speech within the REP's own bill. Reliant concluded that the only way the government can regulate commercial speech is if such regulation directly advances a governmental interest, and the regulation is not more extensive than necessary to serve that interest. Reliant opined that while it can be argued that the State may have an interest in sending customers numerous messages in REP bills, clearly, the requirement, which unreasonably limits the amount of space that a REP can use for its lawful commercial speech, is more extensive than necessary to serve that interest.

*Commission Response*

The commission agrees with Reliant that the proposed requirements that a REP provide notice of customers' rights regarding the availability of critical care and chronic condition designations is overly burdensome three times a year, and adopts language to require REPs to provide information to residential customers two times a year.

*Subsection (e)(1)*

TLSC/TX ROSE proposed minor amendments to the wording related to electronic transmission of the application from the physician to the TDU. They expressed support for the use of electronic submissions, but did not agree with language suggesting that a physician without the ability to submit the form electronically would result in the prevention of the processing the application. Joint TDUs did not agree with this suggestion, and stated that requiring electronic submission of the form is in the customer's best interest - as it is the quickest method of getting the form to the TDU, and ensures that it is received at the right place at the TDU's operations. It is also the best way to ensure that the doctor's recommendation is accurately represented on the form.

OPC stated that it appreciated the commission's efforts in including a contact phone number on the form and offered one minor revision. The last sentence in the paragraph explains that the application must include a telephone number for the physician or customer to call in the event the physician or customer has logistical questions regarding the form. OPC suggested a minor edit to clarify that the telephone number should be one from the TDU.

The REP Group stated that in situations where the form is mistakenly submitted to the REP instead of the TDU, the application form should be designed to include contact information only for the TDU. The REP Group stated that REPs should not be responsible for receiving the application forms. The REP Group therefore recommended deleting the proposed rule's two business day timeline for REPs to forward errant application forms to the TDU. Not only is expedited mail to ensure two-day delivery expensive, it is unlikely that the REP would be able to route the form to the correct person at the TDU for processing on the day it arrived in error. The REP Group also recommended that the critical care/chronic condition application form should be designed to prevent errors that would result in a REP receiving the completed form, and REPs should not be held to a strict time standard for forwarding the form to the TDU if a form is received in error.

Joint TDUs agreed that if they will be responsible for answering questions about the application form, this should only occur during normal business hours.

*Commission Response*

The commission concludes that electronic submission of the form is in the customer's best interest, as noted by the Joint TDUs. The commission agrees with OPC's suggested clarification regarding the TDU telephone number and modifies subsection (e)(1) accordingly. The commission agrees that REPs should not be responsible for receiving applications, and that the form should be designed to prevent errors including the possibility of the customer sending the form to the REP by mistake. However, the commission does not agree with the REP Group's recommendation that REPs should not be held to the two business day standard for forwarding the form to the TDU, and retains that requirement in this paragraph. The commission acknowledges the comments by the REP Group that the form may be mistakenly submitted to the REP and not the TDU and agrees that the REP is not responsible for receiving the application forms; however, the commission retains the two-day requirement for forwarding the form to the TDU. This is so the customer's application can be processed by the TDU in a timely manner.

*Subsection (e)(2)*

TLSC/TX ROSE stated that the language in this paragraph which allows the TDU to determine that the form is materially complete and still request additional information "that is necessary to make a final determination on the application" is too broad and is counterintuitive to subsection (e)(6) which specifically states that the "TDU shall not challenge the diagnosis of the physician." In effect, the physician has determined that the critical care status is appropriate. TLSC/TX ROSE therefore recommended that if an application is materially complete, there should be no need to request additional information. Joint TDUs agreed. Joint TDUs recommended wording changes to correctly reflect the role of the TDU in processing the application. Joint TDUs clarified that the TDU is only responsible for assessing whether the form is incomplete, and OPC agreed.

*Commission Response*

The commission finds that the language originally proposed in this subsection is too broad. The commission agrees with TLSC/TX ROSE and Joint TDUs that if an application is materially complete, there should be no need for the TDU to request additional information. Therefore, the commission adopts changes in this paragraph to require the TDU to evaluate the form for completeness, and if the form is incomplete, the TDU shall mail the form to the customer no later than two business

days with an explanation in writing that information is needed to complete the form.

*Subsection (e)(3)*

The Joint TDUs recommended changes to this subsection that simplify the rule while providing as much or more protection to customers applying for critical care status. The Joint TDUs proposed to designate any customer who has not had final action taken on its application within two days, with the highest level of protection while the process continues. This assures that the customer will receive protection in two days. The Joint TDUs also added a provision that specifies that the temporary designation lasts 14 days if the application form is returned to the customer as incomplete, and TLSC/TX ROSE agreed.

*Commission Response*

The commission agrees with the recommendation by the Joint TDUs that if processing of a form is not completed within two business days from receipt of the form, the customer shall be designated as a Critical Care Residential Customer on a temporary basis, pending final designation by the TDU. The language also specifies that the temporary designation shall last for 14 days if the application is returned to the customer as incomplete, as recommended by the Joint TDUs and TLSC/TX ROSE.

*Subsection (e)(4)*

TLSC/TX ROSE stated that this paragraph should be amended to only apply to materially incomplete applications. The Joint TDUs recommended this paragraph be deleted in its entirety. Joint TDUs explained that if the form is complete, there is no other information the TDUs needs or will request. If additional information is required, then the application is incomplete and will be returned pursuant to subsection (e)(3). Joint TDUs added that inclusion of this provision seems to indicate that the TDU is doing something other than merely processing a complete application, and OPC agreed.

Reliant commented that the proposed language regarding the form should be modified so that a form is considered incomplete if any of the required items are not completed in full. Additionally, Reliant stated it is not clear which "name" (customer or medical patient, if different) and "signature" (customer or physician) is being sought. Joint TDUs responded that they agree that some of the references can be reworded to be more clear, however, it is not necessary to state repeatedly that the information on the form must be "complete". Joint TDUs added that even if not intended, this appears to set a standard designed to prevent a customer from qualifying. In addition, when the TDU processes the application, it will have no way of knowing if, for example, the customer's provided name is "complete."

*Commission Response*

The commission adopts a revised subsection (e)(4) that specifies the reasons a TDU shall consider a form incomplete for a Critical Care or Chronic Condition Residential Customer. The commission clarifies the language to specify the name of the person for whom the protection is sought, the contact information including secondary contact information, the physician signature, and the designation by the physician and the medical board license number of the customer's physician. Any additional mandatory information required for completeness will be clearly identified on the form, and finalized in a compliance project following the adoption of this rule by the commission. These revisions to this paragraph address the comments provided by Reliant, Joint TDUs and OPC. The commission also clarifies that the utility is not performing any role other than processing a complete application, as Joint TDUs and OPC commented.

*Subsection (e)(5)*

TLSC/TX ROSE stated that while this language allows the TDU to ask questions about inconsistencies in the information provided in the application, the ability to require that the applications be materially complete and consistent is sufficient review for the TDU. TLSC/TX ROSE went on to state that they support a rule that would update the status of customers with conditions that are incurable but not require the customers to complete the application process through their physician's office.

Joint TDUs recommended that this paragraph be modified to clarify the role of the TDU and simplify the process for designation of critical care customers. Joint TDUs recommended that this section of the rule require the TDU to "apply the physician's designation" as indicated on the form.

*Commission Response*

The commission agrees with TLSC/TX ROSE that the ability for the TDU to ask questions about inconsistencies, and to require that the applications be materially complete is sufficient review for the TDU. The commission adopts language consistent with this in subsection (e)(4) and (5). The commission agrees with the Joint TDUs' recommendation and adds to subsection (e)(5) the requirement that the TDU shall "apply the physician's designation," as indicated on the form.

*Subsection (e)(6)*

The Joint TDUs pointed out that there is currently no "standard market transaction" that can be used to notify a new REP of the secondary contact information of a critical customer as required in this subsection. The Joint TDUs also pointed out that there is currently nothing in the switch process that flags the switch request as being applicable to a customer designated as critical care. The TDUs will have to find a manual process for identifying that a switch has occurred that requires this notification, and for notifying the REP of the secondary contact information. The Joint TDUs stated they will work with the commission Staff and the REPs to develop an appropriate process, but until there is a new TX SET release, it will not be possible to comply with this through a "standard market transaction."

The Joint TDUs also highlighted an important concern regarding switches for critical care customers. They stated when there is a "Move-in" transaction for a premises, any critical care designation related to that premises is removed. Therefore, Joint TDUs stressed it is important that a Move-in transaction not be used as a substitute for a switch for these customers.

*Commission Response*

The commission notes that until there is a new TX SET release, the TDUs will have to comply with this provision through manual processes. The commission agrees with Joint TDUs that a move-in transaction shall not be used as a substitute switch mechanism.

*Subsection (e)(9)*

The Joint TDUs recommended that an exception be included in this paragraph for customers who are grandfathered in as Critical Care Residential Customers when the rule takes effect. It is not likely that secondary contact information will be available for these customers and providing notice to secondary con-

tacts should not be required for these customers until they have re-qualified under the new rule.

The Joint TDUs and the REP Group agreed that language can be added to this subsection requiring that the renewal notice inform the customer that the designation will expire if the form is not returned by the expiration date, and that the REP will be notified when the customer is no longer classified as critical care.

*Commission Response*

The commission agrees with the Joint TDUs that existing critical care customers, who are grandfathered in as Critical Care Residential Customers, should not have to provide secondary contact information until they have re-qualified under the new rule. The commission also agrees with Joint TDUs and the REP Group that the renewal notice should inform the customer of the expiration of its designation if a completed form is not submitted, and has modified the rule accordingly.

*Subsection (f)*

Ms. Hamilton, Mr. Paez, Ms. Layton and Mr. Jackson stated that the new rule should not allow for the disconnection of critical care customers under any situation. Mr. Paez commented that he has been connected to a machine that requires electricity for his health. Mr. Paez explained that he was not dependent on that machine to sustain life, but it helped him quite a bit, and if his electricity was disconnected, his recuperation time would have increased as a result of not having that machine.

AARP commented that in order to effectuate remarks made by Chairman Smitherman at the Public Hearing on May 17, 2010, the commission should strike the last clause in this subsection which explicitly states a critical care or chronic condition customer's service may be disconnected pursuant to §25.483. MS Society expressed appreciation for Chairman Smitherman's comments that the policy should continue that these customers are not disconnected, because loss of life is the biggest concern.

AARP stated that disconnecting customers that have been found to need electricity to prevent the impairment of a major life function or sustain life is very serious. AARP argued that disconnecting these customers appears to be in conflict with PURA §39.101(a)(1), which states that customers are entitled to "safe, reliable and reasonably priced electricity, including protection against service disconnections in an extreme weather emergency as provided by Subsection (h) *or in cases of medical emergency* or nonpayment for unrelated services." Public Citizen agreed. AARP added that if the commission proceeds with explicitly providing for disconnecting chronic condition and critical care customers as proposed under §25.497 and proposed §25.483 (revisions under consideration in PUC Project No. 36131), at a minimum the TDU should be required to get the commission's approval before disconnecting. TLSC/TX ROSE and Public Citizen supported this recommendation. AARP noted that in Rhode Island, utilities must obtain written approval from the Division of Public Utilities and Carriers before disconnecting households where all residents are aged 62 or older or any resident is handicapped. Joint TDUs responded that this scrutiny indeed may be needed when a REP requests the TDU to disconnect a customer for whom electric service is a necessity to maintain life, and this approach should be considered in this rulemaking.

OPC, Public Citizen, AARP, MS Society and TLSC/TX ROSE commented that they believe that it is contrary to PURA §39.101(a) to disconnect a customer whose life will be threatened if their electric service is disconnected. Therefore, OPC suggested a modification to clarify that the critical care customer has an obligation to pay, but will not be disconnected. Joint TDUs responded that this highlights the concern of the TDUs in carrying out a REP's request to disconnect such a customer.

TLSC/TX ROSE agreed with the language relating to the customer's obligation to pay for electric service, but strongly opposed the language allowing for disconnection of customers. TLSC/TX ROSE opined that the primary purpose of this rule is to protect the customer from disconnection. TLSC/TX ROSE concluded that if adopted, the disconnection procedure would become the number one collection tool for REPs. TLSC/TX ROSE further recommended that the disconnection language be deleted, and new language be added to require the REP to work with the customer and the secondary contact to arrange workable payment arrangements and assist as necessary, by providing information on available sources of bill payment assistance.

*Commission Response*

The commission does not agree with TLSC/TX ROSE that the purpose of this rule is to protect customers from disconnection. The designation as a Critical Care Residential Customer does not guarantee an uninterrupted power supply, nor does it relieve the customer from the responsibility of paying his or her bill. Customers have an obligation to pay for the electric service that they receive. The commission does not agree with the recommendation by Public Citizen, AARP, TLSC/TX ROSE and Joint TDUs that if the TDU is requested to disconnect a critical care customer, it must receive approval from the commission before effectuating a disconnection. The commission rules are intended to provide rules for general application that do not require recourse to the commission on a routine basis. The recommendation by TLSC/TX ROSE that language be included in this subsection to require the REP to work with the customer and the secondary contact for payment arrangements and bill assistance is not adopted by the commission in this rule, as this topic and related issues are being addressed in Project Number 36131, *Rulemaking Relating to Disconnection of Electric Service and Deferred Payment Plans.*

*Subsection (g)*

ERCOT commented that it does not currently collect customer information that delineates critical care customers into Chronic Condition and Critical Care Residential Customer designations and secondary contact information to facilitate switch and move-in transactions. ERCOT would have to make system changes to send and receive the new customer information to and from the TDSPs and REPs. ERCOT also noted that the TDUs and REPs will also need to make system changes to enable all of the parties to send and receive the new customer information.

ERCOT pointed out that the TX SET changes as proposed will be bundled with additional TX SET changes resulting from other approved rule changes and market improvements that have been approved in the ERCOT governance process. As with all TX SET releases, ERCOT clarified that the TX SET changes will require at least a 14-month implementation timeline. These proposed changes to market participants systems' which will provide for automation necessary to process large volumes for the switch-hold, as well as other improvements will be included in the next TX SET release, scheduled for go-live in the first half of 2012.

The REP Group pointed out that the existing critical care rule requires that customers be informed in the renewal notice that

"unless renewed by the date specified by the TDU, the customer's critical care designation will expire" and the commission should include a similar provision here. In addition, subsection (g) should be modified to ensure that the REP receives notification when a critical care or chronic condition designation expires and is not renewed by the customer.

The Joint TDUs strongly recommended that this subsection be made more generic in order to not unnecessarily tie the hands of the ERCOT working groups that will be required to implement this provision. Joint TDUs explained that it has been demonstrated repeatedly that including this level of specificity in a rule hinders rather than helps the process of developing the transactions. They added that there was general agreement in the stakeholder meetings that it was better to simply state that transactions should be developed, without specifying how it should be done.

*Commission Response*

The commission acknowledges the comments by ERCOT that it does not currently collect customer information that delineates critical care customers into Chronic Condition and Critical Care Residential Customer designations and secondary contact information to facilitate switch and move-in transactions, and that in order to track this information, changes will need to be made in TX SET that affect REPs, TDUs, and ERCOT. The commission agrees with the Joint TDUs that the description in the rule of the needed changes in TX SET should be generic, and modifies the language in this paragraph accordingly. The commission also agrees with the REP Group that customers must be informed in the renewal notice that unless their status is renewed, the customer's critical care designation will expire, and it has added this provision in subsection (e)(9).

*New Subsection (h)*

The REP Group recommended that the effective date for this section should be the same as for revised P.U.C. SUBST. R. §25.483, *Relating to Disconnection of Service,* which is being amended in Project No. 36131. REP Group pointed out that a December 1, 2010 effective date is proposed in Project No. 36131, and explained that the changes in the two projects are interrelated and must go into effect at the same time so customers are provided the benefits described in the two rules. Joint TDUs responded that neither of the rules should be implemented until the market has worked out the issues associated with doing so, however, and until the rules are final, market participants cannot evaluate what will be required.

ERCOT commented that the effective date adopted in this rule should specify an exception in subsection (g), to account for the 2012 TX SET Release and associated switch-hold automation which will not be ready by December 2010.

*Commission Response*

The commission does not agree that there needs to be an exception for this subsection as ERCOT recommended - the language specifically recognizes that the ability to flag critical care cannot go into effect until the next TX SET release. The commission agrees with the REP Group that the changes in this rule and in the rulemaking addressing changes to §25.483 are interrelated, and therefore adopts a January 1, 2011 effective date for §25.497 and notes that it will adopt an identical effective date for the amendments to §25.483.

All comments, including any not specifically referenced herein, were fully considered by the commission.

**16 TAC §25.497**

This repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2010) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically §14.001, which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; and §39.101(e), which provides the commission with the authority to adopt and enforce rules relating to the termination of service.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, and 39.101.

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 September 29, 2010.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: January 1, 2011
Proposal publication date: April 16, 2010
For further information, please call: (512) 936-7223

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**16 TAC §25.497**

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2010) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically §14.001, which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; and §39.101(e), which provides the commission with the authority to adopt and enforce rules relating to the termination of service.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, and 39.101.

*§25.497. Critical Load Industrial Customers, Critical Load Public Safety Customers, Critical Care Residential Customers, and Chronic Condition Residential Customers.*

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

(1) Critical Load Public Safety Customer--A customer for whom electric service is considered crucial for the protection or maintenance of public safety, including but not limited to hospitals, police stations, fire stations, and critical water and wastewater facilities.

(2) Critical Load Industrial Customer--An industrial customer for whom an interruption or suspension of electric service will

create a dangerous or life-threatening condition on the retail customer's premises, is a "critical load industrial customer."

(3) Chronic Condition Residential Customer--A residential customer who has a person permanently residing in his or her home who has been diagnosed by a physician as having a serious medical condition that requires an electric-powered medical device or electric heating or cooling to prevent the impairment of a major life function through a significant deterioration or exacerbation of the person's medical condition. If that serious medical condition is diagnosed or re-diagnosed by a physician as a life-long condition, the designation is effective under this section for the shorter of one year or until such time as the person with the medical condition no longer resides in the home. Otherwise, the designation or re-designation is effective for 90 days.

(4) Critical Care Residential Customer--A residential customer who has a person permanently residing in his or her home who has been diagnosed by a physician as being dependent upon an electric-powered medical device to sustain life. The designation or re-designation is effective for two years under this section.

(b) Eligibility for protections. In order to be considered for designation under this section, an application for designation must be submitted by or on behalf of the customer.

(1) To be designated as a Critical Care Residential Customer or Chronic Condition Residential Customer, the commission-approved application form must be submitted to the TDU by a physician, in accordance with provisions of this section.

(2) To be designated as a Critical Load Public Safety Customer or a Critical Load Industrial Customer, the customer must notify the TDU. To be eligible for the protections provided under this section, the customer must have a determination of eligibility pending with or approved by the TDU. Eligibility shall be determined through a collaborative process among the customer, REP, and TDU, but in the event that the customer, REP and TDU are unable to agree on the designation, the TDU has the authority to make or decline to make the designation.

(c) Benefits for Critical Load Public Safety Customers, Critical Load Industrial Customers, Critical Care Residential Customers, and Chronic Condition Residential Customers.

(1) A Critical Load Public Safety Customer or a Critical Load Industrial Customer qualifies for notifications of interruptions or suspensions of service as provided in Sections 4.2.5, 5.2.5, and 5.3.7.1 of the TDU's tariff for retail delivery service.

(2) A Critical Care Residential Customer or Chronic Condition Residential Customer qualifies for notification of interruptions or suspensions of service, as provided in Sections 4.2.5, 5.2.5, and 5.3.7.1, and for Critical Care Residential Customers protections against suspension or disconnection, as provided in Section 5.3.7.4(1)(D) and (E), of the TDU's tariff for retail delivery service.

(3) A Critical Care Residential Customer or Chronic Condition Residential Customer is also eligible for certain protections as described in §25.483 (relating to Disconnection of Service).

(4) Designation as a Critical Load Customer, Critical Care Residential Customer, or Chronic Condition Residential Customer does not guarantee the uninterrupted supply of electricity.

(d) Notice to customers concerning Critical Care Residential Customer and Chronic Condition Residential Customer status.

(1) A REP shall notify each residential applicant for service of the right to apply for Critical Care Residential Customer or Chronic Condition Residential Customer designation. This notice to an applicant for residential service shall be included in the Your Rights as a Customer document.

(2) All REPs that serve residential customers shall provide information about Critical Care Residential Customer and Chronic Condition Residential Customer designations to each residential customer two times a year. The REP may include the information related to the low income rate reduction program in the same notification.

(3) Upon a customer's request, the REP shall provide to the customer the application form for Critical Care Residential Customer and Chronic Condition Residential Customer designation.

(e) Procedure for obtaining Critical Care Residential Customer or Chronic Condition Residential Customer designation.

(1) The commission-approved application form shall instruct the customer to have the physician submit the application form by facsimile or other electronic means to the TDU. If the physician submits the form to the REP, the REP shall forward it to the TDU electronically no later than two business days from receipt of the form. The application form shall include a telephone number for reaching a person at the TDU who is capable of responding to questions from a physician or customer about the form during regular business hours.

(2) After the TDU receives the form, it shall evaluate the form for completeness. If the form is incomplete, no later than two business days after receiving the form, the TDU shall mail the form to the customer and explain in writing what information is needed to complete the form.

(3) If the TDU has returned the form as incomplete or has not finished processing the form within two business days from receipt of the form, the customer shall be designated as a Critical Care Residential Customer or Chronic Condition Residential Customer on a temporary basis pending final designation by the TDU. The temporary designation shall be based on the designation selected by the physician on the form if such designation was included; otherwise, the temporary designation shall be as a Critical Care Residential Customer. The TDU shall notify the customer's REP of such temporary designation using a standard market transaction. If the form is returned to the customer as incomplete, the temporary designation shall remain in effect for 14 days, after which the temporary designation shall expire and the application process must start over.

(4) Reasons that a TDU shall consider a form incomplete for an application for Critical Care Residential Customer or Chronic Condition Residential Customer designation include the omission of the name of the person for whom the protection is sought, contact information (including a secondary contact), physician signature, the designation as a Critical Care Residential Customer or Chronic Condition Residential Customer, and medical board license number of the customer's physician. Any additional mandatory information required for completeness shall be clearly identified on the commission-approved application form.

(5) The TDU shall not challenge the physician's determination of the customer's status, but shall apply the physician's designation of the customer as a Critical Care Residential Customer or Chronic Condition Residential Customer consistent with the information provided on the form and the definitions in this section. The TDU may verify the physician's identity and signature and may deny an application for designation, if it determines that the identity or signature of the physician is not authentic.

(6) The TDU shall notify the customer's REP using a standard market transaction and the customer of the final status of the application process, including whether the customer has been designated for Critical Care Residential Customer or Chronic Condition Residen-

tial Customer status. The TDU shall also notify the customer of the date a designation, if any, will expire, and whether the customer will receive a renewal notice. The TDU shall provide the secondary contact information to the REP using a standard market transaction. If the customer switches to a different REP, the TDU shall provide the new REP with information on the customer's status and the secondary contact information using a standard market transaction.

(7) At the same time the TDU notifies the customer the final status of the customer's application, the TDU shall inform the customer of the customer's right to file a complaint with the commission pursuant to §22.242 of this title (relating to Complaints).

(8) The TDU shall notify Critical Care Residential Customers and Chronic Condition Residential Customers of the expiration of their designation in accordance with this subsection. The TDU shall notify the customer's REP using a standard market transaction when a customer is no longer designated as a Critical Care Residential Customer or a Chronic Condition Residential Customer.

(9) The TDU shall mail a renewal notice to a Chronic Condition Residential Customer whose designation was for a period longer than 90 days or a Critical Care Residential Customer, at least 45 days prior to the expiration date of the customer's designation. The renewal notice shall also be mailed to the secondary contact included on the commission-approved application form. The renewal notice shall include the application form and an explanation of how to reapply for Critical Care Residential Customer or Chronic Condition Residential Customer designation. The renewal notice shall inform the customer that the current designation will expire unless the application form is returned by the expiration date of the existing designation.

(f) Effect of Critical Care Residential Customer or Chronic Condition Residential Customer status on payment obligations. A Critical Care Residential Customer or Chronic Condition Residential Customer designation pursuant to this section does not relieve a customer of the obligation to pay the REP for services provided, and a customer's service may be disconnected pursuant to §25.483 of this title.

(g) TX SET changes. In the first TX SET release after the effective date of this section, market transactions shall be included to address the requirements of this section.

(h) Effective date. The effective date of this section is January 1, 2011.

(i) TDU annual report. A TDU shall report to the commission by March 1 of each year beginning in 2012, the number of customers for each type of customer defined in subsection (a) of this section as of December 31 of the previous calendar year. The TDU report shall also include for the previous calendar year, for each type of customer defined in subsection (a) of this section, the number of applications that were rejected as a result of incomplete forms, the number of requests from REPs for disconnection, and the number of disconnections and reconnections completed. An interim report shall be filed by the TDU on April 1, 2011 for the time period from January 1, 2011 through March 1, 2011.

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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Adriana A. Gonzales
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# TITLE 22. EXAMINING BOARDS

## PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

### CHAPTER 571. LICENSING

### SUBCHAPTER A. EXAMINATION

**22 TAC §571.3**

The Texas Board of Veterinary Medical Examiners adopts an amendment to §571.3, concerning Eligibility for Examination and Licensure, without changes to the proposed text as published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 6919) and will not be republished.

The amendment to §571.3 establishes that the examination score for the Texas State Board Licensing Examination (SBE) is valid for one year past the date of the examination. The amendment also clarifies that a license application is not complete until the completion of any required terms and conditions as set forth by Board order regarding the application for the SBE is received by the Board. The amendment will ensure the completion of any required terms and conditions as set forth by a Board order for the application for examination prior to sitting for the SBE. The amendment will also ensure the examination is within a reasonable time of licensure.

No comments were received regarding the adoption of the amendment to the rule.

The amendment is adopted under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a) which states that the Board may adopt rules necessary to administer the chapter.

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 September 30, 2010.

TRD-201005650
Loris Jones
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For further information, please call: (512) 305-7563

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### CHAPTER 577. GENERAL ADMINISTRATIVE DUTIES

### SUBCHAPTER A. BOARD MEMBERS AND MEETINGS--DUTIES

**22 TAC §577.2**

The Texas Board of Veterinary Medical Examiners adopts an amendment to §577.2, concerning Meetings by the Board, without changes to the proposed text as published in the July 23, 2010, issue of the *Texas Register* (35 TexReg 6432) and will not be republished.

The amendment to §577.2 clarifies and conforms the rule to the Open Meetings Act, current practice and Roberts Rules of Order that decisions made by the Board must be made by a majority of the members present and voting. The amendment provides greater clarification to the general public and licensees as to the number of votes necessary for an item to be decided by the Board.

The Board received several comments stating that they did not believe the Board had the statutory authority to change the rule from five members required to vote in favor of an item before the Board as the Veterinary Licensing Act (Act) requires the Board to consist of six licensed veterinarians and three public members, thereby requiring the Board to be primarily controlled by licensed veterinarians. The Board respectfully disagrees. The Act mandates who are the members of the Board. However, the Act does not mandate how a quorum is counted. The Open Meetings Act, Texas Government Code, §551.001(6) defines quorum as a majority of the governing body, unless otherwise defined by applicable law. According to case law and Texas Attorney General Opinions GA-0554 (2007) and GA-0412 (2006), absent an express provision to the contrary, a proposition is carried in a deliberative body by a majority of the legal votes cast, a quorum being present. In addition, the Board received a comment suggesting that the Board has the ability to meet by telephone conference call or videoconference, therefore the rule is unnecessary, with the effect of reducing the potential number of affirmative votes to pass a proposition. The Board respectfully disagrees. The Open Meetings Act specifically does not allow videoconferencing or telephone conference calls for Board meetings.

The amendment is adopted under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a) which states that the Board may adopt rules necessary to administer the chapter.

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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Effective date: October 20, 2010
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For further information, please call: (512) 305-7563

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# TITLE 25. HEALTH SERVICES

## PART 1. DEPARTMENT OF STATE HEALTH SERVICES

## CHAPTER 146. TRAINING AND REGULATION OF PROMOTORES OR COMMUNITY HEALTH WORKERS

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §§146.1 - 146.4, 146.6 - 146.10, new §§146.5, 146.11 and 146.12, and the repeal of §146.5, concerning the regulation of training and certification of promotores or community health workers. The amendments to §§146.1, 146.2, 146.4, 146.6 - 146.8, and new §146.12 are adopted with changes to the proposed text as published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3189). The amendments to §§146.3, 146.9, 146.10, new §146.5 and §146.11, and the repeal of §146.5, are adopted without changes and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The amendments, repeal, and new sections are necessary to comply with Health and Safety Code, Chapter 48, which requires the department to establish minimum standards for the certification of promotores or community health workers.

Government Code, §2001.039, 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). Sections 146.1 - 146.10 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Amendments to §§146.1 - 146.4 add definitions and clarify other definitions; reflect changes to purpose, tasks and terms of the advisory committee; who is eligible for training and certification; remove language specific to the contents of an application which may be included in program policy or procedure, reflect consistent references to the department, and clarify opportunity for reapplication following expiration of a certificate.

The repeal of §146.5 allows for better organization of the rules concerning application requirements.

The amendment to §146.6 concerns application requirements and procedures for sponsoring organizations, reflect consistent references to the department, and clarify opportunity for reapplication following expiration of a certificate. The amendment to §146.7 provides clarification related to types of certification and applicant eligibility requirements. Amended §146.8 reflects standards for approved curriculum for community health workers or instructors in the program. The amendments to §146.9 and §146.10 outline requirements for certificate renewal and continuing education.

New §§146.5, 146.11 and 146.12 provide clarification on reporting of change in name and address; information related to professional and ethical standards; and information related to violations, complaints, and subsequent actions respectively.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the commission has reviewed and accepts. The commenters were four members of the Promotor(a) or Community Health Worker Training and Advisory Committee (committee), and two individ-

uals. With one exception noted below, the commenters were not against the rules in their entirety; however, the commenters suggested recommendations for change as discussed in the summary of comments.

Comment: Concerning the overall rule changes, one commenter expressed concern that there was a "watering down" of the overall structure of the rules and the role of the committee and noted a relaxing of the rules which in some cases was not the original intent of the current and previous committees.

Response: The commission disagrees. The amendments, repeal, and new rules in 25 TAC, Chapter 146, will clarify the rules and improve the ability of promotores or community health workers to obtain the training and certification established by Health and Safety Code, Chapter 48. No changes were made to the rules as a result of this comment.

Comment: Concerning consideration of use of the term "training" in the proposed rules, one commenter noted that an animal is "trained" while a person is offered and receives an "education."

Response: The commission declines to make a change related to this comment. The use of the term "training" is consistent with Health and Safety Code, Chapter 48.

Comment: Concerning the definition of "promotor(a) or community health worker" in §146.1, one commenter questioned who rewrote the definition (a person or a committee) and whether other definitions were considered from an evidence-based community health worker practice. One commenter requested the inclusion of cultural mediation in the proposed definition as an important element from the current definition. Another commenter noted that the proposed definition was excellent but requested the addition of patient navigation and follow-up and participation in clinical research to the range of activities.

Response: The commission agreed to most comments related to the definition of promotor(a) or community health worker. Revisions were made to the proposed definition in §146.1(12) to include cultural mediation, and patient navigation/follow-up, and participation in clinical research. The proposed definition was based on input received from stakeholders during the development of the proposed rules and included a review of definitions from multiple state and national resources related to community health workers.

Comment: One commenter noted that the proposed rules needed a definition of distance learning as reference to distance learning is noted in §146.8(b)(14) and (c)(13) and referenced a definition provided by the Unites States Distance Learning Association (USDLA).

Response: The commission agrees. The USDLA definition of distance learning was added in §146.1(8).

Comment: Concerning §146.2(c), the purpose and tasks of the committee, two commenters requested that the proposed rules reflect that the committee continue to review instructor applications. The commenter noted that the committee represents community health workers and instructors and that the elimination of the assignment to evaluate instructor applications limits the committee role to just one function (that of reviewing applications from sponsoring organizations). The commenter also expressed concern that eliminating committee members from the process of evaluating instructor applications results in department staff serving in a dual role - that of program administrator and decision maker for instructor applicants.

Response: The commission disagrees. The committee's purpose and tasks include advising the Executive Commissioner concerning rules to implement standards adopted under the Health and Safety Code, Chapter 48, relating to the training and regulation of persons working as promotores or community health workers, advising the department concerning guidelines and requirements relating to training and certification of promotores or community health workers, instructors, and sponsoring organizations, as well as reviewing applications from sponsoring organizations to recommend certification to the department if program requirements are met. It is the responsibility of the department to approve any application in compliance with program requirements and which properly documents applicant eligibility, unless disapproved due to unethical conduct, conviction of a crime directly related to the duties and responsibilities as a promotor(a)/community health worker, or instructor, or an incapacity to practice with reasonable skill, competence, and safety to the public. No changes were made to the rule as a result of comments.

Comment: Concerning the repeal of §146.5 which related to application requirements and procedures for instructors, one commenter inquired whether this section was being replaced by §146.1, which defines a community health worker instructor.

Response: Concerning the need for clarification, the commission responds that the repeal of §146.5 that concerned application procedures for instructors has now been included in amended §146.4 which allows for better organization of the rules for applications requirements. No change was made to the rules as a result of this comment.

Comment: Concerning §146.7, related to types of certificates and applicant eligibility, one commenter supported the change that qualified individuals with not less than 1000 hours of experience in the previous six years from the date the application is signed may apply for instructor certification based on their experience, noting that this gives individuals with extensive instruction experience the opportunity to apply to become a certified instructor. The commenter noted the need to expand the pool of qualified instructors to help increase the number of well-trained and qualified community health workers. Another commenter noted that there are references to instructors of community health workers in two different sections of the rules where one appeared to be a definition of the role and later an exception for the role. The commenter also noted that §146.7(c) allows the department to make exceptions for persons with "experience training individuals" and questioned what the experience was to be, over what period of time, and with whom.

Response: The commission agrees with the comment supporting the rule that qualified individuals with not less than 1000 hours of experience in the previous six years from the date the application is signed may apply for instructor certification based on their experience. The commission responds to clarify that §146.7(c) states that a person with not less than 1000 cumulative hours instructing or training promotores, community health workers, or other health care professional in the previous six years (from the date the application is signed) may be issued a certificate of competence by the department. Section 146.7(f) also notes that the department may also certify individuals completing an instructor/training program by an approved sponsoring organization. No change was made to the rule as a result of these comments.

Comment: Concerning standards for the approval of curricula in §146.8 and continuing education requirements in §146.10, one

commenter stated that online trainings provided by the department for continuing education units in other areas, such as Texas Health Steps online provider education modules be accepted as the department certified continuing education hours (CEUs) for community health workers. The commenter also requested that the department certified CEUs be provided by teleconference so that rural staff who do not have easy access to local trainings may obtain their department certified CEUs. Another commenter questioned reference to "real time" for distance learning technology in proposed §146.8(b)(14) noting this limits learning to certain times, places, and spaces.

The commenter also questioned why the proposed rules do not include requirements for instructors teaching via distance learning to have any previous distance learning curriculum or teaching certification (as found in higher education settings). Another commenter noted the complexity of educating promotores with diverse educational levels and requested that the rules include a 2-tier curriculum similar to the following:

(1) Tier 1--100 hour curriculum (10 hours in each of the eight core competencies with an additional 20 hours of field work) for promotores wishing to provide educational and outreach services only in their community.

(2) Tier 2--Current 160 hour curriculum (20 hours in each of the eight core competencies with an opportunity to transfer for credit to an educational institution or sponsoring agency) for a career in public health and case management.

Response: The commission agrees with most of the comments. Section 146.8(b)(14) and (c)(13) include a requirement that all 160-hour curricula and continuing educations specify the method or methods by which training will be delivered, including class room instruction and use of distance learning. Reference to "real time" was removed from §146.8(b)(14). Section 146.10(b)(1)(A) notes that at least 5 hours of continuing education shall be satisfied by participation in a department certified training program, including a training program sponsored or provided by the department (including Texas Health Steps online provider education modules where content relates to one or more of the core competencies). The commission disagrees with the inquiry to include requirements for instructors teaching via distance learning to have some type of certification in developing distance learning curriculum or teaching via distance learning. Sponsoring organizations of training programs include community-based organizations as well as community colleges or other higher education settings, therefore, application of standards within a higher education setting may not be applicable to all approved training programs. No changes were made to the rules as a result of this comment. The commission also declined to make changes to the rules in order to establish an additional curriculum tier of 100 hours as the department does not currently have the capacity to adopt this type of educational system within the Promotor(a) or Community Health Worker Training and Certification Program.

Comment: One commenter noted that the inclusion of new §146.11 concerning professional and ethical standards was needed and supported the addition to the rules.

Response: The commission agrees and no change was made to the rule as a result of this comment.

Minor changes maintain consistency with Health and Safety Code, Chapter 401, throughout the section; revise outdated references for electronic processing; and clarify the intent of the section with minor grammatical changes.

Revisions have been made to provide consistency of terms to further clarify the intent of the sections with minor grammatical changes; update information to maintain rules that provide consistency; and delete outdated references.

An outdated website was deleted in §146.1(10); and changes in §146.2(n), §146.4(c) - (d), §146.6(c) - (d), §146.7(h), §146.8(b) - (c), and §146.12(b) were made for clarification on procedures for the committee report, applications, eligibility requirements, materials submitted for approval of curricula, and criminal convictions.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

**25 TAC §§146.1 - 146.12**

STATUTORY AUTHORITY

The amendments and new rules are authorized under Health and Safety Code, §48.003, which requires the Texas Board of Health (board) to adopt rules that provide minimum standards and guidelines on training; §48.002, which allows the board to provide for exemption from certification by rule; §11.016, which allows the board to appoint advisory committees to assist the board in performing its duties; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the Texas Department of Health and the commissioner of health. The Texas Department of Health and the Texas Board of Health were abolished by Chapter 198, §1.18 and §1.26, 78th Legislature, Regular Session, 2003. Government Code, §531.0055, and Health and Safety Code, §1001.075, authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the sections implements Government Code, §2001.039.

*§146.1. Definitions.*

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

(1) Administrator--The department employee designated as the administrator of regulatory activities authorized by the Health and Safety Code, Chapter 48.

(2) Applicant--A promotor(a) or community health worker who applies to the Department of State Health Services for a certificate of competence; an instructor who applies to the department to train promotores or community health workers; or a sponsoring organization who applies to the department to offer training approved by the department to train promotores or community health workers.

(3) HHSC--The Texas Health and Human Services Commission.

(4) Certificate--Certificate issued to a promotor(a) or community health worker or instructor by the Department of State Health Services.

(5) Committee--The Promotor(a) or Community Health Worker Training and Certification Advisory Committee established by §146.2 of this title.

(6) Core Competencies--Key skills for promotores or community health workers required for certification by the department,

including communication skills, interpersonal skills, knowledge base on specific health issues, service coordination skills, capacity-building skills, advocacy skills, teaching skills, and organizational skills.

(7) Department--The Department of State Health Services.

(8) Distance Learning--The acquisition of knowledge and skills through mediated information and instruction, encompassing all technologies and other forms of learning at a distance.

(9) Executive Commissioner--Executive Commissioner of the Health and Human Services Commission.

(10) Health--A state of complete physical, mental and social well-being where an individual or group is able to realize aspirations and satisfy needs, and to change or cope with the environment. Health is a resource for everyday life, not the objective of living; it is a positive concept emphasizing social and personal resources as well as physical capabilities. This definition is from the World Health Organization, "Ottawa Charter for Health Promotion, 1986."

(11) Certified Instructor--An individual approved by the department to provide instruction and training in one or more core competencies to promotores or community health workers.

(12) "Promotor(a)" or "Community Health Worker"--A person who, with or without compensation is a liaison and provides cultural mediation between health care and social services, and the community. A promotor(a) or community health worker: is a trusted member, and has a close understanding of, the ethnicity, language, socio-economic status, and life experiences of the community served. A promotor(a) or community health worker assists people to gain access to needed services and builds individual, community, and system capacity by increasing health knowledge and self-sufficiency through a range of activities such as outreach, patient navigation and follow-up, community health education and information, informal counseling, social support, advocacy, and participation in clinical research.

(13) Sponsoring organization--An organization approved by the department to deliver a certified training curriculum to promotores or community health workers or instructors.

(14) Certified Training Curriculum--An educational, community health training curriculum approved by the department for the purpose of training promotores or community health workers or instructors.

*§146.2. Promotor(a) or Community Health Worker Training and Certification Advisory Committee.*

(a) The committee. An advisory committee shall be appointed under and governed by this section.

(1) The name of the committee shall be the Promotor(a) or Community Health Worker Training and Certification Advisory Committee.

(2) The committee is established under the Health and Safety Code, §11.016, which allows the Executive Commissioner of HHSC to establish advisory committees.

(b) Applicable law. The committee is subject to Texas Government Code, Chapter 2110, concerning state agency advisory committees.

(c) Purpose and tasks.

(1) The committee shall advise the Executive Commissioner concerning rules to implement standards adopted under the Health and Safety Code, Chapter 48, relating to the training and regulation of persons working as promotores or community health workers.

(2) The committee shall advise the department concerning guidelines and requirements relating to training and certification of promotores or community health workers, instructors, and sponsoring organizations.

(3) The committee shall review applications from sponsoring organizations, and recommend certification to the department if program requirements are met.

(4) The committee shall carry out any other tasks given to the committee by the Executive Commissioner.

(d) Review and duration. By November 1, 2013, the Executive Commissioner will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(e) Composition. The committee shall be composed of nine members appointed by the Executive Commissioner. The composition of the committee shall include:

(1) four promotores or community health workers currently certified by the department;

(2) two public members which may include consumers of community health work services or individuals with paid or volunteer experience in community health care or social services;

(3) one member from the Texas Higher Education Coordinating Board, or a higher education faculty member who has teaching experience in community health, public health or adult education and has trained promotores or community health workers; and

(4) two professionals who work with promotores or community health workers in a community setting, including employers and representatives of non-profit community-based organizations or faith-based organizations.

(f) Terms of office. The term of office of each member shall be three years, and the member may be reappointed once.

(1) If a vacancy occurs, a person shall be appointed to serve the unexpired portion of that term.

(2) Members shall be appointed for staggered terms so that the terms of three members will expire on January 1 of each year.

(g) Officers. The committee shall elect a presiding officer and an assistant presiding officer at its first meeting after August 31st of each year.

(1) Each officer shall serve until the next regular election of officers.

(2) The presiding officer shall preside at all committee meetings at which he or she is in attendance, call meetings in accordance with this section, appoint subcommittees of the committee as necessary, and cause proper reports to be made to the board. The presiding officer may serve as an ex-officio member of any subcommittee of the committee.

(3) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. In case the office of presiding officer becomes vacant, the assistant presiding officer will serve until a successor is elected to complete the unexpired portion of the term of the office of presiding officer.

(4) A vacancy which occurs in the offices of presiding officer or assistant presiding officer may be filled at the next committee meeting.

(5) A member shall serve no more than two consecutive terms as presiding officer and/or assistant presiding officer.

(6) The committee may reference its officers by other terms, such as chairperson and vice-chairperson.

(h) Meetings. The committee shall meet only as necessary to conduct committee business.

(1) A meeting may be called by agreement of department staff and either the presiding officer or at least three members of the committee.

(2) Meeting arrangements shall be made by department staff. Department staff shall contact committee members to determine availability for a meeting date and place.

(3) Each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551. The committee is not a "governmental body" as defined in the Open Meetings Act. However, in order to promote public participation, each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551, with the exception that the provisions allowing executive sessions shall not apply.

(4) Each member of the committee shall be informed of a committee meeting at least five working days before the meeting.

(5) A simple majority of the members of the committee shall constitute a quorum for the purpose of transacting official business.

(6) The committee is authorized to transact official business only when in a legally constituted meeting with quorum present.

(7) The agenda for each committee meeting shall include an item entitled public comment under which any person will be allowed to address the committee on matters relating to business. The presiding officer may establish procedures for public comment, including a time limit on each comment.

(i) Attendance. Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which the member is assigned.

(1) A member shall notify the presiding officer or appropriate department staff if he or she is unable to attend a scheduled meeting.

(2) It is grounds for removal from the committee if a member cannot discharge the member's duties for a substantial part of the term for which the member is appointed because of illness or disability, is absent from more than half of the committee and subcommittee meetings during a calendar year, or is absent from at least three consecutive committee meetings.

(3) The validity of an action of the committee is not affected by the fact that it is taken when a ground for removal of a member exists.

(4) The attendance records of the members shall be reported to the Executive Commissioner. The report shall include attendance at committee and subcommittee meetings.

(j) Staff. Staff support for the committee shall be provided by the department.

(k) Procedures. Roberts Rules of Order, Newly Revised, shall be the basis of parliamentary decisions except where otherwise provided by law or rule.

(1) Any action taken by the committee must be approved by a majority vote of the members present once quorum is established.

(2) Each member shall have one vote.

(3) A member may not authorize another individual to represent the member by proxy.

(4) The committee shall make decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.

(5) Minutes of each committee meeting shall be taken by department staff and approved by the committee at the next scheduled meeting.

(l) Subcommittees. The committee may establish subcommittees as necessary to assist the committee in carrying out its duties.

(1) The presiding officer shall appoint members of the committee to serve on subcommittees and to act as subcommittee chairpersons. The presiding officer may also appoint nonmembers of the committee to serve on subcommittees.

(2) Subcommittees shall meet when called by the subcommittee chairperson or when so directed by the committee.

(3) A subcommittee chairperson shall make regular reports to the advisory committee at each committee meeting or in interim written reports as needed. The reports shall include an executive summary or minutes of each subcommittee meeting.

(m) Statement by members.

(1) The Executive Commissioner, the department, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the Executive Commissioner, department, or committee.

(2) The committee and its members may not participate in legislative activity in the name of the Executive Commissioner, the department, or the committee except with approval through the department's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(3) A committee member should not accept or solicit any benefit that might reasonably tend to influence the member in the discharge of the member's official duties.

(4) A committee member should not disclose confidential information acquired through his or her committee membership.

(5) A committee member should not knowingly solicit, accept, or agree to accept any benefit for having exercised the member's official powers or duties in favor of another person.

(6) A committee member who has a personal or private interest in a matter pending before the committee shall publicly disclose the fact in a committee meeting and may not vote or otherwise participate in the matter. The phrase "personal or private interest" means the committee member has a direct pecuniary interest in the matter but does not include the committee member's engagement in a profession, trade, or occupation when the member's interest is the same as all others similarly engaged in the profession, trade, or occupation.

(n) Reports to the Executive Commissioner. The committee shall file an annual written report with the Executive Commissioner.

(1) The report shall list the meeting dates of the committee and any subcommittees, the attendance records of its members, a brief description of actions taken by the committee, a description of how the committee has accomplished the tasks given to the committee by the Executive Commissioner, the status of any rules which were recommended by the committee to the Executive Commissioner, anticipated activities of the committee for the next year, and any amendments to this section requested by the committee.

(2) The report shall identify the costs related to the committee's existence, including the cost of department staff time spent in support of the committee's activities and the source of funds used to support the committee's activities.

(3) The report shall cover the meetings and activities in the immediate preceding 12 months and shall be filed with the Executive Commissioner each January.

(o) Reimbursement for expenses. In accordance with the requirements set forth in the Government Code, Chapter 2110, a committee member may receive reimbursement for the member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or budget execution process.

(1) No compensatory per diem shall be paid to committee members unless required by law.

(2) A committee member who is an employee of a state agency, other than the department, may not receive reimbursement for expenses from the department.

(3) A nonmember of the committee who is appointed to serve on a subcommittee may not receive reimbursement for expenses from the department.

(4) Each member who is to be reimbursed for expenses shall submit to staff the member's receipts for expenses and any required official forms not later than 14 days after each committee meeting.

(5) Requests for reimbursement of expenses shall be made on official state vouchers prepared by department staff.

*§146.4. Application Requirements and Procedures for Promotores or Community Health Workers and Instructors.*

(a) Purpose. The purpose of this section is to set out the application procedures for certification of promotores or community health workers and instructors.

(b) Application Requirements.

(1) Unless otherwise indicated, an applicant must complete all required information and documentation on current official department forms and submit the required information and documentation electronically or in hard copy as specified by the department.

(2) The department shall send a notice listing the additional materials required to an applicant whose application is incomplete. An application not completed within 30 days after the date of notice shall be invalid unless the applicant has advised the department of a valid reason for the delay.

(c) Application approval. The department shall approve any application which is in compliance with this chapter and which properly documents applicant eligibility, unless the application is disapproved under the provisions of subsection (d) of this section.

(d) Disapproved applications.

(1) The department may disapprove the application if the applicant:

(A) has not met the eligibility and application requirements set out in this chapter;

(B) has failed or refused to properly complete or submit any application form(s) or has knowingly presented false or misleading information on the application form, or any other form or documentation required by the department to verify the applicant's qualifications for certification;

(C) has engaged in unethical conduct as defined in §146.11 of this title (relating to Professional and Ethical Standards);

(D) has been convicted of a felony or misdemeanor directly related to the duties and responsibilities of a promotor(a) or community health worker or instructor as set out in §146.12 of this title (relating to Violations, Complaints and Subsequent Actions); or

(E) has developed an incapacity, which in accordance with the Americans with Disabilities Act, prevents the individual from practicing with reasonable skill, competence, and safety to the public as the result of:

*(i)* an illness;

*(ii)* drug or alcohol dependency; or

*(iii)* another physical or mental condition or illness;

(2) If the department determines that the application should not be approved, the department shall give the applicant written notice of the reason for the disapproval and of the opportunity for re-application or appeal;

(3) The applicant whose application has been disapproved under paragraph (1) of this subsection shall be permitted to reapply and shall submit a current application satisfactory to the department, in compliance with the then current requirements of this chapter and the provisions of the Health and Safety Code, Chapter 48.

(4) An applicant whose application has been disapproved may appeal the disapproval under the fair hearing procedures found in Chapter 1, Subchapter C of this title (relating to Fair Hearing Procedures).

(e) Application processing. A written notice stating that the application has been approved may be sent in lieu of the notice of acceptance of a complete application. The following periods of time shall apply from the date of receipt of an application until the date of issuance of a written notice that the application is complete and has been approved or that the application is deficient and additional specific information is required.

(1) Letter of approval for certification - no more than 90 days.

(2) Letter of application deficiency - no more than 90 days.

*§146.6. Application Requirements and Procedures for Sponsoring Organizations.*

(a) Purpose. The purpose of this section is to set out the application procedures for certification of curricula from sponsoring organizations.

(b) Sponsoring organization certificate.

(1) Unless otherwise indicated, an applicant must complete all required information and documentation of credentials on current official department forms and submit the required information and documentation electronically or in hard copy as specified by the department.

(2) A sponsoring organization may submit an application to request approval to use a certified curriculum from another sponsor-

ing organization who has agreed to share the certified curriculum. In this situation, the application must include a description of changes, if any, to the certified curriculum.

(3) The department shall send a notice listing the additional materials required to an applicant whose application is incomplete. An application not completed within 30 days after the date of notice shall be invalid unless the applicant has advised the department of a valid reason for the delay.

(c) Application approval.

(1) The committee shall review applications from sponsoring organizations and recommend to the department certification for curricula that meets program requirements.

(2) The department shall approve any application which is in compliance with this chapter and which properly documents applicant eligibility, unless the application is disapproved under the provisions of subsection (d) of this section.

(d) Disapproved applications.

(1) The department may disapprove the application if the applicant:

(A) has not met the eligibility and application requirements set out in this chapter; or

(B) has failed or refused to properly complete or submit any application form(s) or has knowingly presented false or misleading information on the application form, or any other form or documentation required by the department to verify the applicant's qualifications for certification.

(2) If the department determines that the application should not be approved, the department shall give the applicant written notice of the reason for the disapproval and of the opportunity for re-application or appeal.

(3) The applicant whose application has been disapproved under paragraph (1) of this subsection shall be permitted to reapply and shall submit a current application satisfactory to the department, in compliance with the then current requirements of this chapter and the provisions of the Health and Safety Code, Chapter 48.

(4) An applicant whose application has been disapproved may appeal the disapproval under the fair hearing procedures found in Chapter 1, Subchapter C of this title (relating to Fair Hearing Procedures).

(e) Application processing. A written notice stating that the application has been approved may be sent in lieu of the notice of acceptance of a complete application. The following periods of time shall apply from the date of receipt of an application until the date of issuance of a written notice that the application is complete and accepted for filing or that the application is deficient and additional specific information is required.

(1) Letter of acceptance of application for certification - no more than 90 days.

(2) Letter of application deficiency - no more than 90 days.

*§146.7. Types of Certificates and Applicant Eligibility.*

(a) Purpose. The purpose of this section is to set out the types of certificates issued and the qualifications of applicants.

(1) Upon approval of the application, the department shall issue the promotor(a) or community health worker, instructor or sponsoring organization a certificate with an expiration date and a certificate number. An identification card shall be included for a promotor(a) or community health worker or instructor.

(2) Certificates shall be signed by the commissioner of the department and presiding officer of the advisory committee. The identification card issued to a promotor(a) or community health worker and instructor shall bear the signature of the commissioner and contain a photo of the promotor(a) or community health worker and instructor.

(3) Any certificate or identification card(s) issued by the department remains the property of the department and shall be surrendered to the department on demand.

(4) A promotor(a) or community health worker and instructor shall carry the original identification card. A sponsoring organization shall display the original certificate at the training or educational site. Photocopies shall not be carried or displayed.

(5) A person certified as a promotor(a) or community health worker shall only allow his or her certificate to be copied for the purpose of verification by employers, professional organizations, and third party payors for credentialing and reimbursement purposes. Other persons and/or agencies may contact the administrator in writing or by phone to verify certification.

(6) No one shall display, present, or carry a certificate or an identification card which has been altered, photocopied, or otherwise reproduced.

(7) No one shall make any alteration on any certificate or identification card issued by the department.

(8) The department shall replace a lost, damaged, or destroyed certificate or identification card upon written request.

(b) Special provisions for persons who have performed promotor(a) or community health worker services in the previous six years starting from the date the application is signed. Upon submission of the application forms by the practicing promotor(a) or community health worker and upon approval by the department, the department shall issue a certificate of competence to a person who has performed promotor(a) or community health worker services for not less than 1000 cumulative hours in the previous six years starting from the date the application is signed, as documented on form(s) specified by the department.

(c) Special provisions for persons with experience in instructing or training individuals providing promotor(a) or community health work services, including promotores or community health workers and other health care paraprofessionals and professionals. Upon submission of the application forms by the instructor and upon approval by the department, the department shall issue a certificate of competence to a person who has provided instruction or training to individuals providing community health work services for not less than 1000 cumulative hours in the previous six years starting from the date the application is signed.

(d) Minimum eligibility requirements for promotor(a) or community health worker certification. The following requirements apply to all individuals applying for certification:

(1) attainment of 18 years of age or an eligible and informed minor as determined by the department;

(2) freedom from physical or mental impairment, which in accordance with the Americans with Disabilities Act, interferes with the performance of duties or otherwise constitutes a hazard to the health or safety of the persons being served; and

(3) submission of a satisfactory completed application on a form supplied by the department.

(e) Individuals applying for certification who do not meet the requirements of subsection (b) of this section shall complete a certified competency-based training program by an approved sponsoring organization.

(f) Minimum eligibility requirements for instructor certification. The following requirements apply to all individuals applying for certification:

(1) attainment of 18 years of age as determined by the department;

(2) freedom from physical or mental impairment, which in accordance with the Americans with Disabilities Act, interferes with the performance of duties or otherwise constitutes a hazard to the health or safety of participants; and

(3) submission of a satisfactory completed application on a form supplied by the department.

(g) Individuals applying for certification who do not meet the requirements of subsection (c) of this section shall complete a certified instructor trainer program by an approved sponsoring organization. An individual applying for certification as an instructor may seek certification in one or more of the eight core competencies.

(h) Minimum eligibility requirements for certification of a curriculum from a sponsoring organization. The following requirements apply to all organizations applying for certification of a curriculum:

(1) approval and certification of a curriculum for promotor(a) or community health worker training, instructor certification or for continuing education of promotores or community health workers and instructors that meets the standards and guidelines established by the department and as set forth in §146.8 of this title (relating to Standards for the Approval of Curricula); and

(2) submission of a satisfactory completed application on a form supplied by the department.

*§146.8. Standards for the Approval of Curricula.*

(a) Purpose. The purpose of this section is to establish the minimum standards for approval of curricula and programs to train persons to perform promotor(a) or community health worker services or to act as an instructor.

(b) All 160-hour curricula to be used to train individuals to perform promotor(a) or community health worker services or to act as instructors must:

(1) assure that the eight core skill and knowledge competencies, identified in the National Community Health Advisor Study, June 1998 for promotores or community health workers, including communication, interpersonal, service coordination, capacity-building, advocacy, teaching and organizational skills and knowledge base on specific health issues are addressed;

(2) include at a minimum 20 clock hours of knowledge and skill-building per core competency for promotores or community health workers and include at a minimum 20 clock hours for instructor training in each of the core competencies that affect promotores or community health workers;

(3) include a method or process to evaluate and document the acquisition of knowledge and mastery of skills by the individual trained;

(4) include a method or process for the individual trained to evaluate the training experience;

(5) be certified by the department and offered within the geographic limits of the State of Texas;

(6) be submitted to the department along with supporting materials in hard copy and electronic format as specified by the department;

(7) be organized with all pages clearly legible and consecutively numbered with a table of contents and divided with tabs identified to correspond to the core competencies, including evaluation materials and other programmatic information and assurances required within this section;

(8) provide a list of certified instructors, facilities and locations for the training program;

(9) provide a calendar of scheduled training events by dates, times and locations;

(10) identify the method for recruiting persons to the program;

(11) report the names of individuals to the department who have successfully completed the training program within 30 days of program completion on a form supplied by the department;

(12) maintain an accurate record of each person's attendance and participation for not less than five years;

(13) include the participation in the curriculum development of an instructor certified by the department; and

(14) specify the method or methods by which training will be delivered, including classroom instruction and use of distance learning.

(c) All continuing education curricula to be used to provide continuing education to certified promotores or community health workers or instructors must:

(1) assure that one or more of the eight core skill and knowledge competencies, identified in the National Community Health Advisor Study, June 1998 for promotores or community health workers, including communication, interpersonal, service coordination, capacity-building, advocacy, teaching and organizational skills and knowledge base are addressed;

(2) include a method or process to evaluate and document the acquisition of knowledge and mastery of skills by the individual trained;

(3) include an evaluation by the individual trained of the training experience;

(4) be certified by the department and offered within the geographic limits of the State of Texas;

(5) be submitted to the department along with supporting materials in hard copy and electronic format as specified by the department;

(6) identify the title of the proposed continuing education curriculum, total contact hours, and hours per core competency;

(7) provide a list of certified instructors, facilities and locations for the training program;

(8) provide a calendar of scheduled training events by dates, times and locations;

(9) identify the method for recruiting persons to the program;

(10) report the names of individuals to the department who have successfully completed the training program within 30 days of program completion;

(11) maintain an accurate record of each person's attendance and participation for not less than five years;

(12) include the participation in the curriculum development of an instructor certified by the department; and

(13) specify the method or methods by which training will be delivered, including classroom instruction and use of distance learning.

(d) Addenda to existing certified curriculum. A sponsoring organization may submit an addendum when making revisions to a current, certified curriculum. An addendum may be submitted to the department via mail or email and must be in compliance with standards listed in this section.

*§146.12. Violations, Complaints and Subsequent Actions.*

(a) General. This section establishes standards relating to:

(1) offenses or criminal convictions;

(2) violations which result in disciplinary actions;

(3) procedures for filing complaints alleging violations and prohibited actions under the Health and Safety Code, Chapter 48, or this chapter; and

(4) the department's investigation of complaints.

(b) Criminal convictions which directly relate to the profession as an instructor, promotor(a) or community health worker.

(1) The department may suspend or revoke any existing certificate, or disqualify a person from receiving any certificate because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of an instructor, promotor(a) or community health worker.

(2) In considering whether a criminal conviction directly relates to the occupation of an instructor, promotor(a) or community health worker, the department shall consider:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the purposes for certification as an instructor, promotor(a) or community health worker. The following felonies and misdemeanors relate to any certificate of an instructor, promotor(a) or community health worker because these criminal offenses indicate an inability or a tendency to be unable to perform as an instructor, promotor(a) or community health worker:

*(i)* any misdemeanor and/or felony offense involving moral turpitude by statute or common law; and

*(ii)* a misdemeanor or felony offense under various titles of the Texas Penal Code:

*(I)* offenses against the person (Title 5);

*(II)* offenses against property (Title 7);

*(III)* offenses against public order and decency (Title 9);

*(IV)* offenses against public health, safety, and morals (Title 10); and

*(V)* offenses of attempting or conspiring to commit any of the offenses in this subsection (Title 4);

(C) the extent to which any certificate might offer an opportunity to engage in further criminal history activity of the same type as that in which the person previously has been involved;

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibility of an instructor, promotor(a) or community health worker. In making this determination, the department will apply the criteria outlined in Texas Occupations Code, Chapter 53, the legal authority for the provisions of this section; and

(E) the length of time since the date of the crime.

(3) The misdemeanors and felonies listed in paragraph (2)(B)(i) - (ii) of this subsection are not inclusive in that the department may consider other particular crimes in special cases in order to promote the intent of the Health and Safety Code, Chapter 48, and this chapter.

(c) Types of violations:

(1) a person intentionally or knowingly represents oneself as an instructor, promotor(a) or community health worker without a certificate issued under the Health and Safety Code, Chapter 48;

(2) a person obtains or attempts to obtain a certificate issued under the Health and Safety Code, Chapter 48, by bribery or fraud;

(3) a person engages in unprofessional conduct, including the violation of the standards of practice for instructors, promotores or community health workers as established by the department;

(4) a person fails to report to the department the violation of the Health and Safety Code, Chapter 48, or any allegations of sexual misconduct by another person;

(5) a person violates a provision of the Health and Safety Code, Chapter 48, or this chapter, an order of the department previously entered in a disciplinary proceeding, or an order to comply with a subpoena issued by the department; or

(6) a person has a certificate revoked, suspended or otherwise subjected to adverse action or being denied a certificate by another certification authority in another state, territory or country.

(d) Procedures for revoking, suspending, or denying a certificate to persons with criminal backgrounds.

(1) The department shall give written notice to the person that the department intends to deny, suspend, or revoke the certificate after hearing in accordance with the provisions of Chapter 1, Subchapter C of this title (relating to Fair Hearing Procedures).

(2) If the department denies, suspends, or revokes a certificate under these sections after hearing, the department shall give the person written notice of the reasons for the decision.

(e) Filing of complaints.

(1) Anyone may complain to the department alleging that a person has committed an offense or action prohibited under the Health and Safety Code, Chapter 48, or that a certificate holder has violated the Health and Safety Code, Chapter 48, or this chapter.

(2) A person wishing to complain about an offense, prohibited action, or alleged violation against an instructor, promotor(a) or community health worker or other person shall notify the department. The initial notification of a complaint may be in writing, by telephone, or by personal visit to the department. The department's mailing address is Office of Title V and Family Health, Promotor(a)/Community Health Worker Training and Certification Program, Mail Code 1922, P.O. Box 149347, Austin, Texas 78714-9347, physical address is 1100 West 49th Street, Austin, Texas 78756-3183, and telephone (512) 458-7111, extension 3500.

(3) Upon receipt of a complaint the department or the department's designee shall send an acknowledgment letter to the complainant and the department's complaint form which the complainant must complete and return to the department or the department's designee before action can be taken. If the complaint is made by a visit to the department, the form may be given to the complainant at that time; however, it must be completed and returned to the department or the department's designee before further action may be taken. Copies of the complaint form may be obtained from the department.

(4) Anonymous complaints shall be investigated by the department, provided sufficient information is submitted.

(f) Investigation of complaints. The department is responsible for investigating complaints.

(g) The department's action.

(1) The department shall take one or more actions described in this section.

(2) The department may determine that an allegation is groundless and dismiss the complaint.

(3) The department may determine that an instructor, promotor(a) or community health worker has violated the Health and Safety Code, Chapter 48, or this chapter and may institute disciplinary action in accordance with subsection (h) of this section.

(4) Whenever the department dismisses a complaint or closes a complaint file, the department shall give a summary report of the final action to the advisory committee, the complainant, and the accused party.

(h) Disciplinary actions. The department may take action under this section as follows.

(1) The department may reprimand an instructor, promotor(a) or community health worker or initiate action to deny, suspend, not renew, or revoke a certificate.

(2) The department may take disciplinary action if it determines that a person who holds a certificate is in violation of §146.11 of this title (relating to Professional and Ethical Standards).

(3) The department shall take into consideration the following factors in determining the appropriate action to be imposed in each case:

(A) the severity of the offense;

(B) the danger to the public;

(C) the number of repetitions of offenses;

(D) the length of time since the date of the violation;

(E) the number and type of previous disciplinary cases filed against the instructor, promotor(a) or community health worker;

(F) the length of time the instructor, promotor(a) or community health worker has performed community health work services or training;

(G) the actual damage, physical or otherwise, to the patient, if applicable;

(H) the deterrent effect of the penalty imposed;

(I) the effect of the penalty upon the livelihood of the instructor, promotor(a) or community health worker;

(J) any efforts for rehabilitation; and

(K) any other mitigating or aggravating circumstances.

(4) The department may take action for violation of the Health and Safety Code, Chapter 48, or this chapter, an order of the department previously entered in a disciplinary proceeding, or an order to comply with a subpoena issued by the department.

(i) Fair hearing.

(1) The fair hearing shall be conducted according to the Chapter 1, Subchapter C of this title.

(2) Prior to making a final decision adverse to a certificate holder, the department shall give the certificate holder written notice of an opportunity for a hearing on the proposed action.

(3) The certificate holder has 20 days after receiving the notice to request a hearing on the proposed action. A request for a hearing shall be made in writing and mailed or hand-delivered to the department, unless the notice letter specifies an alternative method. If a person who is offered the opportunity for a hearing does not request a hearing within the prescribed time for making such a request, the person is deemed to have waived the hearing and the action may be taken.

(j) Final action.

(1) If the department suspends a certificate, the suspension remains in effect until the department determines that the reasons for suspension no longer exist. The instructor, promotor(a) or community health worker whose certificate has been suspended is responsible for securing and providing to the department such evidence, as may be required by the department that the reasons for the suspension no longer exist. The department shall investigate prior to making a determination.

(2) During the time of suspension, the former certificate holder shall return the certificate and identification card(s) to the department.

(3) If a suspension overlaps a certificate renewal period, the former certificate holder shall comply with the normal renewal procedures in these sections; however, the department may not renew the certificate until the department determines that the reasons for suspension have been removed.

(4) A person whose application is denied or certificate is revoked as a result of disciplinary action is ineligible for a certificate under Health and Safety Code, Chapter 48, for one year from the date of the denial or revocation or surrender.

(5) Upon revocation or nonrenewal, the former certificate holder shall return the certificate and any identification card(s) to 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 October 4, 2010.

TRD-201005696
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: October 24, 2010
Proposal publication date: April 23, 2010
For further information, please call: (512) 458-7111 x6972

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**25 TAC §146.5**

STATUTORY AUTHORITY

The repeal is authorized under Health and Safety Code, §48.003, which requires the Texas Board of Health (board) to adopt rules that provide minimum standards and guidelines on training; §48.002, which allows the board to provide for exemption from certification by rule; §11.016, which allows the board to appoint advisory committees to assist the board in performing its duties; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the Texas Department of Health and the commissioner of health. The Texas Department of Health and the Texas Board of Health were abolished by Chapter 198, §1.18 and §1.26, 78th Legislature, Regular Session, 2003. Government Code, §531.0055, and Health and Safety Code, §1001.075, authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the sections implements Government Code, §2001.039.

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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Department of State Health Services
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# CHAPTER 169. ZOONOSIS CONTROL
## SUBCHAPTER E. DOG AND CAT STERILIZATION

**25 TAC §169.102**

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts an amendment to §169.102, concerning the Department of State Health Services Animal Friendly Account, with changes to the proposed text as published in the July 2, 2010, issue of the *Texas Register* (35 TexReg 5716).

BACKGROUND AND PURPOSE

The amendment is necessary to comply with Health and Safety Code, Chapter 828, "Dog and Cat Sterilization," which requires the department to make grants to eligible organizations for the purpose of providing low-cost dog and cat sterilization to the general public.

Government Code, §2001.039, 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 169.102 has been reviewed and the department has determined that reasons for adopting the section continue to exist because a rule on this subject is needed.

SECTION-BY-SECTION SUMMARY

The amendment to §169.102 replaces the definition of "owner" with "custodian;" deletes the definition of "department" because it is defined in Subchapter A which refers to definitions in the chapter; replaces the word "grants" to "account" in the section title, and in subsections (a), (d), and (g) to align more closely with current state law; replaces "non-profit" with "nonprofit" to align more closely with current state law and for rule consistency; changes "animal friendly account" throughout the rule to lower case lettering to align more closely with current state law; adds a definition of "sterilization" to make the rule consistent with the statute in subsection (b); adds language in subsection (f) to assure that sterilizations are performed in a manner consistent with the statute; updates the department's mailing address in subsection (g); and clarifies the requirements for animal friendly grants to align more closely with current state law and revises terminology throughout the rule for consistency.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rule during the comment period, which the commission has reviewed and accepts. The commenters were individuals, associations, and/or groups, including the following: Texas Federation of Animal Care Societies, Texas Humane Legislation Network, and the Texas Veterinary Medical Association. Two commenters were not against the rule in its entirety; however, the commenters suggested recommendations for change as discussed in the summary of comments. One commenter was in favor of the rule in its entirety.

Comment: Concerning the elimination of giving funding preference to "a new, qualified program that does not duplicate existing low-cost sterilization efforts in a given community" in §169.102(j)(2)(D), one commenter stated that it is important to assist groups that are starting, or are in their first two years of doing low-cost spay/neuter. The commenter stated that it is hardly fair, nor does it achieve the intended goal, to just keep giving the money to the same groups. The commenter stated there should be a cap on the number of years one agency can receive the monies.

Response: The commission disagrees because giving funding preference to organizations in §169.102(j)(2)(D) is not mandated by statute and can eliminate organizations that have the most positive effect in curbing the pet overpopulation problem in Texas. All eligible organizations in Texas may apply for animal friendly grant money when requests for proposals are announced. Contracts last for one year and may be renewed for an additional year. Following the two-year project period, a new application process is offered statewide, if additional funds are available. Applications are screened and awards are made based on the highest scores and the availability of funds. Every attempt is made to distribute funds across the state to the degree made possible by the applications received. No change was made to the rule as a result of this comment.

Comment: Concerning the elimination of giving funding preference to organizations that "targets low-income pet owners, describing how the applicant defines, ascertains, and verifies that the person is financially challenged" in subsection (j)(2)(A), one commenter asked that the department not make changes to this subsection and continue to target grant funds where they will do the most good to those in the most need of low cost spays and neuters: low income pet owners.

Response: The commission disagrees because the grant money is, by statute, for sterilizing animals owned by the general public in its entirety. Asking pet owners specifically for proof of income can be considered an invasion of privacy; keeping those records for audit purposes can have negative consequences, such as identity theft; and the acquisition and maintenance of this information has been burdensome for grant recipients. However, the commenter's concerns are already addressed by the fact that each organization applying for grant money must, as required in the request for proposals, include in the application their general marketing plan with their specific method for outreach to the low-income pet owner community. The manner in which this criterion is addressed may result in points being awarded to the applicant during the application screening process. No change was made to the rule as a result of this comment.

The following changes were made to the section in compliance with statutory requirements and consistency of the rule language.

Concerning the title of §169.102 and in subsections (a), (d), and (g), the word "grants" has been changed to "account," and the word "fund" was also changed to "account" in subsections (a)(1) and (d)(3) to be consistent with the title of Health and Safety Code, §828.014, "Animal Friendly Account." Also, grammatical changes were included in the rule text.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendment is authorized under the Health and Safety Code, §828.014, which provides the department with the authority to make grants to eligible organizations for the purpose of providing low-cost dog and cat sterilization to the general public and to establish guidelines in rules for spending grant money; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department, and for the administration of Chapter 1001, Health and Safety Code. Review of the rule implements Government Code, §2001.039.

*§169.102. Department of State Health Services Animal Friendly Account.*

(a) Purpose.

(1) As authorized by the Texas Health and Safety Code, §828.014, relating to the animal friendly account, the department shall institute and administer grants under this subchapter.

(2) The grants shall be known as a part of the "Department of State Health Services Animal Friendly Account."

(3) This subchapter governs the administration of the account, the submission and review of grant applications, and the award of the grants.

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

(1) Closing date--Date specified in the request for proposals as the date on which applications must be received or postmarked.

(2) Custodian--A person or agency which feeds, shelters, harbors, owns, has possession or control of, or has the responsibility to control an animal.

(3) Local nonprofit veterinary medical association--An organization set up by and comprised of several volunteer veterinarians in their immediate region for the purpose of presenting continuing education, planning group activities, or discussing issues common to their professional field.

(4) Nonprofit organization--A private, nonprofit, tax-exempt corporation, association or organization under Internal Revenue Code of 1986, §501(c)(3) (26 United States Code §501(c)(3)).

(5) Sterilization--The surgical removal of the reproductive organs of a dog or cat or the use of nonsurgical methods and technologies approved by the United States Food and Drug Administration or the United States Department of Agriculture to permanently render the animal unable to reproduce.

(c) Philosophy.

(1) The intent of the grants is to increase the sterilization of dogs and cats owned by the general public at minimal or no cost.

(2) Grant funds will not be used to:

(A) augment a releasing agency's adoption sterilization program; or

(B) fund programs that do not operate within the State of Texas.

(3) One grant per grant period will be awarded per agency for the sterilization of dogs and/or cats.

(4) Efforts will be made to distribute funds to all areas of the state.

(d) Sources and Allocation of Funds.

(1) Funds for the grants shall be provided in accordance with the Texas Health and Safety Code, §828.014, relating to the animal friendly account.

(2) All grants shall be awarded competitively according to the provisions of this subchapter.

(3) Grants shall be made only to the extent that funds are available in the animal friendly account.

(4) The department shall have the authority and discretion to:

(A) determine the purpose(s) of the grants pursuant to law and this subchapter;

(B) approve or deny grant applications;

(C) determine the number, size, and duration of grants; and

(D) modify or terminate grants.

(5) The department shall not be liable, nor shall grant funds be used, for any costs incurred by applicants in the development, preparation, submission, or review of applications.

(e) Eligibility for Grants. Eligible applicants include:

(1) a releasing agency;

(2) an organization that is qualified as a charitable organization under the Internal Revenue Code, §501(c)(3), that has animal welfare or sterilizing animals owned by the general public at minimal or no cost as its primary purpose; or

(3) a local nonprofit veterinary medical association that has an established program for sterilizing animals owned by the general public at minimal or no cost.

(f) Requirements for Grants.

(1) The department shall specify reasonable requirements for grant applications.

(2) Applicants for grants shall submit as a part of their application a plan of how they intend to provide sterilization services to their target population, compliant with Texas Health and Safety Code, Chapter 828, and this section.

(3) Grant recipients shall made quarterly reports to the department in a form and at a time determined by the department.

(g) Procedures for Grant Announcements.

(1) Before applications are requested, the department shall publish one or more notices of grant availability in the *Texas Register*. These notices shall also be distributed throughout the state through mail and electronic means. The notices will include details about the grants, instructions for obtaining a request for proposals, and the names of persons to contact in the department for further information.

(2) The department shall maintain a list of persons to be notified of requests for proposals. Any person wanting to be placed on the list should contact: Animal Friendly Account, Zoonosis Control Branch, Mail Code 1956, P. O. Box 149347, Austin, TX 78714-9347.

(3) The department shall develop and publish one or more request for proposals, which shall contain details concerning, but not limited to, the following:

(A) the nature and purpose(s) of the grants;

(B) the total amount of funds available for the grants under each part;

(C) the maximum and minimum dollar amounts that will be awarded for individual grants and for individual grantees;

(D) the information and format required for grant applications;

(E) information about the criteria used to judge grant applications; and

(F) the closing date.

(h) Procedures for Grant Applications.

(1) The department may specify any reasonable requirements for grant applications, including, but not limited to, length, format, authentication, and supporting documentation.

(2) Applications that are incomplete or substantially inconsistent with the requirements of this subchapter may be rejected without further consideration at the discretion of the department.

(3) Applications received after the closing date will not be considered, unless the closing date is extended by the department.

(4) Applicants will be given a minimum of 60 calendar days to file applications after a request for proposals is published. Applications must be received by the department on or before the closing date specified in the request for proposals.

(i) Competitive Review Process.

(1) Each application shall be reviewed by the department for completeness, relevance to the published request for proposals, adherence to department policies, general quality, technical merit, and budget appropriateness.

(2) The department's review process shall be completed within 45 days after the closing date.

(j) Selection Criteria.

(1) No grant shall be approved unless, in the opinion of the department:

(A) the application contains an explanation as to why provision of low-cost sterilization for pets will help minimize pet-overpopulation in their community;

(B) the application includes a workable plan to provide sterilization of dogs and cats for the general public at low or no cost;

(C) the application includes a method to report the number, species, and sex of animals sterilized;

(D) the applicant specifies how the general public will be made aware of the availability of low-cost sterilization; and

(E) the applicant has a written non-discrimination policy in place to ensure that no person is discriminated against on the grounds of race, color, religion, sex, national origin, age, or disability.

(2) A grant application will be given funding preference, in a manner determined by the department and announced in the request for proposals, to the extent that it:

(A) includes an outreach program targeting pet custodians;

(B) documents the intent and ability of the applicant to communicate and collaborate with the local health departments, animal control agencies, animal welfare agencies, veterinary organizations, and human services organizations;

(C) demonstrates a low cost for sterilization on a per animal basis, thereby maximizing the number of animals which can be sterilized; and

(D) contains such other information or criteria that the department may specify and include in the request for proposals.

(k) Project Approval. Grant recipients shall execute a contract with the department. The contract shall detail items such as budget, reporting requirements, general provisions for department grant contracts, and any other specifics that might apply to the award.

(l) Continuation Funding.

(1) Grant recipients may be eligible for continuation funding. The department will consider the grant recipient's accomplishments, progress toward stated goals and objectives, award of past grants, and development of alternative funding. Applications shall be submitted in accordance with this subchapter.

(2) The department will award continuation grants after a review of applications in accordance with the provisions of this subchapter.

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 September 28, 2010.

TRD-201005579

Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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# TITLE 28. INSURANCE

## PART 1. TEXAS DEPARTMENT OF INSURANCE

### CHAPTER 21. TRADE PRACTICES

### SUBCHAPTER PP. OUT-OF-NETWORK CLAIM DISPUTE RESOLUTION

The Commissioner of Insurance (Commissioner) adopts new Subchapter PP, §§21.5001 - 21.5003, 21.5010 - 21.5013, 21.5020, 21.5030, and 21.5031, concerning the out-of-network claim dispute resolution process, the plan administrator's required notice of the out-of-network claim dispute resolution process, the resolution of related complaints, and outreach efforts to inform consumers about the out-of-network claim dispute resolution process. Sections 21.5002, 21.5003, 21.5010, 21.5011, 21.5012, 21.5013, 21.5020 and 21.5030 are adopted with changes to the proposed text published in the May 14, 2010, issue of the *Texas Register* (35 TexReg 3760). Sections 21.5001 and 21.5031 are adopted without changes.

REASONED JUSTIFICATION. The new sections are necessary to implement SECTION 1 of House Bill (HB) 2256, enacted by the 81st Legislature, Regular Session, effective June 19, 2009. HB 2256 enacts the Insurance Code Chapter 1467, requiring mandatory mediation at the request of the enrollee for certain out-of-network claims and requiring the collection of information on complaints relating to such claims. Under the Insurance Code §1467.002, new Chapter 1467 applies to: (i) a preferred provider benefit plan issued under the Insurance Code Chapter 1301; and (ii) an administrator of a health benefit plan, other than a health maintenance organization plan, under the Insurance Code Chapter 1551. The Insurance Code Chapter 1551 is the Texas Employees Group Benefits Act, administered and implemented by the board of trustees established under the Government Code Chapter 815 to administer the Employees Retirement System of Texas (ERS). The Insurance Code §1467.003 authorizes the Commissioner to adopt rules as necessary to implement the Commissioner's powers and duties under Chapter 1467. The Insurance Code §1467.054 further provides that a request for mandatory mediation must be provided to the Department on a form prescribed by the Commissioner. This new subchapter is necessary to prescribe the process for requesting and initiating mandatory mediation of out-of-network claims as authorized in the Insurance Code Chapter 1467. This new subchapter is also necessary to implement the requirements of the Insurance Code §1467.151(a). Section 1467.151(a) requires the Commissioner to adopt rules to regulate the investigation and review of a filed complaint that relates to the settlement of an out-of-network health benefit claim subject to Chapter 1467. Section 1467.151(a) requires that these rules: (i) distinguish among complaints for out-of-network coverage or payment and give priority to investigating allegations of delayed medical care; (ii) develop a form for filing a complaint and establish an outreach effort to inform enrollees of the availability of the claims dispute resolution process under Chapter 1467; (iii) ensure that a complaint is not dismissed without appropriate consideration; (iv) ensure that enrollees are informed of the availability of mandatory mediation; and (v) require the administrator to include a notice of the claims dispute resolution process available under Chapter 1467 with the explanation of benefits sent to an enrollee. This new subchapter implements these requirements.

The Department on August 31, 2009, posted an informal working draft of the proposed new rules on the Department's Internet website and invited public input. The Department held a stakeholder's meeting on September 9, 2009, to discuss implementation of SECTION 1 of HB 2256 and the informal working draft with interested parties. The Department received several written comments regarding the informal working draft of the proposed new rules, and these comments were taken into consideration in preparing the proposed rules. The proposed new rules were formally published in the May 14, 2010, issue of the *Texas Register* (35 TexReg 3760). The Department did not receive any requests for a public hearing on the rule proposal.

As a result of comments, the Department has made non-substantive changes to (i) proposed §21.5002 relating to the inclusion of a provision that a claim that is not covered under the terms of the health benefit plan coverage is not subject to mandatory mediation; (ii) proposed §21.5010(c)(2), relating to complete disclosures made by a hospital-based physician; (iii) proposed §21.5012, relating to the informal settlement teleconference; (iv) proposed §21.5030(b)(4) relating to specific information about a qualified claim; and (v) proposed Form No. LHL619 relating to the required information on the hospital-based physician. The Department has also made non-substantive changes to (i) proposed §21.5002 (1) and (2) (designated as §21.5002(a)(1) and (2) in the rule text as adopted) relating to the change in the effective date of the rules from June 19, 2009 and September 1, 2010, respectively, to November 1, 2010; (ii) proposed §21.5003(11) relating to the definition of "preferred provider"; (iii) proposed §21.5011(b)(4) relating to online submission of Form No. LHL619; (iv) proposed §21.5013 relating to mediation participation; (v) proposed §21.5020 relating to the required notice of claims dispute resolution; and (vi) the certification statement, eligibility factors, and references to the terms "claim" and "claims" and "claim number" and "claim numbers" in proposed Form No. LHL619. None of the changes made to the proposed text or proposed form in this adoption materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

As a result of a comment, the Department added subsection (b) to proposed §21.5002, to clarify that this subchapter does not apply to a non-covered claim. The commenter requested that §21.5010, relating to qualified claim criteria, be revised to reflect that only *covered* claims are subject to the procedures mandated by Chapter 1467 and that proposed §21.5010(c), relating to ineligible claims, be revised to reflect that claims that are not covered by the enrollee's health insurance are ineligible for mediation. The commenter requested this clarification for consistency with Chapter 1467 of the Insurance Code, which, according to the commenter, requires that only certain *covered* claims are subject to mandatory mediation. The Department agrees that the requested clarification is needed but in lieu of revising proposed §21.5010(c), as requested by the commenter, the Department has added a new subsection (b) to §21.5002, relating to the scope of the subchapter. Section 21.5002(b) as adopted reads: "This subchapter does not apply to a claim for health benefits,

including medical and health care services and/or supplies, that is not a covered claim under the terms of the health benefit plan coverage."

Also, as a result of a comment, proposed §21.5010(c)(2)(D) was deleted to remove the requirement that a complete disclosure under §21.5010(c)(1) must otherwise comply with any rules promulgated by the Texas Medical Board under the Insurance Code §1467.003. A commenter requested that §21.5010(c)(2)(D) be deleted because Chapter 1467 of the Insurance Code does not require a complete disclosure to comply with rules promulgated by the Texas Medical Board and the statute does not confer any authority on the Texas Medical Board to promulgate standards for the content and procedures pertaining to the disclosure process. In response to this comment, the Department has deleted proposed §21.5010(c)(2)(D) in this adoption.

Additionally, as a result of comments, proposed §21.5012, relating to the informal settlement teleconference, is changed as adopted to require the insurer or administrator to use best efforts to coordinate the informal settlement teleconference. Two commenters objected to proposed §21.5012, because the insurer or administrator will not have control over the enrollee's or physician's actions, and failure by either the enrollee or the physician to cooperate or participate may affect the insurer or administrator's ability to comply with proposed §21.5012. The first commenter suggested that proposed §21.5012 be revised to state that neither an insurer nor an administrator should be subject to any sanction if the other parties to the teleconference fail to cooperate by not responding to the insurer/administrator's communications, by not providing information necessary to set up the teleconference, or by not making themselves available to participate in the teleconference. The second commenter asserted that the Department has shifted the burden of scheduling the settlement conference on the insurer without making allowances for the availability of the parties and the timing of the receipt of the request by the insurer from the Department. The commenter states that the Texas Insurance Code §1467.054(d) obligates "all parties" to participate in a teleconference not later than the 30th day after the date of the request. According to the commenter, the proposed rule subjects the insurer to penalties for actions taken or not taken by the other parties. The commenter suggests that proposed §21.5012 be revised as follows: "An insurer or administrator that is subject to mandatory mediation requested by an enrollee under §21.5011 of this division (relating to Mediation Request Form and Procedure) shall coordinate the informal settlement teleconference required by the Insurance Code §1467.054(d) by: (1) arranging a date and time when the insurer or administrator, the enrollee or the enrollee's representative if the enrollee or the enrollee's representative chooses to participate, and the hospital-based physician or the hospital-based physician's representative can participate in the informal settlement teleconference, [which shall occur not later than the 30th day after the date on which the enrollee submitted a request for mediation;] and (2) providing a toll-free number for participation in the informal settlement teleconference. *An insurer or administrator must use best efforts to schedule the informal settlement conference not later than the 30th day after the date on which the enrollee submits a request for mediation under this section."* The Department agrees with the commenters on the necessity of clarification that best efforts must be used by insurers and administrators in scheduling the informal settlement conference. The Department, however, does not agree with one of the commenter's suggestions that the requested clarification should be made to §21.5012(2). Instead, the following change has been made to §21.5012 as adopted: "An insurer or administrator that is subject to mandatory mediation requested by an enrollee under §21.5011 of this division (relating to Mediation Request Form and Procedure) shall *use best efforts to* coordinate the informal settlement teleconference required by the Insurance Code §1467.054(d) by: . . ." (emphasis added). This revision is very similar to that recommended by the commenter and has the same effect as the commenter's suggested language. This revision makes the commenter's suggestion to delete the requirement that the informal settlement teleconference "shall occur not later than the 30th day after the date on which the enrollee submitted a request for mediation" unnecessary. Therefore, this requirement is not deleted from §21.5012(1) as adopted because it reiterates the Insurance Code §1467.054(d) and is necessary for understanding §21.5012.

Also, as a result of a comment, proposed §21.5030(b)(4) is revised to add a subparagraph (D) to include the dollar amount of the disputed claim to the elements of specific information required on the qualified claim on the complaint form filed under §21.5030. A commenter suggested adding "(b)(4)(D) the dollar amount of the claim at dispute" to proposed §21.5030, stating that such language will give a better idea of the costs related to out-of-network claim disputes. Section 21.5030(b)(4)(D) as adopted incorporates the commenter's suggestion.

Finally, as a result of a comment, proposed Form No. LHL619 was revised to include the additional information of the amount billed by the physician under the "Hospital-Based Physician Information." A commenter stated that the request for mediation should include the "amount billed by the physician" because this information is important in determining whether or not the enrollee's request involves a qualified claim. The adopted Form No. LHL619 incorporates the commenter's suggestion.

In addition to the change made as a result of a comment to §21.5002, the Department made a change to proposed §21.5002(1) and (2) (designated as §21.5002(a)(1) and (2) in the rule text as adopted) to change the effective date of the rules from June 19, 2009 and September 1, 2010, respectively, to November 1, 2010. Section 21.5002(a)(1) and (2) as adopted provide that the subchapter applies to a qualified claim filed under health benefit plan coverage: (1) issued by an insurer as a preferred provider benefit plan under the Insurance Code Chapter 1301, provided the claim is filed on or after *November 1, 2010;* or (2) administered by an administrator of a health benefit plan, other than a health maintenance organization (HMO) plan, under the Insurance Code Chapter 1551, provided the claim is filed on or after *November 1, 2010.* This change was made for compliance with the effective date requirements in the Government Code §2001.036. Section 2001.036 provides that a rule takes effect 20 days after the date on which it is filed in the Office of the Secretary of State unless certain other statutorily specified conditions are met. The change is also necessary to avoid any retroactive effect of the rule.

The Department made a non-substantive change to proposed §21.5003(11), defining "Preferred provider" as "A hospital or hospital-based physician that contracts on a preferred benefit basis with an insurer issuing a preferred provider benefit plan under the Insurance Code Chapter 1301 to provide medical care or health care to enrollees [insureds] covered by a health insurance policy," replacing the term "insureds" with the term "enrollees." Although both terms refer to the same category of individuals, this change was made for consistency within the text and to avoid ambiguity or confusion. The Department also made a non-sub-

stantive change to §21.5011(b)(4), stating, "Upon the department's making [available] Form No. LHL619 (Health Insurance Mediation Request Form) *available to* [that may] be completed and submitted online, an enrollee may submit the request in this manner." This change was made for ease of readability.

The Department also made a non-substantive change to proposed §21.5013(a), stating that an insurer or administrator subject to mediation under Subchapter PP shall participate in mediation in good faith and *is subject to any* rules adopted by the chief administrative law judge pursuant to the Insurance Code §1467.003, instead of stating that the insurer or administrator *shall comply with* any rules adopted by the chief administrative law judge. This change was made to clarify that the rule is intended to notify the insurer or administrator of the applicability of other rules adopted by the chief administrative law judge.

The Department also changed proposed §21.5020 to provide that a Chapter 1551 plan administrator must include a notification of the availability of mandatory mediation under this subchapter with each explanation of benefits sent to an enrollee for an out-of-network claim filed on or after *November 1, 2010,* for services and/or supplies furnished in a hospital that has a contract with the administrator. The November 1, 2010 change was necessary for compliance with the effective date requirements in the Government Code §2001.036. Section 2001.036 provides that a rule takes effect 20 days after the date on which it is filed in the Office of the Secretary of State unless certain other statutorily specified conditions are met. The change is also necessary to avoid any retroactive effect of the rule.

In addition to the change made at the request of the commenter to add the "amount billed by the physician" as a required field to Form No. LHL619, the Health Insurance Mediation Request Form, the Department determined that it was necessary to change proposed Form No. LHL619, to provide that the enrollee submitting this completed form certifies that the claim(s) indicated on the form qualify for mandatory mediation pursuant to the requirements of Chapter 1467 of the Texas Insurance Code *and the rules in Title 28 Texas Administrative Code Chapter 21, Subchapter PP, adopted pursuant to Chapter 1467.* The certification in the form as proposed did not reference the Subchapter PP rules. This addition is necessary to ensure that the claim(s) for which mediation is requested by the enrollee on the form not only qualify for mandatory mediation pursuant to the requirements of Chapter 1467 of the Texas Insurance Code but also pursuant to the Subchapter PP rules. The Department also amended the Eligibility section of proposed Form No. LHL619 to include claims that are eligible under a Texas Employee Retirement System plan. The Eligibility section of Form No. LHL619 as adopted provides in pertinent part that under Chapter 1467 of the Texas Insurance Code, an individual may request mediation if their claim(s) meets the eligibility criteria: "your claim(s) was filed with (i) a PPO on or after June 19, 2009; or (ii) a health benefit plan, other than an HMO, under Chapter 1551 of the Insurance Code (an Employee Retirement System of Texas plan) on or after September 1, 2010." This change is necessary for consistency with §1467.002 of the Insurance Code and Section 6 of HB 2256. Additionally, the adopted Form No. LHL619 is revised to change the references throughout the form from the singular term "claim" to the plural term "claims" and the reference from the singular term "claim number" to the plural term "claim numbers." The proposed form references both the term "claim" and "claims," as well as the term "claim number." This change is necessary for consistency with the adopted rules and for internal consistency of the form and to avoid ambiguity and confusion.

The following discussion provides an overview of and explains additional reasoned justification for the adopted new rules.

Section 21.5001 sets forth the purpose of the subchapter. Section 21.5002 describes the scope of the subchapter. As contemplated in the Insurance Code §1467.002 and §1467.051 and HB 2256, SECTION 6, the new subchapter applies to a qualified claim filed under health benefit plan coverage that is: (i) issued by an insurer as a preferred provider benefit plan under the Insurance Code Chapter 1301, provided the claim is filed on or after November 1, 2010; or (ii) administered by the administrator of a health benefit plan, other than a health maintenance organization plan, under the Insurance Code Chapter 1551, provided the claim is filed on or after November 1, 2010. The new subchapter does not apply to a claim for health benefits, including medical and health care services and/or supplies, that is not a covered claim under the terms of the health benefit plan coverage.

Section 21.5003 specifies definitions for words and terms when used in the new subchapter. Included in the defined terms is the term "hospital-based physician" at §21.5003(6), which the Department defines as "a radiologist, an anesthesiologist, a pathologist, an emergency department physician, or a neonatologist: (A) to whom the hospital has granted clinical privileges; and (B) who provides services to patients of the hospital under those clinical privileges." This definition is generally consistent with the statutorily-defined term "facility-based physician," set forth at the Insurance Code §1467.001(4). The definition, however, provides additional clarity by eliminating any ambiguity associated with the use of the term "facility" by substituting the word "hospital" for the term "facility." This clarification is consistent with the statutory requirement in the Insurance Code §1467.051(a)(2) that an enrollee may request mediation of a settlement of an out-of-network health benefit claim if it is for a medical service or supply provided by a facility-based physician in a "hospital" that is a preferred provider or that has a contract with the ERS administrator.

Section 21.5010 establishes the criteria for a claim to be eligible for mediation and provides that a claim that meets such criteria is referred to as a "qualified claim." In accordance with the Insurance Code §1467.051(a)(2), §21.5010(a)(1) provides that an enrollee may request mandatory mediation of an out-of-network claim if the claim is for medical services and/or supplies provided by a hospital-based physician in a hospital that is a preferred provider with the insurer or that has a contract with the administrator. New §21.5010(a)(2) is consistent with the intent of the Insurance Code §1467.051(a)(1), but §21.5010(a)(2) has clarifying language that is necessary to eliminate ambiguity and ensure uniform claims-handling standards. Without these clarifications, there would be ambiguity concerning whether a particular request for payment of health benefits meets the $1,000 threshold of enrollee responsibility described in the Insurance Code §1467.051(a)(1) as necessary to eligibility for mandatory mediation. Section 21.5010(a)(2) provides that the *aggregate* amount for which the enrollee is responsible to the hospital-based physician for an out-of-network claim, *not including* copayments, deductibles, coinsurance, or *amounts paid by an insurer or administrator directly to the enrollee, must be* greater than $1,000 to be eligible for mandatory mediation. This provision incorporates the eligibility criteria described in the Insurance Code §1467.051(a)(1) with necessary clarification (as indicated by italics) to reduce possible ambiguity and to facilitate uniform han-

dling of out-of-network claims. Section 1467.051(a) of the Insurance Code provides that an enrollee may request mediation of a settlement of an out-of-network health benefit claim if "(1) the amount for which the enrollee is responsible to a facility-based physician, *after* copayments, deductibles, and coinsurance, *including the amount unpaid by the administrator or insurer,* is greater than $1,000; . . . ." Section 21.5010(a)(2) clarifies the Insurance Code §1467.051(a)(1) in three ways. First, the use of the term "aggregate," when read together with §21.5010(b) and §21.5003(3), clarifies that individual units of a claim may be aggregated to reach the threshold $1,000 amount necessary to eligibility for mandatory mediation under the Insurance Code §1467.051(a)(1), as opposed to each individual line item of a claim having to reach the $1,000 threshold in order to be eligible for mandatory mediation. Without this clarification, different interpretations could be given to §1467.051(a)(1). Some enrollees, insurers, and physicians could interpret §1467.051(a)(1) to mean that each line item of a claim for a medical service or supply has to meet the $1,000 threshold in order for that line item to be eligible for mandatory mediation while other enrollees, insurers, and physicians could interpret it to mean that line items of a claim for a medical service or supply could be aggregated to meet the $1,000 threshold in order for the claim to be eligible for mandatory mediation. Second, the use of the phrase "not including" in §21.5010(a)(2) rather than the term "after" in §1467.051(a)(1) clarifies the Department's interpretation of the statutory provision and enhances readability thereby aiding in uniform compliance. Third, the use of the language in §21.5010(a)(2) reading "or amounts paid by an insurer or administrator directly to the enrollee, must be. . . ." in lieu of the language in §1467.051(a)(1) of the Insurance Code reading "including the amount unpaid by the administrator or insurer, is. . . ." clarifies the Department's interpretation of the statutory provision and enhances readability thereby aiding in uniform compliance. Consistent with §1467.051(a)(1) of the Insurance Code, under §21.5010(a)(2), when an insurer makes payment on a claim directly to the enrollee, the amount of such payment should not be included in determining whether the claim meets the $1,000 threshold for eligibility for mediation. This clarification is necessary to ensure uniform handling of similar claims for which the only variation is whether payment was issued directly to the enrollee or instead to the hospital-based physician.

Section 21.5010(b) provides that the use of more than one form in the submission of a claim does not preclude eligibility of a claim for mandatory mediation if the claim otherwise meets the requirements of §21.5010. Section 21.5003(3) defines the term "claim" as "a request to a health benefit plan for payment for health benefits under the terms of the health benefit plan coverage, including medical and health care services and/or supplies, provided that such services or supplies: (A) are furnished pursuant to a single date of service; or (B) if furnished pursuant to more than one date of service, are provided as a continuing and/or related course of treatment over a period of time for a specific medical problem or condition or in response to the same initial patient complaint." This definition of "claim" and the provision under §21.5010(b) that the use of more than one form in the submission of a claim does not preclude eligibility of the claim for mandatory mediation are necessary because the term "claim" is not defined in the Insurance Code Chapter 1467. These clarifications in §21.5003(3) and §21.5010(b) are also necessary to ensure uniform handling of similar claims. Similar claims could otherwise be treated differently because of differences in how the medical services and/or supplies were billed or furnished. These clarifications will prevent disparate handling of similar claims that vary based only on certain features not related to the nature or substance of the claims. For example, these clarifications will prevent disparate handling of similar claims that vary based upon whether the medical and health care services and/or supplies were included on a single or multiple claim forms. The clarifications will also prevent disparate handling of similar claims that vary based upon whether the services and/or supplies were provided as a single treatment or as part of a continuing and/or related course of treatment over a period of time. Absent these clarifications, there would be ambiguity concerning whether a particular request for payment of health benefits meets the $1,000 threshold of enrollee responsibility described in the Insurance Code §1467.051(a)(1) as necessary to eligibility for mandatory mediation. The Department has determined that any approach that does not include these particular clarifications would be insufficient to comply with the intent of HB 2256, which is to protect the economic welfare of all enrollees who have been charged large and unanticipated medical bills resulting from balance billing.

Section 21.5010(c) provides that a claim is not eligible for mandatory mediation under this new subchapter if the hospital-based physician has provided a complete disclosure as described in the Insurance Code §1467.051. This provision is necessary to reflect the statutory provision under the Insurance Code §1467.051(d), which states that a facility-based physician who makes a disclosure under the Insurance Code §1467.051(c) and obtains the enrollee's written acknowledgment of that disclosure may not be required to mediate a billed charge under Subchapter B of Chapter 1467 of the Insurance Code if the amount billed is less than or equal to the maximum amount projected in the disclosure.

Section 21.5011(a) adopts by reference Form No. LHL619 (Health Insurance Mediation Request Form) and identifies information elements that the mediation request form requires in accordance with the Insurance Code §1467.054(b). These information elements include: (i) the name and contact information, including a telephone number, of the enrollee requesting mediation; (ii) a brief description of the qualified claim to be mediated; (iii) the name and contact information, including a telephone number, for the requesting enrollee's counsel, if applicable; (iv) the names of the hospital-based physician and insurer or administrator; and (v) the name and address of the hospital where services were rendered. Section 21.5011(a) also provides a web address for accessing the form to request mediation. Section 21.5011(b)(1) - (3) provides that an enrollee may submit a request for mediation by completing and submitting Form No. LHL619 by mail, fax, or e-mail. Section 21.5011(b)(4) provides that upon the Department's making Form No. LHL619 available to be completed and submitted online, an enrollee may submit the request in this manner. Section 21.5011(c) provides the toll-free telephone number for assistance with submitting a request for mediation.

Section 21.5012 imposes requirements regarding the coordination of the informal settlement teleconference, requiring the insurer or administrator that is subject to the mandatory mediation request to use best efforts to coordinate the informal settlement teleconference required by the Insurance Code §1467.054(d) by: (i) arranging a date and time when the parties can participate in the teleconference, to occur no later than the 30th day after the date on which the enrollee submitted the request for mediation; and (ii) providing a toll-free number for participation in the informal settlement conference. The purpose of §21.5012 and the Insurance Code §1467.054(d) is to provide a forum for settlement of eligible enrollee claims before mediation commences.

This purpose is a necessary element in protecting the economic welfare of all enrollees who have been charged large and unanticipated medical bills resulting from balance billing. "Balance billing" is the discrepancy between the dollar amount of reimbursement allowed for the service by the insurer and the dollar amount of reimbursement charged by the hospital-based physician. The Department anticipates that the insurer will be the most frequent participant in the mediation process. The requirements under §21.5012 are necessary to provide for more uniform implementation of the statutory teleconference requirement, reduce potential confusion for all participants in the informal settlement teleconference, and provide for more efficient regulation by the Department of the teleconference requirement.

Section 21.5013 incorporates the statutory requirements described in the Insurance Code §1467.051 and §1467.101 with respect to participation of an insurer or administrator subject to mediation under Chapter 1467 by requiring good faith participation in mediation. The new section also notifies such insurers or administrators that they are also subject to any rules adopted by the chief administrative law judge under the Insurance Code §1467.003 and restates the conduct specified in the Insurance Code §1467.101 that constitutes bad faith mediation.

Section 21.5020 requires an administrator of a plan under the Insurance Code Chapter 1551 (ERS plans) to include a notification of the availability of mandatory mediation under this subchapter with each explanation of benefits sent to an enrollee for an out-of-network claim filed on or after November 1, 2010, for services and/or supplies furnished in a hospital that has a contract with the administrator. This rule is required in the Insurance Code §1467.151(a).

Section 21.5030 describes the process for resolution of complaints regarding a qualified claim or a mediation that has been requested under §21.5010. Section 21.5030(a) specifies the web address from which the recommended complaint form may be accessed, the manner in which a complaint may be submitted, and the Department's toll-free number for assistance with filing a complaint. Section 21.5030(b) specifies information elements on the form for filing the complaint, including: (i) whether the complaint falls within the scope of the Insurance Code Chapter 1467; (ii) whether medical care has been delayed or has not been given; (iii) whether the medical service and/or supply that is the subject of the complaint was for emergency care; (iv) the type and specialty of the hospital-based physician; (v) the type of service performed or supply provided; (vi) the city and county where the service was performed; and (vii) the dollar amount of the disputed claim. Section 21.5030(b) is necessary to comply with the §1467.151(a)(1) and (2) requirements that the rules adopted pursuant to §1467.151 of the Insurance Code must distinguish among complaints for out-of-network coverage or payment, give priority to investigating allegations of delayed medical care, and develop a form for filing a complaint. Additionally, the information provided pursuant to these requested information elements will facilitate the Department's maintenance of such information as required under the Insurance Code §1467.151(b).

Section 21.5030(c) specifies the steps that the Department will undertake in resolving a complaint under this section. New §21.5030(c) is necessary to comply with the §1467.151(a)(3) requirement that the rules adopted pursuant to §1467.151, relating to consumer protection, ensure that a complaint is not dismissed without appropriate consideration.

Section 21.5031 describes outreach efforts that the Department will undertake to inform consumers of the availability of mandatory mediation. This new section is necessary to comply with the §1467.151(a)(2) requirement that the rules adopted pursuant to §1467.151, relating to consumer protection, establish an outreach effort to inform enrollees of the availability of the claims dispute resolution process under Chapter 1467 of the Insurance Code. This new section is also necessary to comply with the §1467.151(a)(4) requirement that the rules adopted pursuant to §1467.151, relating to consumer protection, ensure that enrollees are informed of the availability of mandatory mediation.

HOW THE SECTIONS WILL FUNCTION.

§21.5001. Purpose. Section 21.5001 sets forth the purpose of the subchapter, which is to prescribe the process for requesting and initiating mandatory mediation of claims as authorized in the Insurance Code Chapter 1467 and to facilitate the process for the investigation and review of a complaint filed with the department that relates to the settlement of an out-of-network claim under the Insurance Code Chapter 1467.

§21.5002. Scope. Section 21.5002 establishes the scope of the subchapter. The new subchapter applies to a qualified claim filed under health benefit plan coverage that is: (i) issued by an insurer as a preferred provider benefit plan under the Insurance Code Chapter 1301, provided the claim is filed on or after November 1, 2010; or (ii) administered by the administrator of a health benefit plan, other than a health maintenance organization plan, under the Insurance Code Chapter 1551, provided the claim is filed on or after November 1, 2010. The subchapter does not apply to a claim for health benefits, including medical and health care services and/or supplies, that is not a covered claim under the terms of the health benefit plan coverage.

§21.5003. Definitions. Section 21.5003 contains definitions for words and terms when used in the adopted new subchapter.

§21.5010. Qualified Claim Criteria. Section 21.5010 establishes the criteria for a claim to be eligible for mediation and provides that a claim that meets such criteria is referred to as a "qualified claim." Section 21.5010(a) sets forth the required criteria for what constitutes a "qualified claim," requiring (i) the claim to be an out-of-network claim for medical services and/or supplies provided by a hospital-based physician in a hospital that is a preferred provider with the insurer or that has a contract with the administrator; and that (ii) the aggregate amount for which the enrollee is responsible to the hospital-based physician for the out-of-network claim, not including copayments, deductibles, coinsurance, or amounts paid by an insurer or administrator directly to the enrollee, must be greater than $1,000. Section 21.5010(b) provides that the use of more than one form in the submission of a claim does not preclude eligibility of a claim for mandatory mediation if the claim otherwise meets the requirements of §21.5010.

Section 21.5010(c) provides that a claim is not eligible for mandatory mediation under this new subchapter if the hospital-based physician has provided a complete disclosure as described in the Insurance Code §1467.051.

§21.5011. Mediation Request Form and Procedure. Section 21.5011(a) adopts by reference Form No. LHL619 (Health Insurance Mediation Request Form) and identifies information elements that the mediation request form requires in accordance with the Insurance Code §1467.054(b). These information elements include: (i) the name and contact information, including a telephone number, of the enrollee requesting mediation; (ii) a brief description of the qualified claim to be mediated; (iii) the

name and contact information, including a telephone number, for the requesting enrollee's counsel, if applicable; (iv) the names of the hospital-based physician and insurer or administrator; and (v) the name and address of the hospital where services were rendered. Section 21.5011(a) also provides a web address for accessing the form to request mediation. Section 21.5011(b)(1) - (3) provides that an enrollee may submit a request for mediation by completing and submitting Form No. LHL619 by mail, fax, or e-mail. Under §21.5011(b)(4), an enrollee may submit the request for mediation online when this means of completing and submitting the request becomes available. Section 21.5011(c) provides the toll-free telephone number for assistance with submitting a request for mediation.

§21.5012. Informal Settlement Teleconference. Section 21.5012 imposes requirements regarding the coordination of the informal settlement teleconference, requiring the insurer or administrator that is subject to the mandatory mediation request to use best efforts to coordinate the informal settlement teleconference required by the Insurance Code §1467.054(d) by: (i) arranging a date and time when the parties can participate in the teleconference, to occur no later than the 30th day after the date on which the enrollee submitted the request for mediation; and (ii) providing a toll-free number for participation in the informal settlement conference.

§21.5013. Mediation Participation. Section 21.5013 incorporates the statutory requirements described in the Insurance Code §1467.051 and §1467.101 with respect to participation of an insurer or administrator subject to mediation under Chapter 1467 by requiring good faith participation in mediation. The section also notifies such insurers or administrators that they are subject to any rules adopted by the chief administrative law judge under the Insurance Code §1467.003 and restates the types of conduct specified in the Insurance Code §1467.101 that constitutes bad faith mediation.

§21.5020. Required Notice of Claims Dispute Resolution. Section 21.5020 requires an administrator of a plan under the Insurance Code Chapter 1551 (ERS plans) to include a notification of the availability of mandatory mediation under this subchapter with each explanation of benefits sent to an enrollee for an out-of-network claim filed on or after November 1, 2010, for services and/or supplies furnished in a hospital that has a contract with the administrator.

§21.5030. Complaint Resolution. Section 21.5030 describes the process for resolution of complaints regarding a qualified claim or a mediation that has been requested under §21.5010. Section 21.5030(a) specifies the web address for accessing the recommended complaint form, the manner in which a complaint may be submitted, and the toll-free number for obtaining Department assistance with filing a complaint. Section 21.5030(b) specifies information elements on the form for filing the complaint, including: (i) whether the complaint is within the scope of the Insurance Code Chapter 1467; (ii) whether medical care has been delayed or has not been given; (iii) whether the medical service and/or supply that is the subject of the complaint was for emergency care; (iv) the type and specialty of the hospital-based physician; (v) the type of service performed or supply provided; (vi) the city and county where the service was performed; and (vii) the dollar amount of the disputed claim. Section 21.5030(c) specifies the steps that the Department will undertake in resolving a complaint under this section.

§21.5031. Department Outreach. Section 21.5031 describes outreach efforts that the Department will undertake to inform consumers of the availability of mandatory mediation.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

General Comment

Comment: One commenter expresses appreciation for the work the Department staff has done to draft rules relating to mediation, complaint resolution and outreach. The commenter states that the rules as proposed adequately implement HB 2256 as passed by the 81st Texas Legislature and will provide an important consumer protection for enrollees who have claim disputes when they access out-of-network services.

Agency Response: The Department appreciates the supportive comment.

§21.5003(3). Proposed definition of claim

Comment: Two commenters state that the definition of "claim" in §21.5003(3) is inconsistent with statutory language. The first commenter requests that part (B) of the definition of "claim" be revised to read: "(B) if furnished pursuant to more than one date of service, are provided as a continuing [and/or related] course of treatment [over a period of time] for a specific medical problem or condition, *and would typically be considered one claim in the normal course of business for an insurance company.* [or in response to the same initial patient complaint.]" A second commenter requests that at a minimum, subsection (B) should be revised to apply to services or supplies provided during the course of a single hospital admission because the reference to "in response to the same initial patient complaint" in the proposed definition is vague and too broad.

The first commenter asserts the following reasons for the requested change: (i) the proposed §21.5003(3) definition of "claim" appears overly broad, vague and beyond the scope of Chapter 1467 of the Insurance Code; (ii) the definition construes the term "claim" to include requests for health insurance benefits that would normally constitute more than one claim; (iii) the Insurance Code Chapter 1467 does not reference the aggregation of claims in order to meet the statutory $1,000 minimum requirement for mandatory mediation under the statute; (iv) as used in the statute, a "claim" in the amount of $1,000 is consistently stated in the singular and not plural; (v) since "claim" is not defined in the statute, the term should be given its ordinary meaning as commonly understood and applied in the business of processing and adjudicating a claim for health insurance benefits; (vi) the statute speaks in terms of a single discrete claim in connection with the $1,000 minimum, and not an aggregation of claims as contemplated by the Department's proposed rule; (vii) the scope of the definition appears particularly unreasonable and overly broad in permitting multiple requests for health benefits, not only for a specific medical procedure, but for subsequent procedures so long as they are "related to" the initial treatment; (viii) the definition is inconsistent with the terms of the statute to the extent the definition encompasses as one claim requests arising from both an original procedure and the treatment of a complication "related to" the earlier procedure; (ix) if the definition would treat as one "claim" both an underlying treatment and a subsequent "related" medical procedure that occurred two, four or more than four years after the original procedure, such a construction would plainly exceed the bounds set by the statute, and allowing an enrollee to aggregate claims in this manner to reach the $1,000 threshold violates the plain language and intent of the statute.

The second commenter asserts the following reasons for the requested change: (i) the Texas Insurance Code §1467.051(a)(2) provides that an enrollee may request mediation if "the health benefit claim is for a medical service or supply provided by a facility based physician..." (emphasis added), and the proposed definition of "claim" in §21.5003(3) conflicts with the statute; (ii) the proposed definition of "claim" exceeds the Department's statutory authority; and (iii) the proposed definition of "claim" conflicts with the Department's own form regarding a request of mediation (LHL619), which provides that an enrollee may request mediation if "your claim is for a medical service or supply. . . ."

Agency Response: The Department declines to make the requested changes for the following reasons: (i) the Department disagrees that the definition of "claim" in proposed §21.5003(3), which is adopted without changes, is overly broad, vague, or exceeds the scope of the statute; an individual or entity will be able to determine what constitutes a "claim" by a plain reading of the rules; (ii) the definition of "claim" in proposed §21.5003(3), which is adopted without changes, is consistent with the Department's rulemaking authorization in the Insurance Code §1467.003 to adopt rules as necessary to implement the Department's powers and duties under Chapter 1467 of the Insurance Code; (iii) the definition is consistent with the statutory provisions of the Insurance Code Chapter 1467, including but not limited to the statutory right for an enrollee to request mediation of a settlement of certain out-of-network health benefit claims under §1467.051; (iv) the inclusion of the definition of "claim" does not impose any additional burdens, conditions, or restrictions on a person, including an administrator or insurer, beyond or inconsistent with the Insurance Code Chapter 1467; to the contrary, as previously stated, the term "claim" in these rules is applied consistently with the provisions of the Insurance Code Chapter 1467; (v) the use of the term "claim" is also consistent with the general objectives of Chapter 1467, as enacted by HB 2256. The primary purpose of Chapter 1467 of the Insurance Code is to create a remedy for enrollees who have been billed for covered services because of a discrepancy between the dollar amount of reimbursement allowed for the service by the insurer and the dollar amount of reimbursement charged by the hospital-based physician ("balance billing"). According to the Senate Committee on State Affairs Bill Analysis for HB 2256, balance billing most commonly occurs when a facility-based physician does not have a contract with a certain health benefit plan, but the facility at which the physician practices has a contract with that health benefit plan. TEXAS SENATE STATE AFFAIRS COMMITTEE, BILL ANALYSIS (Committee Report), HB 2256, 81st Leg., R.S. (May 22, 2009). The Bill Analysis further explains, "An enrollee who is admitted into one of these facilities for a procedure or an emergency is ultimately responsible for an unexpected bill. Currently, there is no remedy for this bill other than the patient attempting to set up a payment plan with the facility-based physician." HB 2256 provides an alternative remedy for these unexpected medical bills that result from balance billing (subject to certain minimum amounts) by creating an out-of-network claim dispute resolution process. Sections 21.5010(a)(2), 21.5010(b), and 21.5003(3) clarify how to calculate whether a claim is qualified for mandatory mediation. The Department has determined that any approach that does not include these particular clarifications would be insufficient to comply with the intent of HB 2256, which is to protect the economic welfare of all enrollees who have been charged large and unanticipated medical bills resulting from balance billing.

Additionally, as noted in the Department's rule proposal, few requests for mediation had been received as of April 1, 2010, and few such requests have been received to date. Even if the number of mediations were to increase, however, the Department is of the opinion that it would be a relatively rare occurrence for an enrollee to have multiple services on separate dates by the same out-of-network facility based physician at a network hospital as part of a "related" but not "continuing" course of treatment. The Department's reason for adopting the definition of "claim," in §21.5003 is to provide a clear, broad standard to guide all affected parties. This type of standard will eliminate much of the potential for manipulation of the process by these parties and eliminate difficult disputes over whether claims qualify for mediation. Further, the Department is of the opinion that this standard will not have a significant impact on the number of mediations that will actually occur. Because all mediations will be requested through the Department, the Department staff will also be able to continue to monitor this issue to determine if problems arise.

§21.5010. Qualified Claim Criteria

Comment: A commenter requests that §21.5010 be revised to reflect that only *covered* claims are subject to the procedures mandated by Chapter 1467 and that proposed §21.5010(c) be revised to reflect that claims that are not covered by the enrollee's health insurance are ineligible for mediation. The commenter asserts the following reason for the requested changes: (i) the statute reflects that its requirements are not intended generally to supplant or substitute ERS' and the ERS Board of Trustees' exclusive authority under Texas Insurance Code §§1551.051, 1551.052, 1551.055, 1551.201, 1551.202, and Subchapter H of Chapter 1551, to define the terms of health insurance coverage under the Texas Employees Group Benefits Program, administer claims and process administrative appeals arising from the denial of claims; (ii) the disclosure provisions of §1467.051 state that if an out-of-network facility-based physician makes a proper disclosure identifying his or her status, the projected amounts for which the enrollee may be responsible, and the circumstances in which the enrollee would be responsible, then neither the mediation nor special trial provisions of the statute would apply; (iii) the disclosure provisions reflect that the requirements of Chapter 1467 apply to issues regarding an enrollee's share of a covered claim, not to whether or not a particular medical service or good is covered; such issues remain subject to the provisions of Chapter 1551 of the Insurance Code and ERS' rules and plan provisions regarding those issues; (iv) the complaint provisions of §1467.054(d) further reflect that the statute is intended as a vehicle to resolve disputes over improper billing by an out-of-network facility-based physician and for unfair claim settlement practices; (v) §1467.054(i) provides that the subsection does not require an insurer or administrator to pay for an uncovered service; (vi) the Insurance Code §1467.056 specifies the issues that are the proper subject of mediation and include: (a) whether the amount charged by the facility-based physician for the medical service or supply is excessive; (b) whether the amount paid by the insurer or administrator represents the usual and customary rate for the medical service or supply or is unreasonably low; and (c) a determination of the amount, after copayments, deductibles, and coinsurance are applied, for which an enrollee is responsible to the facility-based physician; and (vii) §1467.056(d) further states that the goal of the mediation is to reach an agreement among the parties as to the amount paid by the insurer or administrator to the facility-based physician, the amount charged by the physician, and the amount paid to the physician by the enrollee.

The commenter emphasizes that the scope of Chapter 1467 of the Insurance Code is limited to the procedures that apply to disputes regarding an enrollee's share of the costs for medical goods and services. The commenter also points out that §1467.057(c) states that "a special judge's verdict is not relevant or material to *any other balance bill dispute* and has no precedential value." Disputes regarding the scope of coverage are not addressed other than to state that a service by a facility-based physician may not be summarily disallowed. Chapter 1551, the Master Benefit Plan Document for HealthSelect and ERS' rules provide for multiple levels of review before a claim is disallowed for lack of coverage.

Agency Response: The Department agrees that only covered claims are subject to the mandatory mediation prescribed by Chapter 1467 of the Insurance Code but does not agree with the commenter's suggestion to amend §21.5010 in order to clarify this fact. While the Department is of the opinion that the proposed rules provide that only covered claims are subject to mandatory mediation, the Department also agrees that the rules could more explicitly state that only "covered" claims are within the scope of the rules. Therefore, the Department has made the clarification in §21.5002, relating to the scope of the rule. The following discusses the Department's reasoning and the changes made to the proposed text in response to the comments. The proposed definition of "claim," which is adopted without change, already clarifies that only covered claims are subject to mandatory mediation. Proposed new §21.5003(3), which is adopted without change, defines "claim" as "a request to a health benefit plan for payment for *health benefits under the terms of the health benefit plan coverage,* including medical and health care services and/or supplies. . ." (emphasis added). Proposed §21.5010 discusses criteria for an "out-of-network claim" to be a "qualified claim." Proposed §21.5003(10), which is adopted without change, defines "out-of-network claim" as "a *claim* for payment for medical or health care services and/or supplies that are furnished by a hospital-based physician that is not contracted as a preferred provider with a preferred provider benefit plan or contracted with an administrator." Thus, a "qualified claim" under proposed §21.5010 is a type of "out-of-network claim," and an "out-of-network claim" is a type of "claim." Because the definition of "claim" is therefore incorporated into proposed §21.5010, the limitation of "covered" claims also already applies. However, because of the concerns raised by the commenter, the Department has revised proposed §21.5002 relating to the scope of the rule, adding the following language: "(b) This subchapter does not apply to a claim for health benefits, including medical and health care services and/or supplies, that is not a covered claim under the terms of the health benefit plan coverage." This revision makes it unnecessary to revise proposed §21.5010 as the commenter requests.

Comment: A commenter requests the deletion of §21.5010(c)(2)(D), which requires a complete disclosure under §21.5010(c)(1) to otherwise comply with any rules promulgated by the Texas Medical Board under the Insurance Code §1467.003. The commenter asserts the following reasons for the requested change: (i) proposed §21.5010(c) appears to exceed the scope of Chapter 1467 with respect to the requirements for a disclosure by an out-of-network facility-based physician that will forestall an enrollee's recourse to mandatory mediation; (ii) §21.5010(c)(2)(D) provides that in order for the disclosure to be "complete," it must comply with any rules promulgated by the Texas Medical Board under Insurance Code §1467.003; however, §1467.051 provides the specific requirements for a disclosure to be effective, and it does not mention compliance with any rules promulgated by the Texas Medical Board; (iii) although §1467.003 provides that the Texas Medical Board may promulgate rules to implement its respective powers and duties under Chapter 1467, the statute does not confer any authority on the Board with respect to the content and procedures pertaining to the disclosure process; on the contrary, the Texas Medical Board's authority under Chapter 1467 appears to include: (a) addressing complaints of bad faith mediation by physicians subject to the mediation process; (b) adopting rules regulating the investigation and review of complaints relating to the settlement of an out-of-network health benefit claim that is subject to the chapter; (c) distinguishing between complaints for out-of-network coverage or payment and giving priority to investigating allegations of delayed medical care; (d) developing forms relating to such complaints and ensuring that complaints are given appropriate consideration; and (e) maintaining information regarding complaints as specified in §1467.151(b); and (iv) the Insurance Code §1467.151(d) provides that a facility-based physician who fails to provide disclosure under that section is not subject to discipline by the Texas Medical Board; given this statutory context, there appears to be no authority for proposed §21.5010(c)(2)(D) requiring that an out-of-network facility-based physician's disclosure comply with unspecified rules promulgated by the Texas Medical Board.

Agency Response: The Department agrees to delete the requirement in §21.5010(c)(2)(D) and has made the requested deletion in §21.5010(c)(2)(D) as adopted.

§21.5011. Mediation Request Form and Procedure

Comment: Two commenters assert that the Health Insurance Mediation Request Form should include additional required fields. One commenter states that a request for mediation should include (i) the date(s) of service by the out-of-network facility-based physician; (ii) whether or not the physician is a hospital-based radiologist, anesthesiologist, pathologist, emergency department physician or neonatologist; and (iii) the amount billed by the physician. This information is important in determining whether or not the enrollee's request involves a qualified claim and meets the $1,000 minimum requirement and/or constitutes an aggregation of claims not permitted by statute. This commenter also requests that the enrollee be required to state whether a proper disclosure has been received by the physician, as the Department will not otherwise be able to make an informed decision as to whether or not mandatory mediation is appropriate as requested by the enrollee.

Another commenter states that §21.5011 should require the enrollee to include a copy of the bill from the out-of-network provider. The commenter asserts that it is unclear how the Department would make a determination regarding the eligibility of the claim for mediation without obtaining a copy of the bill from the out-of-network provider.

Agency Response: The Department agrees that the request for mediation should include the amount billed by the physician and has updated the Health Insurance Mediation Request Form, as adopted, accordingly. While the Department agrees that this information is important in determining whether or not the enrollee's request involves a qualified claim and meets the $1,000 minimum requirement, the Department does not agree with the commenter's assertion that an aggregation of claims is not permitted by statute. It is the Department's position that the term "claim" as used in Chapter 1467 of the Insurance Code may in some instances include an aggregation of claims as provided by

the use of the term "aggregate" in §21.5010(a)(2) when read together with §21.5010(b) and §21.5003(3). Section 21.5010(b) provides for the use of more than one form in the submission of a claim and §21.5003(3) defines the term "claim." The Department, however, does not agree that the other requested additional elements should be required for the following reasons: (i) the date of service is already an optional field in the Health Insurance Mediation Request Form; (ii) the name of the hospital-based physician is a required element for submitting a request, which enables the Department to easily determine whether the physician is a radiologist, anesthesiologist, pathologist, emergency department physician, or neonatologist; (iii) the "Eligibility" section of the form specifically informs the potential requestor that the claim must be for "a medical service or supply provided by an out-of-network hospital-based physician (such as a radiologist, an anesthesiologist, a pathologist, an emergency department physician, or a neonatologist)"; (iv) the "Eligibility" section informs the potential requestor that he or she would be ineligible to request mandatory mediation if the hospital-based physician provided a complete and accurate disclosure before providing a medical service or supply that (a) explained that the facility-based physician did not have a contract with the individual's health benefit plan; (b) disclosed projected amounts for which the individual may be responsible; and (c) disclosed the circumstances under which the individual would be responsible for those amounts; a hospital-based physician would also have the opportunity to produce documentation that such a disclosure had been made once notified that a request for mediation has been made; and (v) the "Eligibility" section also states that the amount owed to the hospital-based physician (not including copayments, deductibles, coinsurance, and amounts paid by the insurer or administrator directly to the enrollee) must be more than $1,000; the individual, by submitting a request for mediation, certifies that the claim qualifies for mandatory mediation pursuant to the requirements of Chapter 1467 of the Texas Insurance Code.

Therefore, additional documentation, such as a copy of the bill, is unnecessary at the initial request. While the Department sets forth the eligibility criteria in the Health Insurance Mediation Request Form, it is the responsibility of the enrollee to determine whether his or her claim is eligible. Chapter 1467 of the Insurance Code does not require the Department to make determinations on whether claims are eligible for mediation.

Comment: A commenter suggests that the Department should be required to review each request for mediation and to determine whether or not it meets the statutory requirements for mediation. Such review and determination by the Department will be important to ensure that the parties are not improperly subjected to the time and expense of mediation, and possible special trial, when the statutory prerequisites for those procedures have not been met.

Agency Response: The Department disagrees. Chapter 1467 of the Insurance Code does not require the Department to make determinations on whether claims are eligible for mediation. The Insurance Code §1467.051(a) and §1467.054(b) are the relevant statutes, and none of these statutes require the Department to make determinations on whether claims are eligible for mediation. The Insurance Code §1467.051(a) states, "An enrollee may request mediation of a settlement of an out-of-network health benefit claim if: (1) the amount for which the enrollee is responsible to a facility-based physician, after copayments, deductibles, and coinsurance, including the amount unpaid by the administrator or insurer, is greater than $1,000; and (2) the health benefit claims is for a medical service or supply provided by a facility-based physician in a hospital that is a preferred provider or that has a contract with the administrator." The Insurance Code §1467.054(b) states, "A request for mandatory mediation must be provided to the department on a form prescribed by the commissioner and must include: (1) the name of the enrollee requesting mediation; (2) a brief description of the claim to be mediated; (3) contact information, including a telephone number, for the requesting enrollee and the enrollee's counsel, if the enrollee retains counsel; (4) the name of the facility-based physician and name of the insurer or administrator; and (5) any other information the commissioner may require by rule." To assist in ensuring that the statutory process is followed, the Department's Health Insurance Mediation Request Form requires that the enrollee certify that the claim indicated in the form qualify for mandatory mediation pursuant to the requirements of Chapter 1467 of the Texas Insurance Code and the rules in Title 28 Texas Administrative Code Chapter 21, Subchapter PP, adopted pursuant to Chapter 1467. Therefore, it is the responsibility of the enrollee under both the statute and the adopted rules to determine whether his or her claim is eligible. However, if a request for mandatory mediation clearly does not meet the eligibility requirements, the Department may inform the requestor and appropriately reclassify the request as a complaint. Alternatively, the assigned mediator and/or special judge, with the ability to request additional information from the parties, may be in the best position to quickly determine whether a claim is eligible under the statute.

§21.5012. Informal Settlement Teleconference

Comment: Two commenters object to §21.5012 as proposed because the insurer or administrator will not have control over the enrollee's or physician's actions, and failure by either enrollee or physician to cooperate or participate may affect the insurer or administrator's ability to comply with proposed §21.5012. The first commenter contends that proposed §21.5012 does not address the obligation of the enrollee and out-of-network physician to cooperate in the informal settlement teleconference process or the consequences of any failure in that regard. The commenter suggests that proposed §21.5012 be revised to state that neither an insurer nor an administrator should be subject to any sanction if the other parties to the teleconference fail to cooperate by not responding to the insurer/administrator's communications, by not providing information necessary to set up the teleconference, or by not making themselves available to participate in the teleconference.

The second commenter asserts that the Department has shifted the burden of scheduling the settlement conference on the insurer without making allowances for the availability of the parties and the timing of the receipt of the request by the insurer from the Department. The Insurance Code §1467.054(d) obligates "all parties" to participate in a teleconference not later than the 30th day after the date of the request. According to the commenter, the proposed rule subjects the insurer to penalties for actions taken or not taken by the other parties. The commenter suggests that proposed §21.5012 be revised as follows: "An insurer or administrator that is subject to mandatory mediation requested by an enrollee under §21.5011 of this division (relating to Mediation Request Form and Procedure) shall coordinate the informal settlement teleconference required by the Insurance Code §1467.054(d) by: (1) arranging a date and time when the insurer or administrator, the enrollee or the enrollee's representative if the enrollee or the enrollee's representative chooses to participate, and the hospital-based physician or the hospital-based

physician's representative can participate in the informal settlement teleconference, [which shall occur not later than the 30th day after the date on which the enrollee submitted a request for mediation;] and (2) providing a toll-free number for participation in the informal settlement teleconference. *An insurer or administrator must use best efforts to schedule the informal settlement conference not later than the 30th day after the date on which the enrollee submits a request for mediation under this section."*

Agency Response: The Department agrees with the commenters on the necessity of clarification that best efforts must be used by insurers and administrators in scheduling the informal settlement conference. The Department, however, does not agree with one of the commenter's suggestions that the requested clarification should be made to §21.5012(2). Instead, the following change has been made to §21.5012 as adopted: "An insurer or administrator that is subject to mandatory mediation requested by an enrollee under §21.5011 of this division (relating to Mediation Request Form and Procedure) shall *use best efforts to* coordinate the informal settlement teleconference required by the Insurance Code §1467.054(d) by . . . ." This revision is very similar to that recommended by the commenter and has the same effect as the commenter's suggested language. This revision makes the commenter's suggestion to delete the requirement that the informal settlement teleconference "shall occur not later than the 30th day after the date on which the enrollee submitted a request for mediation" unnecessary. Therefore, this requirement is not deleted from §21.5012(1) as adopted because it reiterates the Insurance Code §1467.054(d) and is necessary for understanding §21.5012.

Comment: A commenter requests that proposed §21.5012 be revised to specify that if the enrollee fails to cooperate or attend the teleconference, he or she waives the right to mediation. The commenter's reasons are: (i) §1467.054(d) provides, "In an effort to settle the claim before mediation, all parties must participate in an informal settlement teleconference not later than the 30th day after the date on which the enrollee submits a request for mediation under this section"; (ii) unlike the actual mediation session in which the enrollee's attendance is optional, the statute requires his or her participation in the teleconference proceeding; and (iii) the enrollee's participation is mandatory and necessary to explore the possibility of resolving the dispute without the expense and time involved in preparing for and attending mediation.

Agency Response: The Department disagrees that the enrollee is required by statute to participate in the informal teleconference. Section 1467.054(d) provides, "In an effort to settle the claim *before mediation,* all parties must participate in an informal settlement teleconference not later than the 30th day after the date on which the enrollee submits a request for mediation under this section" (emphasis added). Section 1467.001(7) defines "party" as "an insurer offering a preferred provider benefit plan, an administrator, or a facility-based physician or the physician's representative who participates in a mediation conducted under this chapter. The enrollee is also considered a party *to the mediation"* (emphasis added). Thus, it is the Department's position that the informal settlement teleconference is not considered part of the mediation and also that the enrollee is not defined in §1467.001(7) as a "party" whose participation is required in the informal settlement teleconference under the Insurance Code §1467.054(d).

§21.5013. Mediation Participation

Comment: A commenter notes that although proposed §21.5013 requires insurers and administrators to mediate in good faith, the rule is silent regarding such obligation with respect to enrollees and out-of-network facility-based physicians. Chapter 1467 clearly requires that all parties to mediation attend in good faith, and the proposed rule should be revised to reflect that the duty of good faith applies to all parties to the mediation.

Agency Response: The Insurance Code §1467.101 describes the conduct that constitutes bad faith mediation for purposes of Chapter 1467. The Insurance Code §1467.102(a) states, "Bad faith mediation, by a party other than the enrollee, is grounds for imposition of an administrative penalty by *the regulatory agency that issued a license or certificate of authority to the party who committed the violation"* (emphasis added). As a result, the Department's rules address only those parties, i.e., insurers and administrators, that are subject to the Department's regulatory authority.

Comment: A commenter suggests that proposed §21.5013 could be improved to clarify the limits of the mediator's right to request information from the parties. Proposed §21.5013 should be revised to (i) provide that any confidential information provided to the mediator must remain confidential unless the providing party consents to its disclosure to the other party(s); (ii) reflect that the mediator's request for information must be objectively reasonable in terms of facilitating an agreement between the parties; and (iii) emphasize the requirement of §1467.055 that, except as otherwise provided by the statute, the mediator shall hold in strict confidence all information provided to him or her by a party and all his or her communications with each party. The commenter asserts the following reasons for the suggested change: (i) to the extent that it would permit the mediator to share, without consent, confidential or privileged information with other parties to the mediation, proposed §21.5013 exceeds both the scope of Chapter 1467 and conflicts with the accepted common and best practices used in mediations generally; (ii) the Texas Civil Practice and Remedies Code Chapter 154 addresses general statutory procedures for mediation, including the parties' control over information provided to the mediator; (iii) currently, proposed §21.5013 places no limits on the kind of information the mediator may request, leaving entirely to his or her discretion the determination of what information is necessary to facilitate the agreement; and (iv) much of the information relevant to mediation may be considered important privileged and confidential information, and the proposed rules should recognize the parties' legitimate rights and expectations regarding its protected nature.

Agency Response: The Department does not have the statutory authority to make the suggested changes. Chapter 1467 of the Insurance Code does not delegate any authority to the Department to regulate mediators for purposes of Chapter 1467. Therefore, the Department is not involved in oversight of the mediators participating in the mediation process. Pursuant to the Insurance Code §1467.053, the chief administrative law judge shall appoint the mediator through a random assignment from a list of qualified mediators maintained by the State Office of Administrative Hearings. For purposes of mandatory mediation under Chapter 1467, mediators are regulated pursuant to rules promulgated by the State Office of Administrative Hearings under Title 1 of the Texas Administrative Code, Chapter 167, Subchapters A - E.

§21.5030. Complaint Resolution

Comment: A commenter recommends that proposed §21.5030(c) be revised to require that the enrollee be notified

of available administrative remedies provided pursuant to Chapter 1551 of the Texas Insurance Code and ERS' rules, in addition to the Department's procedures for addressing complaints pursuant to Chapter 1467. The scope of Chapter 1467 is limited to disputes between an enrollee and out-of-network facility-based physician and an insurer or administrator regarding the enrollee's share after benefits have been paid on a covered claim. To the extent that the enrollee's complaint relates to matters outside the scope of Chapter 1467, Chapter 1551 provides exclusive administrative remedies through ERS, its administrator and/or through judicial review as provided by the statute. Enrollees will need the Department's guidance so that their complaints are directed appropriately as required by either Chapter 1467 or Chapter 1551 of the Insurance Code. Accordingly, the commenter proposes that subsection (c) be revised to include a part (5) stating: "(5) Notification to the enrollee of administrative remedies available under Chapter 1551 of the Insurance Code if a complaint by a participant in the Texas Employees Group Benefits Program does not fall within the scope of Chapter 1467."

Agency Response: The Department declines to make the requested change because rulemaking on this issue is not required under Chapter 1467 of the Insurance Code, and the Department disagrees that such a change is required or necessary. The Department will provide the recommended notice on its website to enable ERS enrollees to have access to such information. Additionally, the ERS has the option, without any such rule, to provide the notice on the enrollees' explanations of benefits at the same time that the required notice of the availability of mediation is provided.

Comment: A commenter suggests adding a part (b)(4)(D) to proposed §21.5030 to address additional specific information to be included about the qualified claim that is the basis of the complaint. According to the commenter, it will further strengthen the rules and give a better idea of the costs related to out-of-network claim disputes. The commenter recommends that it read: "(b)(4)(D) the dollar amount of the claim at dispute."

Agency Response: The Department agrees and §21.5030 as adopted includes "(b)(4)(D) the dollar amount of the disputed claim."

Fiscal Note--Cost of mediation

Comment: One commenter states disagreement with the Department's published Fiscal Note for mediation costs for the Employees Retirement System (ERS). This disagreement is based on: (i) legislative cost information provided to the Department and to the Legislative Budget Board during the 81st Legislative session (ERS Cost Estimate); and (ii) a potentially higher estimate of the number of mediations that will be requested. The commenter anticipates that ERS' likely average costs for each mediation, including travel, would be $2,000. The language and context of the ERS Cost Estimate shows that the focus was on the cost of mediation to ERS and not to all parties, and that the likely average cost to ERS would be $2,000. The ERS Cost Estimate states, "While this additional [mediation] cost, estimated at about $2,000 per case including associated travel expenses, would initially be paid by the HealthSelect administrator, it would ultimately be passed through to HealthSelect as an increase in the administrative fee." The commenter, referencing the Department's Fiscal Note, asserts that "this analysis appears reasonably clear that ERS' estimate of its average cost per mediation is $2,000, not the $1,000 figure referenced in TDI's fiscal analysis." The commenter further asserts that actual costs for representation and travel to the location of the mediation may substantially exceed the Department's estimate in the Fiscal Note. If ERS staff and/or its attorneys are required to travel across the state to attend a mediation, then the travel costs would increase substantially beyond the Department's estimate. The commenter also states that the estimated cost for mediation does not appear to reflect costs associated with lost productivity of staff and attorney time during prolonged travel.

The commenter states that the ERS Cost Estimate reflected that as many as 2,500 claims of participants in HealthSelect may be subject to mediation per plan year. Reliance on initial experience for claims for mediation may be misleading, since increased awareness of the right to mediation may increase the number of requests. If 2,500 ERS cases were mediated, ERS' likely cost would be approximately $5 million. Further, according to the commenter, that estimate does not reflect the Department's proposed definition of "claim" allowing the aggregation of claims that otherwise would not meet the mandatory $1,000. As more claims would qualify for mediation through the process of aggregation, the costs to the HealthSelect plan would increase accordingly.

Agency Response: The Department acknowledges the difference in cost estimates, which are a result of the Department's reliance on additional sources of information and a different methodology that does not result in a figure analogous to the commenter's estimated $5 million cost. However, based on the following reasons, the Department is of the opinion that the Fiscal Note is not incorrect nor does it fail to substantially comply with the requirements of the Government Code §2001.024. The Department estimated in its Fiscal Note a potential range of fiscal cost to ERS of between $81.26 and $1,936.18 per mediation, but noted additional factors that might increase this cost, such as: (i) the parties' agreement to participate in additional hours of mediation under the Insurance Code §1467.058; (ii) the amount of time required to coordinate the informal settlement teleconference; (iii) whether a staff representative or attorney is used; and (iv) the amount of time required for litigation before a special judge. The Fiscal Note further explained that an estimate of the total fiscal impact resulting from the Department's proposed rule was not possible. Consistent with the Government Code §2001.024, the Fiscal Note did not address fiscal impact resulting from the statute. The Department relied on the ERS Cost Estimate in conjunction with more recent correspondence with ERS' in its methodology to develop the Fiscal Note for mediation costs to the ERS. The ERS Cost Estimate, 81st Legislature, HB 2256, to which the commenter refers, states, "The As Passed Second House version continues to require the cost of mediation *to be split evenly between the facility-based physician and the HealthSelect administrator* [emphasis added]. While this additional cost, estimated at about $2,000 per case including associated travel expenses, would initially be paid by the HealthSelect administrator, it would ultimately be passed through to HealthSelect as an increase in the administrative fee. This would eventually lead to higher contributions for the state and the members." In addition to the information provided to the Department in the ERS Cost Estimate, the Department also solicited information from ERS through written correspondence during the development of the proposal. The Department submitted a question to the ERS asking, "If the ERS administrator has to arrange for the telephone conferences, is ERS anticipating a separate charge from the administrator for this, or can you estimate what the cost for this would be?" ERS, in correspondence dated September 28,

2009, answered to the Department, "Initially no but if the volume emerges as anticipated, eventually they will have to charge for this service. *The cost of the actual mediator charge we believe will be passed on to ERS. We estimate our portion of the mediator charge at $1,000 per mediation"* (emphasis added). The Department read the ERS Cost Estimate in conjunction with the ERS' correspondence and interpreted the "$2,000 per case including associated travel expenses" as describing the entire cost of the case, which was to be split between the facility-based physician and the HealthSelect administrator for a resulting cost of $1,000 per party. This figure was consistent with the $1,000 estimate in the September 28, 2009 ERS correspondence. In the Fiscal Note discussion titled "Cost of Mediation," the Department estimates mediator fees will range from $325 to $1,000 per party for a half-day of mediation. This estimated range was based on the following factors: (i) ERS' statement in its September 28, 2009 correspondence that its estimated mediator charge was $1,000 per mediation, and (ii) other mediation cost estimates provided by the Texas Medical Association, Texas Society of Anesthesiologists, and Burdin Mediators. Significantly, the Department acknowledges in the Fiscal Note that such costs for mediator fees and travel expenses may exceed the $325 to $1,000 estimate.

With regard to the commenter's estimated total cost of $5 million for mediations each plan year, the Department disagrees that it should be addressed in the Fiscal Note. According to the commenter, ERS' likely cost for mediations per plan year would be approximately $5 million if 2,500 cases were mediated annually and indicated that such cost does not reflect the Department's proposed definition of "claim." Therefore, the $5 million estimate is projected independent of the Department's rules and reflects only the costs for compliance with the statutory requirements for mandatory mediation. As such, this type of total estimate that includes compliance with statutory requirements would not be included in the Fiscal Note. The Government Code §2001.024 requires that the Fiscal Note in a proposal must address, inter alia, "the additional estimated cost to the state and to local governments expected *as a result of enforcing or administering the rule"* (emphasis added). It does not require the Fiscal Note to address estimated costs to the state and to local governments expected as a result of statute.

Additionally, the Department did not compute an estimate analogous to the $5 million. In contrast to the Department's methodology, the commenter's methodology multiplies (i) the estimated number of mediations (2,500) by (ii) the estimated cost of mediation, including travel ($2,000) for a resulting total estimate of $5 million. The Department's methodology did not include an estimated number of claims eligible for mediation, stating, "It is not possible for the Department to estimate the total number of requests for mediation because that number will be determined by numerous factors not suitable to reliable quantification. . . ." Therefore, the Department does not have a computed estimate analogous to the commenter's total estimate of $5 million, because, unlike the commenter, the Department determined that it was not able to estimate the total number of claims.

With regard to the comment that the estimated cost for mediation does not appear to reflect costs associated with lost productivity of staff and attorney time during prolonged travel, the election of any entity required to comply with these rules to use existing staff to represent the entity in the mediation is the result of a business decision by that entity and not a requirement of these rules. Additionally, the Fiscal Note, which is based on the Department's interpretation of the ERS Cost Estimate and ERS' correspondence, states, "ERS estimates its portion of the mediator charge at $1,000 per mediation, including travel to the county which has jurisdiction." In addition, the Fiscal Note stated that "The Insurance Code §1467.054(e) requires that mediation take place in the county in which the medical services were rendered." Therefore, although the Fiscal Note did not specifically include a separate estimate of the costs of compensating staff or attorneys for travel time as a separate cost component, these two statements clearly indicate that travel may be required. Additionally, under the discussion titled "Cost of representation," the Fiscal Note states an estimate of a mean hourly wage of $64.05 for a general and operations manager in the insurance industry in Texas, i.e., staff, and a mean hourly wage of $59.91 for a lawyer in Texas. These estimated hourly wages could be used by entities required to comply with these rules to compute estimated costs of an employee's lost productivity or estimated costs of an attorney's time for travel to the mediation. If the $64.05 estimated hourly wage for staff or the $59.91 estimated hourly wage for an attorney is not appropriate for any entity required to comply with the rules, such entities have the necessary information to compute estimated costs associated with lost productivity of their own staff and estimated costs associated with the time for their attorneys during prolonged travel. Further, if any entity required to comply with these rules chooses to use existing staff to represent them in the mediation, such a choice is a result of a business decision and not a requirement of these rules.

In addition, the Department's assessment in the published Fiscal Note was that because the Department had received no qualified request for mediation as of April 1, 2010, that this lack of requests could indicate that there would be relatively few requests for mediation involving the ERS on or after September 1, 2010, when the mediation process becomes effective for ERS enrollees. Therefore, as a result of this assessment, the Department is of the opinion that any fiscal impact associated with lost productivity of staff and attorney time during prolonged travel for any entity required to comply with these rules will likely be minimal.

Comment: A commenter requests that the Fiscal Note be revised because it does not reflect certain additional cost factors. These additional cost factors are the costs associated with (i) responding to document requests by the mediator; (ii) responding to discovery and other prehearing matters in the special trial process; (iii) addressing disputes and legal questions relating to implementation of Chapter 1467 and the proposed rules; and (iv) increased costs to the group benefits program if the requirements of Chapter 1467 result in substantial provider reimbursement increases. According to the commenter, the aggregate estimated costs to ERS to comply with Chapter 1467 and the proposed rules may exceed $8.25 million per plan year. Agency Response: The Department declines to revise its Fiscal Note for the following reasons: (i) the Department disagrees that the estimates do not take into account the costs associated with (a) responding to document requests by the mediator and (b) responding to discovery and other prehearing matters in the special trial process; the Department included estimated costs for representation hours, including legal preparation time, and the Department anticipated that this preparation time would include such responses; (ii) the Department disagrees that the Fiscal Note should discuss increased costs to the group benefits program due to potential provider reimbursement increases because the proposed rules do not specifically require any increases in reimbursements to providers; and (iii) the Department does not agree that the costs of addressing disputes and legal questions relating

to the implementation of Chapter 1467 and the proposed rules should be addressed in the Fiscal Note; these costs result from the enactment of Chapter 1467 of the Insurance Code. Further, it is the experience of this agency that there are no legal requirements to estimate cost for purposes of a Fiscal Note or a Cost Note for responding to questions relating to adopted rules.

With respect to the commenter's estimated cost of $8.25 million per plan year, the commenter does not distinguish between estimated costs imposed by Chapter 1467 of the Insurance Code and those imposed by the rules. The commenter did not identify any new costs specifically imposed by the proposed rules that were not included in the Department's Fiscal Note.

Fiscal Note--Cost for special judges' fees

Comment: One commenter asserts that the cost for special judges' fees would be substantially more than is reflected in the Fiscal Note. According to the commenter, Administrative Law Judges (ALJs) spend an average of 16 hours per ERS case rather than the four hours estimated by the Department and substantially more time on aggressively litigated cases heard on the merits. In addition, the commenter argues that the estimated rate of $28.17 per hour for special judges appears unrealistically low. According to the commenter, information from SOAH indicated a rate of $100 per hour for an ALJ hearing an ERS case. If a judge qualifying as a special judge under Chapter 151 of the Texas Civil Practice and Remedies Code who has expertise in dealing with patient share insurance issues can be found, the commenter anticipates that his or her fee rate would probably be in the range of $400 to $500 per hour. The commenter opines that a more reasonable estimate of the special trial judge's cost is approximately $8,000 per case. This estimate would result in a cost of $2,600 for the judge's fee for each party, assuming that the ERS, the provider and the enrollee each bear a proportionate share of the cost. This cost would be in addition to the costs for any court reporting services used in the proceeding and other incidental expenses. According to the commenter, if half of the estimated 2,500 mediations continued to the special trial process, the ERS portion of the special judges' fees alone would exceed $3.25 million per plan year.

Agency Response: While the Department's Fiscal Note estimated $28.17 per hour for special judges' fees and a four-hour period of time for a case, the Fiscal Note also stated that the cost for special judges' fees could be a higher rate and that the average case may take longer than the anticipated four hours. The Department's estimated $28.17 per hour for special judges' fees was based on the latest DOL Wage Report average for Texas, full-time judges, magistrate judges, and magistrates. The Fiscal Note specifically allowed for fee variance, stating that "the salary, however, of a special judge working on a contract basis, as in this instance, will vary from and may exceed the full-time salaried hourly wage." Additionally, the Fiscal Note indicated that the length of a case before a special judge may vary. The four-hour estimate is based on the fact that §1467.055(f) of the Insurance Code provides that a mediation will last no more than four hours except by agreement of the participating parties. Based on the length of the mediation, the Fiscal Note assumed a similar timeframe for the litigation before a special judge. The Fiscal Note stated: "Costs for special judge fees and court reporter fees will be higher if the process takes longer than the estimated four hours." With regard to the average 16 hours per ERS case, it is possible that mediation pursuant to Chapter 1467 of the Insurance Code may not take as long as the average ERS case. Under Chapter 1467 of the Insurance Code, the scope of the mediation before the special judge is limited to the dispute about the amount paid by the insurer or administrator to the facility-based physician, the amount charged by the facility-based physician, and the amount paid to the facility-based physician by the enrollee.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For with changes: Office of Public Insurance Counsel

Neither for nor against, with recommended changes: Texas Association of Health Plans, Employees Retirement System of Texas

## DIVISION 1. GENERAL PROVISIONS

**28 TAC §§21.5001 - 21.5003**

STATUTORY AUTHORITY. The new sections are adopted under the Insurance Code §§1467.003, 1467.054(b), 1467.151(a), 1467.151(b) and 36.001 and HB 2256, enacted by the 81st Legislature, Regular Session, effective June 19, 2009, SECTION 7. Section 1467.003 requires the Commissioner to adopt rules as necessary to implement the Commissioner's respective powers and duties under Chapter 1467 of the Insurance Code (Out-of-Network Claim Dispute Resolution). Section 1467.054(b) provides that a request for mandatory mediation must be provided to the Department on a form prescribed by the Commissioner. Section 1467.151(a) requires that the Commissioner, as appropriate, adopt rules regulating the investigation and review of a complaint filed that relates to the settlement of an out-of-network health benefit claim that is subject to Chapter 1467 of the Insurance Code. Section 1467.151(b) requires the Department to maintain certain information on each complaint filed that concerns a claim or mediation subject to the Insurance Code Chapter 1467 and to related claims, including any information about the insurer or administrator that the Commissioner by rule requires. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Department under the Insurance Code and other laws of this state. HB 2256, SECTION 7 provides that, as soon as practicable after the effective date of HB 2256, the Commissioner shall adopt rules as necessary to implement and enforce HB 2256.

*§21.5002. Scope.*

(a) This subchapter applies to a qualified claim filed under health benefit plan coverage:

(1) issued by an insurer as a preferred provider benefit plan under the Insurance Code Chapter 1301, provided the claim is filed on or after November 1, 2010; or

(2) administered by an administrator of a health benefit plan, other than a health maintenance organization (HMO) plan, under the Insurance Code Chapter 1551, provided the claim is filed on or after November 1, 2010.

(b) This subchapter does not apply to a claim for health benefits, including medical and health care services and/or supplies, that is not a covered claim under the terms of the health benefit plan coverage.

*§21.5003. Definitions.*

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

(1) Administrator--An administering firm or a claims administrator for a health benefit plan, other than an HMO plan, providing coverage under the Insurance Code Chapter 1551.

(2) Chief administrative law judge--The chief administrative law judge of the State Office of Administrative Hearings.

(3) Claim--A request to a health benefit plan for payment for health benefits under the terms of the health benefit plan coverage, including medical and health care services and/or supplies, provided that such services or supplies:

(A) are furnished pursuant to a single date of service; or

(B) if furnished pursuant to more than one date of service, are provided as a continuing and/or related course of treatment over a period of time for a specific medical problem or condition, or in response to the same initial patient complaint.

(4) Enrollee--An individual who is eligible to receive benefits through a health benefit plan.

(5) Health benefit plan--A plan that provides coverage under:

(A) a preferred provider benefit plan offered by an insurer under the Insurance Code Chapter 1301; or

(B) a plan, other than a health maintenance organization plan, under the Insurance Code Chapter 1551.

(6) Hospital-based physician--A radiologist, an anesthesiologist, a pathologist, an emergency department physician, or a neonatologist:

(A) to whom the hospital has granted clinical privileges; and

(B) who provides services to patients of the hospital under those clinical privileges.

(7) Insurer--A life, health, and accident insurance company, health insurance company, or other company operating under the Insurance Code Chapters 841, 842, 884, 885, 982, or 1501, that is authorized to issue, deliver, or issue for delivery in this state a preferred provider benefit plan under the Insurance Code Chapter 1301.

(8) Mediation--A process in which an impartial mediator facilitates and promotes agreement between the insurer offering a preferred provider benefit plan or the administrator and a hospital-based physician or the physician's representative to settle a qualified claim of an enrollee.

(9) Mediator--An impartial person who is appointed to conduct mediation under the Insurance Code Chapter 1467.

(10) Out-of-network claim--A claim for payment for medical or health care services and/or supplies that are furnished by a hospital-based physician that is not contracted as a preferred provider with a preferred provider benefit plan or contracted with an administrator.

(11) Preferred provider--A hospital or hospital-based physician that contracts on a preferred benefit basis with an insurer issuing a preferred provider benefit plan under the Insurance Code Chapter 1301 to provide medical care or health care to enrollees covered by a health insurance policy.

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 September 29, 2010.

TRD-201005627

Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
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Proposal publication date: May 14, 2010
For further information, please call: (512) 463-6327

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## DIVISION 2. MEDIATION PROCESS

**28 TAC §§21.5010 - 21.5013**

STATUTORY AUTHORITY. The new sections are adopted under the Insurance Code §§1467.003, 1467.054(b), 1467.151(a), 1467.151(b) and 36.001 and HB 2256, enacted by the 81st Legislature, Regular Session, effective June 19, 2009, SECTION 7. Section 1467.003 requires the Commissioner to adopt rules as necessary to implement the Commissioner's respective powers and duties under Chapter 1467 of the Insurance Code (Out-of-Network Claim Dispute Resolution). Section 1467.054(b) provides that a request for mandatory mediation must be provided to the Department on a form prescribed by the Commissioner. Section 1467.151(a) requires that the Commissioner, as appropriate, adopt rules regulating the investigation and review of a complaint filed that relates to the settlement of an out-of-network health benefit claim that is subject to Chapter 1467 of the Insurance Code. Section 1467.151(b) requires the Department to maintain certain information on each complaint filed that concerns a claim or mediation subject to the Insurance Code Chapter 1467 and to related claims, including any information about the insurer or administrator that the Commissioner by rule requires. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Department under the Insurance Code and other laws of this state. HB 2256, SECTION 7 provides that, as soon as practicable after the effective date of HB 2256, the Commissioner shall adopt rules as necessary to implement and enforce HB 2256.

*§21.5010. Qualified Claim Criteria.*

(a) Required Criteria. An enrollee may request mandatory mediation of an out-of-network claim under §21.5011 of this division (relating to Mediation Request Form and Procedure) if the claim complies with the criteria specified in paragraphs (1) and (2) of this subsection. An out-of-network claim that complies with such criteria is referred to as a "qualified claim" in this subchapter.

(1) The out-of-network claim must be for medical services and/or supplies provided by a hospital-based physician in a hospital that is a preferred provider with the insurer or that has a contract with the administrator.

(2) The aggregate amount for which the enrollee is responsible to the hospital-based physician for the out-of-network claim, not including copayments, deductibles, coinsurance, or amounts paid by an insurer or administrator directly to the enrollee, must be greater than $1,000.

(b) Submission of Multiple Claim Forms. The use of more than one form in the submission of a claim, as defined in §21.5003(3) of this subchapter (relating to Definitions), does not preclude eligibility of a claim for mandatory mediation under this subchapter if the claim otherwise meets the requirements of this section.

(c) Ineligible Claims.

(1) An out-of-network claim is not eligible for mandatory mediation under this subchapter if:

(A) the hospital-based physician has provided a complete disclosure to an enrollee under the Insurance Code §1467.051 and this subsection before providing the medical service and/or supply and has obtained the enrollee's written acknowledgment of that disclosure; and

(B) the amount billed by the hospital-based physician is less than or equal to the maximum amount specified in the disclosure.

(2) A complete disclosure under paragraph (1) of this subsection must:

(A) explain that the hospital-based physician does not have, as applicable, either a contract with the enrollee's health benefit plan as a preferred provider or a contract with the administrator of the plan, other than an HMO plan, provided under the Insurance Code Chapter 1551;

(B) disclose projected amounts for which the enrollee may be responsible; and

(C) disclose the circumstances under which the enrollee would be responsible for those amounts.

*§21.5011. Mediation Request Form and Procedure.*

(a) Mediation Request Form. The commissioner adopts by reference Form No. LHL619 (Health Insurance Mediation Request Form), which is available at http://www.tdi.state.tx.us/consumer/cpmmediation.html. Form No. LHL619 (Health Insurance Mediation Request Form) requires information necessary for the department to properly identify the qualified claim, including:

(1) the name and contact information, including a telephone number, of the enrollee requesting mediation;

(2) a brief description of the qualified claim to be mediated;

(3) the name and contact information, including a telephone number, of the requesting enrollee's counsel, if the enrollee retains counsel;

(4) the name of the hospital-based physician;

(5) the name of the insurer or administrator; and

(6) the name and address of the hospital where services were rendered.

(b) Submission of Request. An enrollee may submit a request for mediation by completing and submitting Form No. LHL619 (Health Insurance Mediation Request Form) as provided in paragraphs (1) - (4) of this subsection.

(1) The request may be submitted via mail, to the Texas Department of Insurance, Consumer Protection Division, Mail Code 111-1A, P.O. Box 149091, Austin, Texas 78714-9091.

(2) The request may be submitted via fax, to (512) 475-1771.

(3) The request may be submitted via e-mail, to ConsumerProtection@tdi.state.tx.us.

(4) Upon the department's making Form No. LHL619 (Health Insurance Mediation Request Form) available to be completed and submitted online, an enrollee may submit the request in this manner.

(c) Assistance. Assistance with submitting a request for mediation is available at the department's toll-free telephone number, 1-800-252-3439.

*§21.5012. Informal Settlement Teleconference.*

An insurer or administrator that is subject to mandatory mediation requested by an enrollee under §21.5011 of this division (relating to Mediation Request Form and Procedure) shall use best efforts to coordinate the informal settlement teleconference required by the Insurance Code §1467.054(d) by:

(1) arranging a date and time when the insurer or administrator, the enrollee or the enrollee's representative if the enrollee or the enrollee's representative chooses to participate, and the hospital-based physician or the hospital-based physician's representative can participate in the informal settlement teleconference, which shall occur not later than the 30th day after the date on which the enrollee submitted a request for mediation; and

(2) providing a toll-free number for participation in the informal settlement teleconference.

*§21.5013. Mediation Participation.*

(a) An insurer or administrator subject to mediation under this subchapter shall participate in mediation in good faith and is subject to any rules adopted by the chief administrative law judge pursuant to the Insurance Code §1467.003.

(b) Under the Insurance Code §1467.101, conduct that constitutes bad faith mediation includes:

(1) failing to participate in the mediation;

(2) failing to provide information that the mediator believes is necessary to facilitate an agreement; or

(3) failing to designate a representative participating in the mediation with full authority to enter into any mediated agreement.

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 September 29, 2010.

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Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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## DIVISION 3. PLAN ADMINISTRATOR'S REQUIRED NOTICE OF CLAIMS DISPUTE RESOLUTION

**28 TAC §21.5020**

STATUTORY AUTHORITY. The new sections are adopted under the Insurance Code §§1467.003, 1467.054(b), 1467.151(a), 1467.151(b) and 36.001 and HB 2256, enacted by the 81st Legislature, Regular Session, effective June 19, 2009, SECTION 7. Section 1467.003 requires the Commissioner to adopt rules as necessary to implement the Commissioner's respective powers

and duties under Chapter 1467 of the Insurance Code (Out-of-Network Claim Dispute Resolution). Section 1467.054(b) provides that a request for mandatory mediation must be provided to the Department on a form prescribed by the Commissioner. Section 1467.151(a) requires that the Commissioner, as appropriate, adopt rules regulating the investigation and review of a complaint filed that relates to the settlement of an out-of-network health benefit claim that is subject to Chapter 1467 of the Insurance Code. Section 1467.151(b) requires the Department to maintain certain information on each complaint filed that concerns a claim or mediation subject to the Insurance Code Chapter 1467 and to related claims, including any information about the insurer or administrator that the Commissioner by rule requires. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Department under the Insurance Code and other laws of this state. HB 2256, SECTION 7 provides that, as soon as practicable after the effective date of HB 2256, the Commissioner shall adopt rules as necessary to implement and enforce HB 2256.

*§21.5020. Required Notice of Claims Dispute Resolution.*
An administrator of a plan under the Insurance Code Chapter 1551 shall include a notification of the availability of mandatory mediation under this subchapter with each explanation of benefits sent to an enrollee for an out-of-network claim filed on or after November 1, 2010, for services and/or supplies furnished in a hospital that has a contract with the 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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Gene C. Jarmon
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For further information, please call: (512) 463-6327

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## DIVISION 4. COMPLAINT RESOLUTION AND OUTREACH

### 28 TAC §21.5030, §21.5031

STATUTORY AUTHORITY. The new sections are adopted under the Insurance Code §§1467.003, 1467.054(b), 1467.151(a), 1467.151(b) and 36.001 and HB 2256, enacted by the 81st Legislature, Regular Session, effective June 19, 2009, SECTION 7. Section 1467.003 requires the Commissioner to adopt rules as necessary to implement the Commissioner's respective powers and duties under Chapter 1467 of the Insurance Code (Out-of-Network Claim Dispute Resolution). Section 1467.054(b) provides that a request for mandatory mediation must be provided to the Department on a form prescribed by the Commissioner. Section 1467.151(a) requires that the Commissioner, as appropriate, adopt rules regulating the investigation and review of a complaint filed that relates to the settlement of an out-of-network health benefit claim that is subject to Chapter 1467 of the Insurance Code. Section 1467.151(b) requires the Department to maintain certain information on each complaint filed that concerns a claim or mediation subject to the Insurance Code Chapter 1467 and to related claims, including any information about the insurer or administrator that the Commissioner by rule requires. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Department under the Insurance Code and other laws of this state. HB 2256, SECTION 7 provides that, as soon as practicable after the effective date of HB 2256, the Commissioner shall adopt rules as necessary to implement and enforce HB 2256.

*§21.5030. Complaint Resolution.*

(a) Written Complaint.

(1) An individual may submit to the department a written complaint regarding a qualified claim or a mediation that has been requested under §21.5010 of this subchapter (relating to Qualified Claim Criteria). A recommended form for filing a complaint under this subsection is available at http://www.tdi.state.tx.us/consumer/cp-portal.html. The complaint may be submitted by:

(A) mail, to the Texas Department of Insurance, Consumer Protection Division, Mail Code 111-1A, P.O. Box 149091, Austin, Texas 78714-9091;

(B) fax, to (512) 475-1771;

(C) e-mail, to ConsumerProtection@tdi.state.tx.us; or

(D) online submission.

(2) Assistance with filing a complaint is available at the department's toll-free telephone number, 1-800-252-3439.

(b) Complaint Form. The recommended form for filing a complaint under subsection (a) of this section requests that certain information concerning the complaint be provided, including:

(1) whether the complaint is within the scope of the Insurance Code Chapter 1467;

(2) whether medical care has been delayed or has not been given;

(3) whether the medical service and/or supply that is the subject of the complaint was for emergency care; and

(4) specific information about the qualified claim, including:

(A) the type and specialty of the hospital-based physician;

(B) the type of service performed or supplies provided;

(C) the city and county where service was performed; and

(D) the dollar amount of the disputed claim.

(c) Department Processing. The department shall maintain procedures to ensure that a written complaint made under this section is not dismissed without appropriate consideration, including:

(1) review of all of the information submitted in the written complaint;

(2) contact with the parties that are the subject of the complaint;

(3) review of the responses received from the subjects of the complaint to determine if and what further action is required, as appropriate; and

(4) notification to the enrollee of the mediation process, as described in the Insurance Code Chapter 1467, Subchapter B.

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 September 29, 2010.

TRD-201005630
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: October 19, 2010
Proposal publication date: May 14, 2010
For further information, please call: (512) 463-6327

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# TITLE 30. ENVIRONMENTAL QUALITY

## PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

### CHAPTER 7. MEMORANDA OF UNDERSTANDING

**30 TAC §7.117**

The Texas Commission on Environmental Quality (TCEQ or agency) adopts the amendment to §7.117.

Section 7.117 is adopted *without changes* to the proposed text as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2975).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The memorandum of understanding (MOU) between the TCEQ and the Texas Railroad Commission (RRC) was last updated in May, 1998, and since that time, statutory changes and several agency reorganizations have occurred requiring the MOU to be revised. This includes the transfer of the uranium mining program from the Department of State Health Services to the TCEQ, as well as internal agency organizational changes. In addition, Senate Bill (SB) 1387, 81st Legislature, 2009, was passed concerning carbon dioxide injection with respect to geologic sequestration, which also requires an MOU between the TCEQ and the RRC. The revised MOU is now adopted by reference in 30 TAC Chapter 7. The full text of the MOU is adopted within RRC rules 16 TAC §3.30, concerning Memorandum of Understanding between the Railroad Commission of Texas and the Texas Natural Resource Conservation Commission.

SECTION DISCUSSION

*§7.117, Memorandum of Understanding between the Railroad Commission of Texas and the Texas Natural Resource Conservation Commission*

The section is adopted to change the agency's name from the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality. The MOU referenced in this section, 16 TAC §3.30, is amended by the RRC. The titles of both sections are amended to conform to this change.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rule is not subject to §2001.0225 because it does not meet the criteria for a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the adopted rule is to update the MOU between the RRC and the TCEQ to clarify jurisdiction of the respective agencies pursuant to statutory changes and agency reorganizations. In House Bill (HB), 1407, Section 10, 67th Legislature, 1981, a footnote to the Texas Solid Waste Disposal Act, Texas Civil Statutes, Article 4477-7, required the Texas Department of Water Resources, the Texas Department of Health, and the RRC to execute an MOU specifying in detail these agencies' interpretation of the division of jurisdiction among the agencies over waste materials that result from or are related to activities associated with the exploration for and the development, production, and refining of oil or gas, and to amend the MOU at any time that the agencies find it to be necessary. The original MOU between the agencies became effective January 1, 1982. The MOU was revised effective December 1, 1987, to reflect legislative clarification of the RRC's jurisdiction over oil and gas wastes and the Texas Water Commission's, successor to the Texas Department of Water Resources, jurisdiction over industrial and hazardous wastes. SB 1604, 80th Legislature, 2007, gave the TCEQ jurisdiction over certain activities associated with radioactive materials and requires the TCEQ and the RRC to adopt an MOU to define the duties of each agency with respect to radioactive materials. SB 1387 addressed the regulation of the injection and storage of carbon dioxide and requires the TCEQ and the RRC, by rule, to amend the MOU in 16 TAC §3.30 or enter into a new MOU. The agencies have determined that it is now necessary and must revise the MOU found in 16 TAC §3.30, in a concurrent rulemaking to clarify jurisdictional boundaries, reflect legislative changes in agency responsibility, and incorporate the legislative mandates of SB 1604 and SB 1387.

The adopted rule does not meet the definition of a major environmental rule because the adopted rule only explains existing agency responsibilities rather than creates substantive requirements to protect the environment. The intent of the rule is merely to clarify and explain jurisdiction of the respective agencies. Because the intent of the rule does not create or require actions for the purpose of protecting the environment or reducing risks to human health from environmental exposure, the adopted rule is not an environmental rule.

Additionally, the adopted rule does not meet the definition of a major environmental rule because it is not anticipated that the adopted rule will 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 adopted rule merely explicates jurisdiction of the respective agencies and does not impose new requirements.

Finally, the adopted rule action does not meet any of the four applicability requirements for a major environmental rule listed in Texas Government Code, §2001.0225(a). Texas Government

Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. In this case, the adopted rule does not meet any of these applicability requirements. First, in explicating jurisdiction of the respective agencies, the adopted rule does not exceed a standard set by federal law. Second, the adopted rule does not exceed an express requirement of state law, because HB 1407, Section 10, which appeared as a footnote to the Texas Solid Waste Disposal Act, Texas Civil Statutes, Article 4477-7 expressly mandated creation of the MOU including a mandate to amend the MOU at any time that the agencies find it to be necessary. SB 1604 requires the TCEQ and the RRC to adopt an MOU to define the duties of each agency, and SB 1387 requires both agencies, by rule, to amend the MOU in 16 TAC §3.30 or enter into a new MOU. Third, the adopted rule does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Fourth, the commission does not adopt this rule solely under the commission's general powers but under specific authority as explained under the second point. Therefore, the commission concludes that the adopted rule does not meet the definition of a major environmental rule.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received regarding the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rulemaking and performed an assessment of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to update the MOU between the RRC and the TCEQ to clarify jurisdiction of the respective agencies pursuant to statutory changes and agency reorganizations. The adopted rule interprets and clarifies continuing historic statutory jurisdiction as well as recently enacted statutory jurisdiction of the TCEQ and the RRC found in multiple statutes. The adopted rulemaking would substantially advance this stated purpose by providing one reference point interpreting the jurisdiction of the respective agencies.

Promulgation and enforcement of the adopted rule would be neither a statutory nor a constitutional taking of public or private real property because the adopted rule does not affect real property. Because the regulation does not affect real property, it does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. The adopted rule merely clarifies and explains jurisdiction of the respective agencies. Therefore, the adopted rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §5.05.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the Coastal Management Program.

PUBLIC COMMENT

The RRC of Texas held a public hearing on May 11, 2010, in Austin, Texas and received no oral comments. The comment period closed on May 17, 2010. The commission received written comments from the Carbon Sequestration Council (CSC), on behalf of Environmental Defense Fund, Occidental Petroleum Corporation, ConocoPhillips, Denbury Resources, Texas Oil & Gas Association, Shell Exploration & Production Company, and BP Alternative Energy North America.

CSC expressed appreciation to the agencies for the diligent and exemplary work in developing the amendments to the MOU.

RESPONSE TO COMMENTS

CSC commented that 16 TAC §3.30(e)(6)(F) should be added to the MOU to reflect that the agencies can work together on issues beyond the determination of the proper permitting agency or the production of the letter from the TCEQ on proposed carbon dioxide projects. CSC commented that the new subparagraph should state that the agencies agree to cooperate in their respective areas of expertise and knowledge in a manner that allows the permitting process to proceed efficiently and effectively. CSC commented that 16 TAC §3.30(e)(6)(F) should state: "The TCEQ and the RRC agree to work together when required to provide input to the other on applications by letters or other means so that each agency provides the benefits of its particular areas of expertise and knowledge of the other-regarding the geologic settings, circumstances and methodologies of any specific proposed project while fulfills its respective responsibilities in a manner that allows the processing of applications to proceed efficiently and effectively without unwarranted efforts or expense by either agencies or applicants, using existing documentation and submission to the permitting agency as appropriate in order to minimize required additional paperwork and processing expenses."

The commission responded that both agencies appreciate the support of this rulemaking to update the MOU. The agencies agree that TCEQ and RRC staff can and should cooperate and collaborate within their areas of expertise and knowledge to assure efficient and effective permitting of carbon dioxide storage projects under Texas Water Code, §27.041 or §27.011; however, the agencies do not believe that the suggested MOU language is needed to prompt such collaboration that may be necessary and that the suggested language could be interpreted to restrict the ability of the agencies to obtain needed information from each other or from a permit applicant. No changes were made in response to this comment.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is adopted under the Solid Waste Disposal Act, Texas Health and Safety Code (THSC), Chapter

361; the Texas Radiation Control Act, THSC, Chapter 401; TWC, Chapter 26; and the Injection Well Act, TWC, Chapter 27. The amendment is adopted under THSC, §361.024, which authorizes the commission to adopt rules for the management and control of solid waste; THSC, §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; and TWC, §27.019, concerning Rules, Etc., which authorizes the commission to adopt rules required for the performance of the commission's responsibilities under the Injection Well Act.

The adopted amendment implements THSC, §§361.016, 401.069, and 401.414; and TWC, §5.104 and §27.049.

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 October 1, 2010.

TRD-201005669
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: April 16, 2010
For further information, please call: (512) 239-6090

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# TITLE 31. NATURAL RESOURCES AND CONSERVATION

## PART 1. GENERAL LAND OFFICE

### CHAPTER 20. NATURAL RESOURCES DAMAGE ASSESSMENT

The General Land Office (GLO) adopts amendments to Chapter 20 concerning Natural Resource Damage Assessments without changes to the proposed text published in the August 6, 2010, issue of the *Texas Register* (35 TexReg 6788) which will not be republished. The assessments are conducted by the State Trustees (GLO, Texas Parks and Wildlife Department (TPWD), and the Texas Commission on Environmental Quality (TCEQ)) pursuant to authority granted in §40.107 of the Oil Spill Prevention and Response Act of 1991, Chapter 40 of the Texas Natural Resources Code (OSPRA). The adopted amendments pertain to §20.1 (relating to Declaration and Intent), §20.10 (relating to Definitions), §20.21 (relating to Response to an Unauthorized Discharge of Oil), §20.22 (relating to State Trustee Coordination), §20.23 (relating to Responsible Person Participation), §20.31 (relating to Notice of Intent to Perform an Assessment), §20.33 (relating to Expedited Damage Assessment), §20.35 (relating to Negotiated Assessment), §20.36 (relating to Plans for Restoration, Rehabilitation, Replacement and/or Acquisition of the Equivalent of Injured Natural Resources), §20.40 (relating to Assessment Record), §20.41 (relating to Recovery of Damages), and §20.43 (relating to Mediation).

BACKGROUND AND ANALYSIS OF ADOPTED RULES

Section 40.107(c)(4) of OSPRA as amended provides the Commissioner with authority to adopt administrative procedures and protocols for the assessment of natural resource damages resulting from an unauthorized discharge of oil, considering the unique characteristics of the spill incident and the location of the natural resources affected. The Commissioner originally adopted Chapter 20 effective October 19, 1994. These adopted amendments are intended to update Chapter 20 to reflect changes to OSPRA, references to the state trustee agencies, use of the Coastal Protection Fund for state trustee assessment costs, and procedures for mediation. The adopted amendments result from the quadrennial rule review of Chapter 20 required by Texas Government Code §2001.039.

§20.1. Declaration and Intent

The amendment to this section includes updating of references for the Texas Natural Resource Conservation Commission (TNRCC) to the Texas Commission on Environmental Quality (TCEQ), and deletion of references to the State Coastal Discharge Contingency Plan, consistent with legislative changes. In addition, the requirement to conduct a field investigation in all unauthorized discharge cases is deleted. The State Trustees routinely review reports from the state on scene coordinator (SOSC) to determine if a field investigation by Natural Resource Damage Assessment (NRDA) program staff is warranted. As a state trustee designated by the governor, the field investigation conducted by the SOSC employed by the GLO satisfied the requirements of OSPRA.

§20.10. Definitions

The amendment to this section includes updating references of TNRCC to TCEQ, and deletion of references to the State Coastal Discharge Contingency Plan, consistent with legislative changes.

§20.21. Response to an Unauthorized Discharge of Oil

The amendment to this section includes deletion of references to the State Coastal Discharge Contingency Plan, consistent with legislative changes.

§20.22. State Trustee Coordination

The amendment to this section includes deletion of references to the State Coastal Discharge Contingency Plan, consistent with legislative changes.

§20.23. Responsible Person Participation

The amendment to this section adds language concerning agreements between the State Trustees and the responsible person to facilitate their interactions during cooperative assessments that is consistent with rules adopted by the National Oceanic and Atmospheric Administration (NOAA) at 33 CFR §990.14(c)(3) pursuant to the Oil Pollution Act of 1990 (OPA), 33 United States Code Annotated, §2701 et seq.

§20.31. Notice of Intent to Perform an Assessment

The amendment to this section adds language allowing the State Trustees to petition the commissioner for a longer period of time to make the determination to perform an assessment by showing that the full impact of the discharge on the affected natural resources cannot be determined in 60 days, as provided in §40.107(c)(7)(C) of OSPRA. In addition, language is added to clarify that the State Trustees can perform preassessment activities necessary to ensure a reasonable and rational assessment prior to getting a response from the responsible person to the invitation to join a cooperative assessment.

§20.33. Expedited Damage Assessment

The amendment to this section modified the situations where an expedited assessment may be utilized to refer to circumstances

where "(B) the extent of injury MAY [can] be determined within 12 months following the completion of response actions;" and (C) a restoration plan MAY [can] be initiated within 12 months of the completion of response actions." The word "may" is substituted for "can" in both cases. The change is made to clarify that determination of the extent of injury and initiation of a restoration plan within 12 months is not necessarily required, but rather are anticipated goals when choosing to conduct an expedited assessment. In addition, the spelling of the word "judgment" in subsection (a)(3) is corrected.

§20.35. Negotiated Assessment

The amendment to this section substituted the word "timely" for the 15 day requirement for a response by the responsible person to the invitation to join a cooperative assessment, allowing the trustees to designate a specific time for response, usually 30 days. Similarly, the State Trustees' response to a request by the responsible person for a negotiated assessment is changed from 15 days to "timely."

§20.36. Plans for Restoration, Rehabilitation, Replacement and/or Acquisition of the Equivalent of Injured Natural Resources

The amendment to this section inserted language that requires that restoration plans developed by the State Trustees "not have restoration costs GROSSLY disproportionate to the value of the natural resources and the services provided by the resources prior to the unauthorized discharge of oil," consistent with federal case law related to natural resource damage assessments under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 or "CERCLA," 42 U.S.C §9607. See State of Ohio v. United State Department of the Interior, 880 F.2d 432, 443 n. 7 (D.C. Cir. 1989). Compare Kennecott Utah Copper Corp. v. U.S. Dept. of Interior, 88 F.3d 1191, 1218 (D.C. Cir. 1996).

§20.40. Assessment Record

The amendment to this section changed the requirement that assessment records be maintained by the commissioner from "in the Archives and Records Division . . ." to "in accordance with the records retention schedule of the Texas General Land Office" to eliminate the obligation for permanent retention. The retention schedule for this type of record is ten years after closing.

§20.41. Recovery of Damages

The amendment to this section changed the rules to clarify that trustee costs incurred in recovering damages, such as expert witness fees, are costs of the assessment. The changes also clarify that State Trustees may submit proof of costs incurred responding to an unauthorized discharge of oil and costs incurred in assessing natural resource damages directly to the commissioner according to the Comptrollers rules so long as funds are appropriated from the Coastal Protection Fund (CPF) for such reimbursement. Assessment costs are an authorized use of the Fund as provided in §40.152(a)(4) of OSPRA. Inasmuch as §40.157 of OSPRA provides that "[a]ny person other than the state seeking compensation from the fund must file a claim with the commissioner. . ." the amendment to this section also clarifies that requests for reimbursement of state trustee costs are not subject to the claims procedures under §40.159 of OSPRA, requiring prior submission to the National Pollution Fund Center (NPFC) or the responsible person. Section 40.157 does, however, authorize the commissioner to prescribe appropriate forms and requirements for response cost reimbursements to other state agencies from the CPF.

§20.43. Mediation

The amendment to this section adds language to allow the State Trustees and the responsible party to propose the names of five mediators as an alternative to the list submitted by the Center for Public Policy Dispute Resolution.

RESPONSE TO PUBLIC COMMENT

No public comments were received regarding the adopted amendments.

FACTUAL BASIS AND REASONED JUSTIFICATION FOR ADOPTION OF AMENDMENTS

The justification for the adoption of the amendments is that the amendments provide for a more efficient procedure for conducting natural resource damage assessments. Texas NRDA programs rely on reimbursement from responsible parties and/or the National Pollution Fund Center (NPFC) for the cost of sampling, laboratory analysis, biological data collection, modeling, expert witness, and other miscellaneous costs following an oil spill along the Texas coast. Reimbursement from responsible persons or the NPFC is an ineffective mechanism for funding data collection immediately before and after a spill because chemical and biological evidence associated with the spill is rapidly lost due to wind, currents, degradation, and other environmental factors while awaiting funding. Although some responsible persons have agreed to early up-front funding of assessment costs, others are reluctant to agree to enter into an agreement for a cooperative assessment. The amendments that clarify the ability of the State Trustees to seek prompt reimbursement from the CPF for costs of assessment, consistent with the legislative policy stated in §40.002(b) of OSPRA that the State recover monetary damages as early as possible to expedite the restoration, rehabilitation, and/or replacement of injured natural resources and the purpose of the CPF stated in §40.151(a) of OSPRA to provide immediately available funds for payment of damages from unauthorized discharges of oil. Chapter 20 as amended, as well as §40.161 of OSPRA, still require the commissioner to diligently pursue reimbursement to the CPF of any sum expended or paid from the CPF.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The adopted amendments are not anticipated to 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 adopted rulemaking implements legislative requirements in Texas Natural Resources Code §40.107 and §40.157. These sections provide the GLO with the authority to adopt administrative procedures and protocols for the assessment of natural resource damages from an unauthorized discharge of oil, considering the unique

characteristics of the spill incident and the location of the natural resources affected and rules for procedures for filing claims for compensation from the Fund and for response cost reimbursements to other state agencies from the Fund.

## SUBCHAPTER A. GENERAL PROVISIONS

**31 TAC §20.1, §20.10**

STATUTORY AUTHORITY

The amendments are adopted under OSPRA, Texas Natural Resources Code, §40.007(a), which gives the Commissioner of the GLO the authority to promulgate rules necessary and convenient to the administration of OSPRA; §40.107(a), which gives the Commissioner of the GLO the authority to adopt administrative procedures and protocols for the assessment of natural resource damages from an unauthorized discharge of oil, considering the unique characteristics of the spill incident and the location of the natural resources affected; and §40.157(c), which gives the Commissioner of the GLO the authority to adopt by rule procedures for filing claims for compensation from the Fund and for response cost reimbursements to other state agencies from the Fund.

Texas Natural Resources Code §§40.107, 40.157, and 40.159 are affected and implemented by the adopted new rules.

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-201005675
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
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For further information, please call: (512) 475-1859

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## SUBCHAPTER B. STATE TRUSTEE RESPONSE, ORGANIZATION, AND COORDINATION

**31 TAC §§20.21 - 20.23**

STATUTORY AUTHORITY

The amendments are adopted under OSPRA, Texas Natural Resources Code, §40.007(a), which gives the Commissioner of the GLO the authority to promulgate rules necessary and convenient to the administration of OSPRA; §40.107(a), which gives the Commissioner of the GLO the authority to adopt administrative procedures and protocols for the assessment of natural resource damages from an unauthorized discharge of oil, considering the unique characteristics of the spill incident and the location of the natural resources affected; and §40.157(c), which gives the Commissioner of the GLO the authority to adopt by rule procedures for filing claims for compensation from the Fund and for response cost reimbursements to other state agencies from the Fund.

Texas Natural Resources Code §§40.107, 40.157, and 40.159 are affected and implemented by the adopted new rules.

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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Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
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For further information, please call: (512) 475-1859

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## SUBCHAPTER C. NATURAL RESOURCE DAMAGE ASSESSMENTS

**31 TAC §§20.31, 20.33, 20.35, 20.36**

STATUTORY AUTHORITY

The amendments are adopted under OSPRA, Texas Natural Resources Code, §40.007(a), which gives the Commissioner of the GLO the authority to promulgate rules necessary and convenient to the administration of OSPRA; §40.107(a), which gives the Commissioner of the GLO the authority to adopt administrative procedures and protocols for the assessment of natural resource damages from an unauthorized discharge of oil, considering the unique characteristics of the spill incident and the location of the natural resources affected; and §40.157(c), which gives the Commissioner of the GLO the authority to adopt by rule procedures for filing claims for compensation from the Fund and for response cost reimbursements to other state agencies from the Fund.

Texas Natural Resources Code §§40.107, 40.157, and 40.159 are affected and implemented by the adopted new rules.

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. ADMINISTRATION

**31 TAC §§20.40, 20.41, 20.43**

STATUTORY AUTHORITY

The amendments are adopted under OSPRA, Texas Natural Resources Code, §40.007(a), which gives the Commissioner of the GLO the authority to promulgate rules necessary and convenient to the administration of OSPRA; §40.107(a), which gives the Commissioner of the GLO the authority to adopt administrative procedures and protocols for the assessment of natural

resource damages from an unauthorized discharge of oil, considering the unique characteristics of the spill incident and the location of the natural resources affected; and §40.157(c), which gives the Commissioner of the GLO the authority to adopt by rule procedures for filing claims for compensation from the Fund and for response cost reimbursements to other state agencies from the Fund.

Texas Natural Resources Code §§40.107, 40.157, and 40.159 are affected and implemented by the adopted new rules.

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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Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
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For further information, please call: (512) 475-1859

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# PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

## CHAPTER 51. EXECUTIVE

## SUBCHAPTER O. ADVISORY COMMITTEES

The Texas Parks and Wildlife Commission adopts amendments to §§51.606 - 51.611, 51.631, 51.643, 51.671, and 51.672, concerning advisory committees. The amendments to §§51.607, 51.608, and 51.611 are adopted with changes to the proposed text as published in the July 16, 2010, issue of the *Texas Register* (35 TexReg 6277). The amendments to §§51.606, 51.609, 51.610, 51.631, 51.643, 51.671, and 51.672 are adopted without changes and will not be republished.

The change to §51.607 concerning Migratory Game Bird Advisory Committee (MGBAC) corrects the acronym in subsection (d). The change is nonsubstantive.

The change to §51.608 concerning Upland Game Bird Advisory Committee (UGBAC) corrects the acronym in subsection (a). The change is nonsubstantive.

The change to §51.611 concerning Wildlife Diversity Advisory Committee (WDAC) alters language in subsection (a) to make the references to Texas consistent. The change is nonsubstantive.

The amendments establish an expiration date of October 1, 2014 for the following advisory committees: White-tailed Deer Advisory Committee (WTDAC), Migratory Game Bird Advisory Committee (MGBAC), Upland Game Bird Advisory Committee (UGBAC), Private Lands Advisory Committee (PLAC), Bighorn Sheep Advisory Committee (BSAC), Wildlife Diversity Advisory Committee (WDAC), Freshwater Fisheries Advisory Committee (FFAC), Historic Sites Advisory Committee (HSAC), State Parks Advisory Committee (SPAC), and Coastal Resources Advisory Committee (CRAC). Under current rules, entities advising the department are referred to as either "boards" or "committees." To be consistent, the amendments also designate all advisory entities in the rules as "committees."

Parks and Wildlife Code, §11.062, authorizes the Chair of the Texas Parks and Wildlife Commission (the Commission) to "appoint committees to advise the Commission on issues under its jurisdiction." Government Code, Chapter 2110, requires that rules be adopted regarding each state agency advisory committee. Unless otherwise provided by specific statute, the rules must (1) state the purpose of the committee; (2) describe the manner in which the committee will report to the agency; and (3) establish the date on which the committee will automatically be abolished, unless the advisory committee has a specific duration established by statute.

In 2009, the Commission adopted an amendment to §51.601, concerning General Provisions, that established a generic expiration date of October 1, 2010 for advisory committees of the department, unless otherwise specifically specified. The department seeks to extend their expiration dates of the listed committees so that they may continue to function. The change in the title of some committees from "Board" to "Committee" is for the purpose of consistency.

The amendments will function by establishing expiration dates for advisory committees and providing for a uniform naming convention for groups that advise the department and the commission.

Two commenters opposed adoption of the proposed amendments as published. Both commenters articulated specific reasons or rationales for opposing adoption. Those comments, accompanied by the agency's response to each, follow.

One commenter opposed adoption of the amendment concerning the White-tailed Deer Advisory Committee and stated that the committee composition should include deer breeders, deer managers, deer permit holders, and professional deer biologists. The department agrees with the comment and responds that the WTDAC currently includes deer managers, deer permit holders, and professional deer biologists, and that the department utilizes the ad hoc Breeder User Group to gather advice from deer breeders. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the WTDAC composition should include a Breeder Subcommittee to "educate other members of the WTDAC and better assist the commission and industry constituents with program regulations specific to deer breeding practices and its unique management needs." The department disagrees with the comment and responds that the current membership of the White-tailed Deer Advisory Group, along with the ad hoc Breeder User Group, are sufficient to provide advice and information to the commission and the department concerning regulation of persons who hold a deer breeder permit. No changes were made as a result of the comment.

One commenter neither opposed nor supported adoption of the rules, but requested that the White-Tailed Deer Advisory Committee be restructured to include a subcommittee to address deer breeder issues. The commenter requested that the subcommittee be composed of landowners from the ecological range of white-tailed deer in Texas, deer managers, deer breeders, deer permit holders, and professional deer biologists. The commenter also requested the formation of a Mule Deer Advisory Committee containing a subcommittee for mule deer breeders. No changes were made as a result of the comment.

Three persons commented in favor of adoption of the proposed amendments.

The Texas Deer Association commented, but neither opposed nor supported adoption of the proposed rules.

## DIVISION 2. WILDLIFE

**31 TAC §§51.606 - 51.611**

The amendments are adopted under the authority of Parks and Wildlife Code, §11.0162 and Government Code, §2110.005 and §2110.008.

*§51.607. Migratory Game Bird Advisory Committee (MGBAC).*

(a) The MGBAC is created to advise the department regarding the following:

(1) the management, research and habitat acquisition needs of migratory game birds.

(2) development and implementation of migratory game bird regulations, research, and management.

(3) education and communications with various constituent groups and individuals interested in migratory game birds.

(b) The MGBAC consists of members selected from members of the general public with an interest migratory game bird management.

(c) The MGBAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The MGBAC shall expire on October 1, 2014.

*§51.608. Upland Game Bird Advisory Committee (UGBAC).*

(a) The UGBAC is created to advise the department on matters pertaining to the following:

(1) regulation, management, research, and funding needs regarding upland game bird species that occur in Texas;

(2) management, research and habitat acquisition needs of upland game birds; and

(3) education and communications with various constituent groups and individuals interested in upland game bird species of Texas.

(b) The composition of the UGBAC shall represent:

(1) the ecological range of upland game bird species in Texas;

(2) landowners;

(3) conservation organizations;

(4) representatives of appropriate state and federal agencies; and

(5) upland game bird hunters.

(c) The UGBAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The UGBAC shall expire on October 1, 2014.

*§51.611. Wildlife Diversity Advisory Committee (WDAC).*

(a) The WDAC shall advise the department on matters pertaining to management, research, and outreach activities related to nongame and rare species in Texas, including the following:

(1) development and implementation of the wildlife diversity related projects, grants, and policy;

(2) wildlife diversity conservation and regulations;

(3) education and communications with various constituent groups and individuals interested in wildlife diversity in Texas.

(b) The composition of the WDAC shall represent landowner and conservation organizations in Texas.

(c) The WDAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The WDAC shall expire on October 1, 2014.

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 September 28, 2010.

TRD-201005596
Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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## DIVISION 4. INLAND FISHERIES

**31 TAC §51.631**

The amendment is adopted under the authority of Parks and Wildlife Code, §11.0162 and Government Code, §2110.005 and §2110.008.

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

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## DIVISION 5. STATE PARKS

**31 TAC §51.643**

The amendment is adopted under the authority of Parks and Wildlife Code, §11.0162 and Government Code, §2110.005 and §2110.008.

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## DIVISION 8. COMMITTEES OF THE COMMISSION

**31 TAC §51.671, §51.672**

The amendments are adopted under the authority of Parks and Wildlife Code, §11.0162 and Government Code, §2110.005 and §2110.008.

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 65. WILDLIFE
## SUBCHAPTER N. MIGRATORY GAME BIRD PROCLAMATION

**31 TAC §§65.318, 65.320, 65.321**

The Texas Parks and Wildlife Commission adopts amendments to §§65.318, 65.320, and 65.321, concerning the Migratory Game Bird Proclamation. Section 65.318, concerning Open Seasons and Bag and Possession Limits--Late Season Species, is adopted with changes to the proposed text as published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3957). Sections 65.320 and 65.321 are adopted without changes and will not be republished.

The proposed text as published in the May 21, 2010, issue of the *Texas Register* also included amendments to §65.315 and §65.319. Because of the timing of the seasons and bag limits established in §65.315 and §65.319, these amendments were previously adopted in the August 13, 2010, issue of the *Texas Register* (35 TexReg 7075), by order of the department's executive director as authorized by Parks and Wildlife Code, §64.022, and 31 TAC §65.313(d).

The change to §65.318, concerning Open Seasons and Bag and Possession Limits--Late Season Species, increases the bag limit for pintail ducks from one to two. As proposed, the rule would have imposed a daily bag limit of one pintail per hunter, but the U.S. Fish and Wildlife Service (Service) frameworks, issued in August 2010, authorize Texas to implement a two-bird daily bag limit. In keeping with commission policy to provide the maximum hunting opportunity possible under the federal frameworks, the department adopts the higher bag limit.

The change to §65.318 also alters the bag composition for dark geese in the Western Goose Zone. As proposed, the daily bag limit would have been five geese, no more than four Canada geese and no more than one white-fronted goose. The Service frameworks authorize Texas to allow all five birds in the bag to be Canada geese. In keeping with commission policy to provide the maximum hunting opportunity possible under the federal frameworks, the department adopts the new bag composition.

The amendment to §65.318, concerning Open Seasons and Bag and Possession Limits--Late Season Species, retains the basic season structure and bag limits from last year and adjusts the season dates for late-season species of migratory game birds (ducks, coots, mergansers, geese, and sandhill cranes) to account for calendar shift. The amendment also changes the references to mottled ducks with a reference to "dusky ducks." The Service is concerned about perceived instability in mottled duck populations in Texas and last year directed Texas to reduce mottled duck harvest by at least 20 per cent. Although the concern is for mottled ducks, the department believes that it is best to include all ducks that are similar in appearance to dusky ducks (mottled duck, Mexican-like duck, black duck and their hybrids), in order to prevent accidental harvest of mottled ducks.

The amendment to §65.320, concerning Extended Falconry Season--Late Season Species, adjusts season dates for the take of early-season species of migratory game birds by means of falconry to reflect calendar shift.

The amendment to §65.321, concerning Special Management Provisions, adjusts the dates for the conservation season on light geese to account for calendar shift.

The United States Fish and Wildlife Service (Service) issues annual frameworks for the hunting of migratory game birds. The states may be more restrictive than the federal frameworks allow, but may not be less restrictive.

The amendments are generally necessary to implement commission policy to provide the greatest hunter opportunity possible, consistent with hunter and landowner preference for starting dates and segment lengths, under frameworks issued by the Service.

The amendment to §65.318 will function by establishing the seasons and bag limits for the hunting of late-season species of migratory game birds.

The amendment to §65.320 will function by establishing the season length and bag limits for the take of late-season species of migratory game birds by means of falconry.

The amendment to §65.321 will function by establishing the seasons and bag limits for the hunting light geese during the light goose conservation season.

The department received 175 comments opposing adoption of the portion of proposed §65.318 that establishes seasons dates and bag limits for ducks, coots, and mergansers. All the commenters articulated a specific reason or rationale for opposing adoption. Those comments, followed by the department's response to each, follow.

Fifteen commenters opposed adoption and stated that the north and south zone splits should be staggered. The department disagrees with the comments and responds that it is commission

policy to attempt to create opportunity during time periods when most of the public is most able to take advantage of it. For duck seasons, the department believes it is important to provide opportunity during the holiday season and for as many weekends as possible. Under the federal frameworks, Texas is allowed 74 days of opportunity between September 25, 2010 and January 30, 2011. The purpose of a split is to allow an opportunity for ducks to congregate and recover from hunting pressure. Conventional thinking is that splits ideally should be at least two weeks in duration. Concurrent splits are therefore necessary because staggered splits would take hunting opportunity away from the holidays and weekends. No changes were made as a result of the comments.

One hundred thirteen commenters opposed adoption and stated that the duck season should open one week later and close the last weekend in January. The department disagrees with the comments and responds the season dates as adopted were based on nesting studies showing that early-nesting females have better nest success than late-nesting females. The department believes that allowing ducks to form pair bonds on wintering areas should enhance the possibility of better nest success on the breeding grounds. Therefore, the department has adopted seasons that eliminate hunting pressure during the last week of the framework. The department also notes that the season dates as adopted minimize conflicts with other hunting opportunity and thus provide maximum hunting opportunity. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season in the South Zone should open later. The department disagrees with the comment and responds the season dates as adopted were based on nesting studies showing that early-nesting females have better nest success than late-nesting females. The department believes that allowing ducks to form pair bonds on wintering areas should enhance the possibility of better nest success on the breeding grounds. Therefore, the department has adopted seasons that eliminate hunting pressure during the last week of the framework. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season should extend through the first two weeks in February. The department disagrees with the comment and responds that the federal frameworks do not authorize duck hunting in Texas after January 30, 2011. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season should open in November and run continuously to the end of the framework. The department disagrees with the comment and responds the season dates as adopted were based on nesting studies showing that early-nesting females have better nest success than late-nesting females. The department believes that allowing ducks to form pair bonds on wintering areas should enhance the possibility of better nest success on the breeding grounds. Therefore, the department has adopted seasons that eliminate hunting pressure during the last week of the framework. The department also notes that a season beginning in November and running to the end of the framework would eliminate the split season, which is preferred by a majority of hunters. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the closure for dusky ducks should take place at the end of the season. The department disagrees with the comment and responds that the five-day closure of the season for dusky ducks is specified by the federal frameworks. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the dusky duck closure should be eliminated by cutting four days off the beginning of the season. The department disagrees with the comment and responds that eliminating the first four days of the season would result in unacceptable loss of hunting opportunity with respect to species of ducks other than dusky ducks. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be a five-day closure for dusky ducks at the beginning of the second split in addition to the closure at the beginning of the first split. The department disagrees with the comment and responds that the Service has determined that the current five-day closure is sufficient to address population concerns surrounding mottled ducks and the department concurs with that determination. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the split in the South Zone should be later. The department disagrees with the comment and responds that it is commission policy to attempt to create opportunity during time periods when most of the public is most able to take advantage of it. For duck seasons, the department believes it is important to provide opportunity during the holiday season and for as many weekends as possible. Under the federal frameworks, Texas is allowed 74 days of opportunity between September 25, 2010 and January 30, 2011. The purpose of a split is to allow an opportunity for ducks to congregate and recover from hunting pressure. Conventional thinking is that splits ideally should be at least two weeks in duration. Concurrent splits are therefore necessary because staggered splits would take hunting opportunity away from the holidays and weekends which would result in decreased hunting opportunity. No changes were made as a result of the comments.

One commenter opposed adoption and stated that there should be a 96-day season for pintails. The department disagrees with the comment and responds that the current season for pintails is the maximum length allowable under the federal frameworks. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the early teal season should be shortened so that regular duck season can run to the end of the framework. The department disagrees with the comment and responds that the early teal season has nothing to do with the length of the regular duck season. The decision to close the duck season a week prior to the end of the framework is not driven by considerations related to the teal season but, by the department's desire to enhance the possibility of better nest success on the breeding grounds. No changes were made as a result of the comment.

Thirty-four commenters opposed adoption and stated that the bag limit for pintails should be two. The department agrees with the comments, and because the federal frameworks offered a two-bag limit, the change has been made accordingly.

Two commenters opposed adoption and stated that the bag limit for wood ducks should be reduced to two. The department disagrees with the comment and responds that there are no concerns at present with respect to wood duck populations that would warrant a reduction in the daily bag limit. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that there should be a split season in the High Plains Mallard Management

Unit (HPMMU). The department agrees with the comment and responds that there is a split season in the HPMMU. The split season in the HPMMU is very early because the department uses all 89 days available under the federal frameworks and placing the split later in the season would interfere with hunting when large numbers of ducks are in the area. No changes were made as a result of the comment.

The department received 59 comments supporting adoption of the portion of proposed §65.318 that establishes seasons dates and bag limits for ducks, coots, and mergansers.

The department received 32 comments opposing adoption of the portion of the proposed amendment to §65.318 that establishes the youth-only waterfowl seasons. Of those comments, 33 articulated a specific reason or rationale for opposing adoption. Those comments, followed by the department's response to each, follow.

The department received 24 comments opposing adoption of youth seasons and suggesting that youth seasons be held later in the winter, during a split between segments, or following the closure of regular duck season. The department disagrees with the comments and responds that the dates for youth-only waterfowl hunting are not placed during segments, during the splits between segments, or following the closure of duck season because placing the youth-only days at those times would disrupt large numbers of hunters or would result in less than desirable hunting conditions for youth. Placing the youth-only days during the split between segments would defeat the purpose of the split, which is to allow ducks to rest. Placing the youth-only days at the end of the season would result in less than desirable hunting conditions for youth, because duck populations at that time of the season are diminished due to hunting and natural mortality and the remaining ducks are extremely wary. Therefore, the department has determined that the weekend prior to the opening of duck season is the ideal time to locate the youth-only days. No changes were made as a result of the comment.

One commenter opposed adoption and stated that youth seasons should be eliminated because they are discriminatory. The department disagrees with the comment and responds that youth seasons are intended to increase youth interest in hunting and outdoor recreation. Allowing youth-only seasons does not constitute unlawful discrimination. No changes were made as a result of the comment.

Four commenters opposed adoption and stated that the season as proposed is so early that there are no ducks to hunt. The department, although sympathetic, disagrees with the comment and responds that the youth-only dates are placed prior to the beginning of the regular season because placing youth-only dates during the split between segments would defeat the purpose of the split, which is to allow ducks to rest and placing youth-only dates at the end of the season would result in less than desirable hunting conditions for youth, because duck populations at that time of the season are diminished due to hunting and natural mortality and the remaining ducks are extremely wary. Therefore, the department has determined that the weekend prior to the opening of duck season is the ideal time to locate the youth-only days. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the youth season should be the weekend before the opening of regular duck season and the weekend after the closing of regular duck season. The department disagrees with the comment and responds that additional youth-only days (i.e., any more than two) would count against the total hunting days allowed under the federal frameworks and would therefore deny rather than provide opportunity. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the youth season should open in all three zones on the Friday before the opening of the regular season. The department disagrees with the comment and responds that the federal frameworks require the youth-only season to be held during a weekend. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the youth season should be January 30 - 31 in all zones. The department disagrees with the comments and responds that a season closure of January 23 has been adopted because of concerns for breeding potential for ducks. Studies show that early-nesting females have better nest success than late-nesting females. The department believes that allowing ducks to form pair bonds on wintering areas should enhance the possibility of better nest success on the breeding grounds. Therefore, the department has adopted seasons that eliminate hunting pressure during the last week of the framework. No changes were made as a result of the comments.

The department received 80 comments supporting adoption of the portion of the proposed amendment to §65.318 that establishes the youth-only waterfowl seasons.

The department received 64 comments opposing adoption of the portion of proposed §65.318 that establishes season dates and bag limits for geese. Of those comments, 62 articulated a specific reason or rationale for opposing adoption. Those comments, followed by the department's response to each, follow.

Sixteen commenters opposed adoption and stated that the season should begin later. The department disagrees with the comments and responds that although federal rules allow the department to start the season for white-fronted geese at a date later than that adopted, the dates adopted were selected because white-fronted geese are early arrivals and offer additional hunting opportunity during the duck season. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that the season for snow geese should extend into February. The department agrees with the comment and responds that the under the proposal, which was adopted, the light goose conservations order, during which snow geese can be taken in any number, runs from February 7 until March 27. No changes were made as a result of the comments.

Four commenters opposed adoption and stated that the season for white-fronted geese should be concurrent with light and Canada goose season. The department disagrees with the comment and responds that because the federal frameworks allocate fewer days for light geese than for dark geese, it is not possible for the season for light and dark geese to be concurrent unless hunting opportunity for dark geese is reduced. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that there should be a split season for white-fronted geese that runs concurrently with duck season. The department disagrees with the comment and responds that the white-fronted goose season is limited to 72 days under the federal frameworks, while the duck season is 74 days; therefore, making goose season concurrent with ducks season would result in reduced hunting opportunity

due to the loss of a weekend of goose hunting opportunity. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the season for white-fronted geese should be concurrent with the season for Canada geese in the Western Zone. The department agrees with the comment and responds that those seasons are concurrent. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the season for Canada geese should be two weeks longer, even if it means eliminating the light goose conservation season. The department disagrees with the comment and responds that Texas must do its part in the interstate and international effort to curtail light goose populations in order to prevent habitat degradation on their Arctic breeding grounds. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the season for white-fronted geese should run until mid-January. The department disagrees with the comment and responds that the season structure as adopted takes advantage of the migratory chronology of white-fronted geese, which tend to arrive in Texas in huntable numbers in early November. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be one goose season for the entire state. The department disagrees with the comment and responds that if the state were to impose a single season, it would limit hunting opportunity because the federal frameworks do not allow for more than 86 days of hunting opportunity for white-fronted geese in the Eastern Zone or 95 days of hunting opportunity for dark geese in the Western Zone. Having one season would necessarily mean truncating hunting opportunity in the Western Zone. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be a "southwest zone" with a bag of three white-fronted geese. The department disagrees with the comment and responds that zones cannot be created without the prior approval of the Service. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the season dates in all zones should be identical. The department disagrees with the comment and responds that the season dates adopted in each zone are based on federal frameworks that are based on scientific evaluations of distinct populations of migratory birds. The season selections made by Texas represent the most efficient utilization of the total allowable days available for each zone under the federal frameworks and provide the best hunting opportunity when geese are most available, based on historical patterns. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season for white-fronted geese should run one week later. The department disagrees with the comment and responds that the season structure as adopted takes advantage of the migratory chronology of white-fronted geese, which tend to arrive in Texas in huntable numbers in early November and is the maximum number of days allowable under federal framework. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the bag limit for snow geese should be reduced to eight or fewer. The department disagrees and responds that it is commission policy to adopt the most liberal bag limits available under the federal frameworks. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the bag limit for snow geese is too high. The department disagrees with the comment and responds that there is no indication that the current bag limit for snow geese is causing instability or threat to the population. No changes were made as a result of the comment.

Eleven commenters opposed adoption and stated that the bag limit for white-fronted geese should be two. The department disagrees with the comment and responds that if the comment is directed to the bag limit in the Eastern Zone, the bag limit for white-fronted geese is already established at two; if the comment is directed at the bag limit in the Western Zone, the federal frameworks do not allow the take of more than one white-fronted goose per day. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the bag limit on dark geese should be five, white-fronted and Canada geese combined. The department disagrees with the comment and responds that under the federal frameworks, the daily bag limit for dark geese is five, not more than one which can be a white-fronted goose. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the bag limit for light geese should be five. The department disagrees with the comment and responds that under the federal frameworks, the maximum bag limit for light geese is 20. In keeping with the commission policy to adopt the most liberal provisions allowable under the federal frameworks, consistent with the welfare of the resource, the department has adopted the 20-bird bag. No changes were made as a result of the comment.

One commenter opposed adoption and stated that bag limits for Canada and white-fronted geese should be reduced. The department disagrees and responds that it is commission policy to adopt the most liberal bag limits available under the federal frameworks. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the bag limit for dark geese should be five, no more than two white-fronted geese in the Western Zone. The department disagrees with the comment and responds that the maximum bag limit in the Western Zone under the federal frameworks is one white-fronted goose. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the bag limit on white-fronted geese should be three. The department disagrees with the comment and responds that the federal frameworks do not provide for a three-bird bag limit for white-fronted geese anywhere in Texas. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the bag limits should be the same in all zones. The department disagrees with the comment and responds that the bag limits adopted in each zone represent the most efficient utilization of the total allowable days available for each zone under the federal frameworks and provide the best hunting opportunity when geese are most available, based on historical patterns. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the bag limit for Canada geese should be five. The department agrees with the comment if it concerns the Canada goose bag limit in the

Western Zone. The Service has authorized a bag composition of up to five Canada geese per day and the department has made changes accordingly. If the comment is directed at the proposal for the Eastern Zone, however, the department disagrees with the comment and responds that under the federal frameworks, the maximum daily bag limit in the Eastern Zone is three. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that the bag limit for dark geese in the Western Zone should be five. The department agrees with the comments and responds that the bag limit for dark geese in the Western Zone is five. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that there should be no bag limit on snow geese. The department disagrees with the comment and responds that the federal frameworks establish a maximum daily bag, which the department is obligated to implement. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the bag limit for Canada geese is too low. The department disagrees with the comment and responds that the bag limit for Canada geese, as adopted, is maximum allowable under the federal frameworks. No changes were made as a result of the comment.

The department received 59 comments supporting adoption of the portion of proposed §65.318 that establishes seasons dates and bag limits for geese.

The department received 12 comments opposing adoption of the portion of proposed §65.318 that establishes seasons dates and bag limits for sandhill crane. Of those comments, nine articulated a specific reason or rationale for opposing adoption. Those comments, followed by the department's response to each, follow.

One commenter opposed adoption and stated that the hunting of sandhill cranes should be allowed east of Interstate Highway 45. The department disagrees with the comment and responds that the closed areas in Texas are closed by federal law and the department does not have the authority to allow sandhill crane hunting in those areas. No changes were made as a result of the comment.

One commenter opposed adoption and stated that Zone B should open and close later. The department disagrees with the comment and responds that hunter preference has traditionally been to open the season as soon as possible following the migration of endangered whooping cranes and to close the season concurrently with Zone A. The Service's framework and sound biological management enable the department to accommodate this preference. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the season for sandhill crane should run two weeks longer, even if that means shortening the light goose conservation season. If the commenter means to address the total season length, the department disagrees with the comment and responds that the season as adopted is the maximum length allowable under the federal frameworks. If the comment addresses the timing of the season (i.e., a later opening and closing date), the department disagrees with the comment and responds that Texas must do its part in the interstate and international effort to curtail light goose populations in order to prevent habitat degradation on their Arctic breeding grounds. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the bag limit should be three in all zones. The department disagrees with the comment and responds that the bag limits in all three zones are the maximum allowed under federal frameworks. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season in Zone C should be longer. The department disagrees with the comment and responds that the sandhill crane season South C is the maximum length allowed under the federal frameworks. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the bag limit in Zone C should be three. The department disagrees with the comment and responds that the bag limit in Zone C, as adopted, is the maximum allowable under the federal frameworks. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the bag limit in Zone A should be four. The department disagrees with the comment and responds that the bag limit in Zone A, as adopted, is the maximum allowable under the federal frameworks. No changes were made as a result of the comment.

The department received 74 comments supporting adoption of the portion of proposed §65.318 that establishes seasons dates and bag limits for sandhill crane.

The department received two comments opposing adoption of proposed §65.320, which establishes seasons dates and bag limits for the take of late-season migratory game birds by means of falconry. Both commenters articulated a specific reason or rationale for opposing adoption. Those comments, followed by the department's response to each, follow.

One commenter opposed adoption and stated that there should not be a special falconry season because falcons eat enough ducks. The department disagrees with the comment and responds that the falconry season as adopted addresses the take of ducks by trained raptors, not raptors in the wild. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the relative pressure from falconers is so minimal that there should be an extended season in the HPMMU. The department disagrees with the comment and responds that the general season in the HPMMU utilizes all hunting days available under the federal frameworks; therefore, an extended falconry season would reduce overall hunting opportunity available because hunting by means of falconry is far less popular than gun hunting. No changes were made as a result of the comment. The department received 74 comments supporting adoption of the portion of proposed §65.320, which establishes seasons dates and bag limits for the take of late-season migratory game birds by means of falconry.

The department received 21 comments opposing adoption of proposed §65.321, which establishes seasons dates and bag limits for the light goose conservation season. Of those comments, 16 articulated a specific reason or rationale for opposing adoption. Those comments, followed by the department's response to each, follow.

Five commenters opposed adoption and stated that the season should open late enough to allow the maximum days of regular goose hunting allowable under the federal frameworks. The department disagrees with the comment and responds that delaying the opening of the light goose conservation season would defeat its purpose. By February, large numbers of light geese

have begun to migrate and the opportunity to make a significant impact on populations has passed. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season should begin in late November or early December. The department disagrees with the comment and responds that hunter preference for other species of waterfowl precludes the opening of the conservation season any earlier, since all other seasons by federal law would have to be closed in order to implement the conservation season. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the bag limit should be reduced because populations are declining. The department disagrees with the comment and responds that there is no evidence to suggest that light goose populations are being pressured to the extent that they are unviable. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the conservation season should be eliminated. The department disagrees with the comment and responds that Texas must do its part in the interstate and international effort to curtail light goose populations in order to prevent habitat degradation on their Arctic breeding grounds. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the season should be eliminated because of population concerns. The department disagrees with the comment and responds that there is no evidence to suggest that light goose populations are being pressured to the extent that they are unviable. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the conservation season in the eastern and western zones should be concurrent. The department disagrees with the comments and responds that the hunting opportunity for dark geese in the Western Zone is far more significant than that for light geese. The department therefore allows the hunting of dark geese in the Western Zone for 93 days allowed under the federal frameworks. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the bag limit should be the same as during the regular season. The department disagrees with the comment and responds that the purpose of the light goose conservation order is to appreciably reduce light goose populations. Elimination of the bag limit is the most significant tool in that effort. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season should start later. The department disagrees with the comment and responds that delaying the opening of the light goose conservation season would defeat its purpose. By February, large numbers of light geese have begun to migrate and the opportunity to make a significant impact on populations has passed. No changes were made as a result of the comment.

One commenter opposed adoption and stated that eliminating the conservation season would allow the recovery of mid-continent light goose populations. The department disagrees with the comment and responds that the mid-continent light goose population continues to be considered overabundant. No changes were made as a result of the comment.

The department received 75 comments supporting adoption of the portion of proposed §65.321 which establishes seasons dates and bag limits for the light goose conservation season.

The Texas Wildlife Association commented in favor of adoption of the proposed amendments.

No groups or associations commented in opposition to adoption of the proposed amendments.

The amendments are adopted under Parks and Wildlife Code, Chapter 64, which authorizes the Commission and the Executive Director to provide the open season and means, methods, and devices for the hunting and possessing of migratory game birds.

*§65.318. Open Seasons and Bag and Possession Limits--Late Season.*

Except as specifically provided in this section, the possession limit for all species listed in this section shall be twice the daily bag limit.

(1) Ducks, mergansers, and coots. The daily bag limit for ducks is six, which may include no more than five mallards (only two of which may be hens); three wood ducks; two scaup (lesser scaup and greater scaup in the aggregate); two redheads; two pintail; one canvasback; and one "dusky" duck (mottled duck, Mexican like duck, black duck and their hybrids). For all other species not listed, the bag limit shall be six. The daily bag limit for coots is 15. The daily bag limit for mergansers is five, which may include no more than two hooded mergansers.

(A) High Plains Mallard Management Unit:

*(i)* all species other than "dusky ducks": October 23 - 24, 2010 and October 29, 2010 - January 23, 2011.

*(ii)* "dusky ducks": November 1, 2010 - January 23, 2011.

(B) North Zone:

*(i)* all species other than "dusky ducks": October 30 - November 28, 2010 and December 11, 2010 - January 23, 2011.

*(ii)* "dusky ducks": November 4, 2010 - November 28, 2010 and December 11, 2010 - January 23, 2011.

(C) South Zone:

*(i)* all species other than "dusky ducks": October 30 - November 28, 2010 and December 11, 2010 - January 23, 2011.

*(ii)* "dusky ducks": November 4, 2010 - November 28, 2010 and December 11, 2010 - January 23, 2011.

(2) Geese.

(A) Western Zone.

*(i)* Light geese: November 6, 2010 - February 6, 2011. The daily bag limit for light geese is 20, and there is no possession limit.

*(ii)* Dark geese: November 6, 2010 - February 6, 2011. The daily bag limit for dark geese is five, to include not more than one white-fronted goose.

(B) Eastern Zone.

*(i)* Light geese: October 30, 2010 - January 23, 2011. The daily bag limit for light geese is 20, and there is no possession limit.

*(ii)* Dark geese:

*(I)* White-fronted geese: October 30, 2010 - January 9, 2011. The daily bag limit for white-fronted geese is two.

*(II)* Canada geese: October 30, 2010 - January 23, 2011. The daily bag limit for Canada geese is three.

(3) Sandhill cranes. A free permit is required of any person to hunt sandhill cranes in areas where an open season is provided under this proclamation. Permits will be issued on an impartial basis with no limitation on the number of permits that may be issued.

(A) Zone A: November 6, 2010 - February 6, 2011. The daily bag limit is three. The possession limit is six.

(B) Zone B: November 26, 2010 - February 6, 2011. The daily bag limit is three. The possession limit is six.

(C) Zone C: December 18, 2010 - January 23, 2011. The daily bag limit is two. The possession limit is four.

(4) Special Youth-Only Season. There shall be a special youth-only waterfowl season during which the hunting, taking, and possession of geese, ducks, mergansers, and coots is restricted to licensed hunters 15 years of age and younger accompanied by a person 18 years of age or older, except for persons hunting by means of falconry under the provisions of §65.320 of this chapter (relating to Extended Falconry Season--Late Season Species). Bag and possession limits in any given zone during the season established by this paragraph shall be as provided for that zone by paragraph (1) of this section. Season dates are as follows:

(A) High Plains Mallard Management Unit: October 16 - 17, 2010;

(B) North Zone: October 23 - 24, 2010; and

(C) South Zone: October 23 - 24, 2010.

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 September 27, 2010.

TRD-201005576
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: October 17, 2010
Proposal publication date: May 21, 2010
For further information, please call: (512) 389-4775

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# TITLE 34. PUBLIC FINANCE

## PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

### CHAPTER 3. TAX ADMINISTRATION

### SUBCHAPTER O. STATE SALES AND USE TAX

**34 TAC §3.344**

The Comptroller of Public Accounts adopts an amendment to §3.344, concerning telecommunications services, with changes to the proposed text as published in the April 2, 2010, issue of the *Texas Register* (35 TexReg 2729).

This section is being amended to implement several bills as follows. Senate Bill 1497, 77th Legislature, 2001 implements the federal Mobile Telecommunications Sourcing Act (4 U.S.C §§116-126) (hereafter collectively SB 1497). Under SB 1497, effective for billing cycles beginning on or after August 1, 2002, state and local sales taxes on mobile telecommunications services are determined by the customer's place of primary use. House Bill 2425, 78th Legislature, 2003, (hereafter HB 2425) added Tax Code, §151.025(d) and changed billing and records requirements for telecommunications service providers. House Bill 1459, 80th Legislature, 2007 (hereafter HB 1459), excludes from telecommunications services pay telephone calls that are made by coins, but not other forms of payment. House Bill 3319, 80th Legislature, 2007 (hereafter HB 3319), expands the sale for resale exemption to apply to cell phones and other wireless voice communications devices purchased by persons who do not sell telecommunications services.

The agency received comments on the proposed rule amendment. The comments and the agency's responses are as follows:

One set of comments was submitted by Robin A. Casey of Casey, Gentz & Magness, L.L.P. as counsel for the Texas Cable Association (TCA) concerning the provisions of the section relating to voice over Internet protocol (VoIP) services. Similar comments were received from Dineen Majcher of Smith & Majcher. Texaltel, a trade association representing competitive communications providers operating in Texas, submitted comments in support of and consistent with TCA.

TCA expressed concerns that the proposed provisions concerning VoIP services do not accurately reflect the current state and federal regulatory law. Specifically, TCA contends that classifying VoIP services as telecommunications services may violate determinations to be made by the Federal Communications Commission (FCC) and Texas Public Utility Commission (PUC) that VoIP services are information services. Therefore, TCA asks that the section include a clear statement that the definition of VoIP services is intended solely for the purposes of taxation until such time that the term is clearly defined by the FCC and PUC.

TCA and Ms. Majcher also ask that no definition of VoIP services be included in the rule. TCA is concerned that including a definition for the term may result in disparate tax treatment based on definitional interpretation. In the alternative, TCA suggests, as does Ms. Majcher, that if a definition is included then VoIP service should be described as a communications services rather than a telecommunications service. TCA states that although the comptroller's stated intent is to base the definition of VoIP services on the definition of the term as provided by Newton's Telecom Dictionary, TCA submits that the dictionary definition does not describe VoIP as a telecommunications service.

Finally, TCA and Ms. Majcher ask that the term "VoIP service" be added to the definition of taxable service in subsection (a)(12) to clarify that VoIP service is taxable and to ensure that VoIP service is not classified as telecommunications for purposes other than Texas state and local taxes or, in the alternative, asks that an express statement along the lines of "for tax purposes only" be added to the rule language.

The comptroller declines to adopt the changes recommended by TCA, Texaltel, and Ms. Majcher. The comptroller can only

adopt rules that relate to the administration of state and local taxes that are under her authority as provided by the Texas Legislature. The determination that VoIP services are telecommunications services is based solely on the language in the relevant statutes, Texas Tax Code, §151.0101 and §151.0103. Section 151.0103(a) begins by stating that telecommunications services has the meaning provided "(f)or purposes of this title only." Therefore, it is unnecessary to state expressly in the rule that VoIP services are telecommunications services solely for purposes of determining state and local tax responsibilities. Should the FCC, PUC, or any other governmental agency or entity determine that VoIP services are classified otherwise, it would not change the comptroller's determination that the Texas Tax Code definition of telecommunications services includes VoIP services.

The comptroller acknowledges that technology changes over time and that could lead to the current definition of VoIP services as proposed in the section to become outdated or obsolete. Should that occur, the comptroller will amend the section to reflect such changes. For that reason, the comptroller declines to delete the definition of VoIP services as proposed in the rule. And, the comptroller still believes the definition of VoIP services as stated in Newton's Telecom Dictionary, a well-known and accepted treatise on telecommunications issues and terms, is an appropriate guideline for defining the term for state and local tax purposes. We decline to amend subsection (a)(12) as requested because the definition of telecommunications services is defined to include Voice over Internet Protocol (VoIP) and the term telecommunications is used in subsection (a)(12).

Comments and suggested edits were received from Ned A. Lenhart, CPA and President of Sales Tax Advisors of Georgia.

First, Mr. Lenhart notes that subsection (h)(4) uses the term "wireless" when describing certain prepaid services and notes that the term "wireless" is not defined in the rule. He suggests that we substitute the term "telecommunications" for "wireless" because "prepaid telecommunications" services are clearly defined in subsection (a)(9) of the regulation.

Second, he notes that subsection (h) makes a cross reference to the definition of place of primary use in subsection (a)(7), but notes the correct reference is to subsection (a)(8).

Finally, Mr. Lenhart asks that the comptroller reconsider the information in subsection (a)(8) concerning the application of "place of primary use" sourcing rules for purposes of allocating local taxes as applied to prepaid telecommunications services. He suggests the subsection be amended to reflect the realities relating to the purchase, use, and recharging of prepaid phones which typically occurs on an anonymous basis with the seller having no information to determine a place of primary use. He suggests that the sourcing for prepaid telecommunications services be the same as for pre-paid calling cards, which are treated as tangible personal property and subject to state and local tax based on the location where payment is received.

Based on comments received on the proposed version of this section and new §3.1271 of this title (relating to Imposition and Collection of the Prepaid Wireless 911 Service Fee), we have amended subsections (a)(6), (a)(9), and (h), and added new subsection (b)(13), so that prepaid wireless telecommunications services are sourced the same for purposes of sales and use taxes and for purposes of the prepaid wireless 9-1-1 fee as explained in §3.1271. These changes address Mr. Lenhart's comments.

Comments were also received from Patrick Tyler, General Counsel of the Commission on State Emergency Communications (CSEC).

First, CSEC suggests that the section as proposed does not address prepaid telephone calling services as defined in the Mobile Telecommunications Sourcing Act (MTSA), 4 U.S.C. §124(9), and, therefore, does not provide guidance when the purchase of prepaid telecommunications services are through a landline and evidenced by something other than a card or other item of tangible personal property, such as an access code. We have amended subsections (a)(6), (a)(9) and (h) to provide greater clarity on this issue.

CSEC submits that for purposes of the MTSA both prepaid telephone cards and prepaid wireline telecommunications services are excluded from the sourcing rules provided by the MTSA. In addition, CSEC submits that "(i)ncluding prepaid telephone calling services in the rule would also preclude the use of the (MTSA) exception for such services as a means to avoid application of the prepaid wireless emergency 9-1-1 service fee." We understand this comment to mean that prepaid calling cards and prepaid telecommunications services are not covered by the MTSA and that both types of prepaid services needs to be addressed in this section so that it is also clear that 9-1-1 service fees administered by CSEC apply to sales of these items.

We have amended subsections (a)(6), (a)(9), and (h), and added new subsection (b)(13), to reflect that prepaid wireless telecommunications services should be sourced consistently for purposes of sales and use taxes and the prepaid wireless 9-1-1 fee as explained in §3.1271. We decline to adopt the request to treat non-mobile prepaid telecommunications services as tangible personal property and be taxed like prepaid calling cards.

Finally, with respect to the definition of place of primary use in subsection (a)(8), CSEC suggests that the third sentence be deleted or modified to read: "The purchaser of mobile telecommunications service is presumed to be the customer for purposes of determining place of primary use." CSEC submits that without the change, the definition imposes an undue burden on sellers to determine whether a purchaser of mobile telecommunications service is also the ultimate end user. According to CSEC, such a requirement exceeds what is required by the MTSA, which authorizes service providers to rely on information provided by the customer to determine the tax due if such reliance is in good faith. We decline to adopt this suggested change, as the overall language in subsection (a)(8) indicates that, ultimately, it is the end user's place of primary use that determines where the tax is due and the language in the rule is not inconsistent with the provisions of the MTSA on that point.

Specific amendments to the adopted version of the section are as follows.

Subsection (a)(1) updates the definition of basic local exchange telephone service for purposes of clarity and due to SB 1497. Paragraph (4) provides a definition for interstate long-distance telecommunications service for purposes of clarity and due to SB 1497. Paragraph (5) defines intrastate long-distance telecommunications service for purposes of clarity and due to SB 1497. Paragraph (6) defines mobile telecommunications service pursuant to SB 1497. Paragraph (7) defines pay telephone coin sent pursuant to HB 1459. Paragraph (8) defines place of primary use pursuant to SB 1497. Paragraph (9) defines prepaid telecommunications service according to longstanding agency policy. Paragraph (10) clarifies the definition of private commu-

nications service according to longstanding agency policy. Paragraph (13) revises the definition of telecommunications services to reflect changes made under SB 1497, HB 1459, and to clarify agency policy. Paragraph (15) is revised to clarify when the sale of a prepaid telephone calling card is treated as tangible personal property for determining tax due, and when such a sale is taxed as a telecommunications service. New paragraph (16) adds a definition for Voice over Internet Protocol (VoIP) to better reflect the current state of technology with respect to telecommunications services. This definition is based on Newton's Telecom Dictionary (2009).

In this adopted version of the section, we have revised subsection (a)(9) and (15) to better define the difference between a prepaid telecommunications service and a telephone prepaid calling card. Also, in subsection (a)(6) we corrected a misspelling of the word "Mobile" and in subsection (a)(16) we corrected a misspelling of the word "term."

Subsection (b) identifies specific services on which tax is due and now includes provisions to distinguish between intrastate and interstate long-distance services according to agency policy, to account for mobile telecommunications services under SB 1497, and to distinguish the taxability of pay telephone services when paid for with something other than coins. Paragraph (9) clarifies the taxability of equipment and charges related to the sale of telecommunications services and expresses longstanding agency policy related to the requirement for separate invoices for telecommunications services and equipment so that appropriate state and local tax rates are applied. Paragraph (11) clarifies agency policy regarding private line services because of advances in technologies and to express longstanding agency policy regarding allowable allocation methods for sellers based on the percentage of customer channel termination points in Texas. Paragraph (12) clarifies agency policy related to charges that are passed through to customers or imposed on service providers that become part of the tax base. New paragraph (13) is added to this adoption to explain that prepaid wireless telecommunications services as defined in subsection (a)(9) are subject to Texas tax if purchased in person from a Texas business or if purchased by telephone or Internet and the primary business address or residential address of the purchaser is in Texas.

Subsection (c) in the current version of the rule is deleted to reflect that the telecommunications infrastructure fund assessment is repealed as of September 1, 2008. The remaining subsections are relettered accordingly.

Subsection (c) now addresses nontaxable services and adds paragraph (5) to reflect changes due to SB 1497. Paragraph (6) explains longstanding policy that charges reflected on customer bills that are not a cost of doing business of the seller, such as 9-1-1 fees, are not part of the tax base and are not subject to tax.

Subsection (d) now reflects changes to billing and records requirements due to HB 2425 as now reflected in Tax Code, §151.025(d).

Subsection (e) now concerns the resale of tangible personal property and is organized into two paragraphs. Subsection (e)(2) adds the resale exemption for persons who sell cell phones and other wireless voice communications devices as a condition of the purchase of telecommunications services from another pursuant to HB 3319.

Subsection (f)(2) reflects longstanding requirements for the resale of telecommunications services. Paragraph (3) explains the resale provisions for mobile telecommunications service providers under SB 1497.

Subsection (h), previously subsection (i), is rewritten and reorganized to reflect local tax provisions as follows. Paragraph (1) explains that local jurisdictions may repeal the exemption on local telecommunications services taxes. Paragraph (2) clarifies that local taxes can never apply to interstate long-distance telecommunications services. Paragraph (3) explains the general rules for collecting local taxes subject to the exceptions in paragraphs (4) and (6). Paragraph (4) explains how local taxes apply to mobile telecommunications services under SB 1497. Paragraph (5) addresses local tax rules for prepaid telephone cards which are treated as tangible personal property. Paragraph (6) explains the local tax rules for prepaid wireless telecommunications services.

Nonsubstantive changes are made throughout the section to improve clarity and readability.

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

The amendment implements Tax Code, §151.006 (Sale for Resale), §151.009 (Tangible Personal Property), §151.0103 (Telecommunications Services), §151.01032 (Telephone Prepaid Calling Card), §151.025(d) (Records Required to be Kept), §151.061 (Sourcing of Charges for Mobile Telecommunications Services), §151.323 (Certain Telecommunications Services), and §322.109(b) (Telecommunications Exemption).

*§3.344. Telecommunications Services.*

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

(1) Basic local exchange telephone service--The provision by a telephone company of each access line and each dial tone to a fixed location for sending and receiving telecommunications in the telephone company's local exchange network. Services are considered basic irrespective of whether the customer has access to a private or party line, or whether the customer has limited or unlimited access. The term does not include international, interstate, or intrastate long-distance telecommunications services or mobile telecommunications services.

(2) Internet--Collectively the myriad of computer and telecommunications facilities, including equipment and operating software, that comprise the interconnected worldwide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to the protocol, to communicate information of all kinds by wire or radio.

(3) Internet access service--A service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. The term does not include telecommunications services. See §3.366 of this title (relating to Internet Access Services).

(4) Interstate long-distance telecommunication service--A telecommunication service that originates in one state, crosses state lines, and terminates in another state.

(5) Intrastate long-distance telecommunications service--A telecommunication service that originates and terminates within one state, but crosses the boundaries on subdivisions or jurisdictions within the state.

(6) Mobile telecommunications service--The provision of a commercial mobile radio service, as defined in 47 C.F.R. 20.3 of the Federal Communications Commission's (FCC) regulations in effect on June 1, 1999 under the Mobile Telecommunications Sourcing Act (4 U.S.C. §§116-126). The term includes cellular telecommunications services, personal communications services (PCS), specialized mobile radio services, wireless voice over Internet protocol services, and paging services. The term does not include telephone prepaid calling cards or air-ground radio telephone services as defined in 47 C.F.R. 22.99 of FCC regulations in effect on June 1, 1999.

(7) Pay telephone coin sent--Telecommunications service paid for by the insertion of coins into a coin-operated telephone.

(8) Place of primary use--The physical street address that is representative of where a customer primarily uses a mobile telecommunications service. That location must be either the customer's residential street address or the customer's primary business street address that is within the licensed service area of the service provider. The individual or entity that contracts with the service provider is the customer. If the individual or entity that contracts with the service provider is not the end user, then the physical street address where the end user primarily uses the service determines the customer's place of primary use. For example, a business owner who is located in Austin, Texas establishes mobile telecommunication service accounts for employees who are located in other cities. One employee does business from his home in Dallas, Texas. Two other employees work at an office that is located in Houston, Texas. Another employee works at an office that is located in New Orleans, Louisiana. The home street address of the employee in Dallas is the place of primary use for that cellular phone account. The place of primary use for the two Houston employees is the street address of the Houston office. The place of primary use for the employee in Louisiana is the street address of the New Orleans office.

(9) Prepaid telecommunications service--A wireless or wire telecommunications service for which the provider requires a customer to prepay the full amount prior to provision of the service. The term does not include the sale or use of a telephone prepaid calling card as defined in paragraph (15) of this subsection. A card, pin number, access code or similar device that allows a user to access only a specific network, or that is intended for use with a specific user account or device (e.g., to add more minutes to an existing account) is a prepaid telecommunications service and is taxed as the sale of a telecommunications service. Local sales tax is collected as explained in subsection (h) of this section.

(10) Private communication service--A telecommunication service that entitles the customer to exclusive or priority use of a communications channel or group of channels between or among termination points, regardless of the manner in which such channel or channels are connected, and includes switching capacity, extension lines, stations, and any other associated services that are provided in connection with the use of such channel or channels.

(A) As it relates to private communication service, the term "communications channel" means a physical or virtual path of communications over which signals are transmitted between or among customer channel termination points.

(B) As it relates to private communication service, the term "customer channel termination point" means the location where the customer either inputs or receives the communications.

(11) Seller--Any person who sells telecommunications services including a hotel, motel, owner or lessor of an office, residential building or development that contracts and pays for telecommunications services for resale to guests or tenants.

(12) Taxable service--A telecommunications service or other taxable service listed in Tax Code, §151.0101.

(13) Telecommunications services--The electronic or electrical transmission, conveyance, routing, or reception of sounds, signals, data, or information utilizing wires, cable, radio waves, microwaves, satellites, fiber optics, Voice over Internet Protocol (VoIP), or any other method now in existence or that may be devised, including but not limited to long-distance telephone service. The term includes mobile telecommunications services and prepaid telecommunications services. The term does not include:

(A) the storage of data or other information for subsequent retrieval or the processing, or reception and processing, of data or information intended to change its form or content;

(B) the sale or use of a telephone prepaid calling card;

(C) Internet access service; or

(D) pay telephone coin sent.

(14) Telephone company--A person who owns or operates a telephone line or telephone in this state and charges for its use.

(15) Telephone prepaid calling card--A card or other item, including an access code, that represents the right to access telecommunications services, other than prepaid telecommunications services as defined in paragraph (9) of this subsection, through multiple devices, regardless of the network providing direct service to the device used, for which payment is made in incremental amounts and before the call or transmission is initiated. For example, a calling card that allows a user to access a long distance telecommunications network for the purpose of making international calls through a pay phone is a telephone prepaid calling card. The sale of a telephone prepaid calling card is taxed as the sale of tangible personal property.

(16) Voice over Internet Protocol (VoIP)--A telecommunication service where a phone call is transmitted over a data network. The term "Internet Protocol" is a catchall phrase for the protocols and technologies of encoding a voice call that allow the voice call to be slotted in between data on a data network, including the Internet, a company's Intranet, or any other type of data network.

(b) Taxable telecommunications services. The total amount charged for a taxable telecommunications service is subject to sales tax. Sales tax is due on a charge for the following:

(1) basic local exchange telephone services;

(2) enhanced services such as metro service, extended area service, multiline hunting, and PBX trunk;

(3) auxiliary services such as call waiting and call forwarding;

(4) intrastate long-distance telecommunications services;

(5) interstate long-distance telecommunications services that are both originated from, and billed to, a telephone number or billing or service address within Texas such that if a call originates in Texas and is billed to a Texas service address, the charge is taxable even if the invoice, statement, or other demand for payment is sent to an address in another state;

(6) mobile telecommunications services for which the place of primary use is located in Texas;

(7) telegraph services that are both originated from, and billed to, a person within Texas;

(8) a telecommunications service paid for by the insertion of tokens, credit or debit card into a coin-operated telephone located in Texas;

(9) subject to subsection (e) of this section, the lease, rental, or other charges for telecommunication equipment including separately stated installation charges. Separately stated charges for labor to install wiring will not be taxable if the wiring is installed in new structures or residences in such manner as to become a part of the realty. Separately stated charges for labor to install wiring in existing nonresidential real property are taxable. See §3.291 and §3.357 of this title (relating to Contractors; Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance) for additional information. If charges for the installation of wiring and charges for the equipment are not separated, the total charge will be treated as a sale and installation of tangible personal property. Equipment sold by a telecommunications service provider is subject to sales or use tax and is not taxed as part of the telecommunications service if the service provider separately invoices the sale of the equipment. The sale of equipment is not separately invoiced if it is identified on the same bill, receipt or invoice as the sale of the telecommunications service, even if it is identified as a separate line item on the same bill, receipt, or invoice;

(10) installation of telecommunications services, including service connection fees;

(11) private communication services. Taxable receipts include the channel termination charge imposed at each channel termination point within this state, the total channel mileage charges imposed between channel termination points or relay points within this state, and an apportionment of the interoffice channel mileage charge that crosses the state border. An apportionment on the basis of the ratio of the miles between the last channel termination point in Texas and the state border to the total miles between that channel termination point and the next channel termination point in the route will be accepted. If there is a single charge for a private communication service in which the customer has channel termination points both inside and outside of Texas, the apportionment can also be determined by dividing the number of customer channel termination points in Texas by the total number of customer channel termination points to establish the percentage of the charge subject to state sales tax for Texas. Other apportionment methods may be used by the seller if first approved in writing by the comptroller;

(12) charges that are passed through to a purchaser for federal, state, or local taxes or fees that are imposed on the seller of the telecommunications service rather than on the purchaser. Such charges are a cost or expense of the seller and are included in the total price subject to sales tax; and

(13) prepaid wireless telecommunications services as defined by subsection (a)(9) of this section when the purchase is made in person at a Texas business or is made by telephone or the Internet and the purchaser's primary business address or residential address is in Texas.

(c) Nontaxable services. Sales tax is not due on charges for:

(1) interstate long-distance telecommunications services that are not both originated from, and billed to, a telephone number or billing or service address within Texas. Records must clearly distinguish between taxable and exempt long-distance services;

(2) broadcasts by commercial radio or television stations licensed or regulated by the FCC. See §3.313 of this title (relating to Cable Television Service) for the tax status of cable television services;

(3) telecommunications services purchased for resale;

(4) telegraph services that are not both originated from and billed to a person within Texas;

(5) mobile telecommunications services for which the place of primary use is located outside of Texas; and

(6) charges for federal, state, or local taxes or fees that are imposed on the purchaser rather than on the seller of the telecommunications service. For example, no sales tax is due on a separately stated charge for federal excise tax or for 9-1-1 Emergency Service Fee and 9-1-1 Equalization Surcharge because these taxes or fees are imposed on the purchaser and are not a cost of doing business of the seller.

(d) Billing and records requirements. If any nontaxable charges are combined with and not separately stated from taxable telecommunications service charges on the purchaser's bill or invoice from a provider of telecommunications services, the combined charge is subject to tax unless the service provider can identify the portion of the charges that are nontaxable through the provider's books and records kept in the regular course of business. If the nontaxable charges cannot reasonably be identified, the charges from the sale of both nontaxable services and taxable telecommunications services are attributable to taxable telecommunications services. The provider of telecommunications services has the burden of proving nontaxable charges.

(e) Resale of tangible personal property. See §3.285 of this title (relating to Resale Certificate; Sales for Resale).

(1) Transfer of tangible personal property to the care, custody and control of the purchaser. A telecommunications service provider may claim a resale exemption on the purchase of tangible personal property that is transferred by the telecommunications service provider to the care, custody, and control of the purchaser. A telecommunications service provider must collect sales tax on charges for such items.

(2) Wireless voice communication devices. A person may claim a resale exemption on the purchase of a cell phone or other wireless voice communication device as an integral part of a taxable service, regardless of whether there is a separate charge for the wireless voice communication device or whether the purchaser is the provider of the taxable telecommunications service, if payment for the service is a condition for receiving the wireless voice communication device. For example, if a person signs a contract for the purchase of telecommunications services at the location of a retailer and the retailer sells the person a cell phone as a condition of entering the contract for the telecommunications services that will be provided by someone other than the retailer, the retailer can purchase the cell phone tax free with a properly completed resale certificate.

(f) Resale of a telecommunications service. See §3.285 of this title.

(1) Sales tax is not due on the charge by one telephone company to another for providing access to a local exchange network. The telecommunications service provider must collect sales tax from the final purchaser on the total charge for the taxable service including the charge for access.

(2) A telecommunications service may be purchased tax free for resale if resold by the purchaser as an integral part of a taxable service. The purchaser must give the service provider a properly completed resale certificate to purchase the telecommunications service tax free for resale. A telecommunications service is an integral part of a taxable service if the telecommunications service is essential to the performance of the taxable service and without which the taxable service could not be rendered. For example, an Internet access service provider (ISP) may give a resale certificate when purchasing

the dedicated dial-up line services to be used by the ISP's customers. However, the ISP must pay sales tax when purchasing its own personal or business use of telecommunications services such as charges for its office phone lines, mobile telecommunications services for its traveling salespersons, or for a customer service call-center.

(3) A mobile telecommunications service provider may purchase roaming services from another mobile telecommunications service provider tax free for resale to its customers that are using the roaming services. For example, an out-of-state mobile telecommunications service provider purchases roaming services in Texas for resale to its out-of-state customers (i.e., persons who have a place of primary use outside Texas). To be exempt from sales tax, the out-of-state mobile telecommunications service provider must give the seller of the roaming services a resale certificate showing either a Texas sales tax permit number or the sales tax permit number or registration number issued by its home state. Effective for billing periods that begin on or after August 1, 2002, these out-of-state customers do not owe Texas sales tax on roaming charges incurred while visiting or traveling through Texas.

(g) Taxable purchases. Subject to the provisions of subsections (e) and (f) of this section, a telecommunications service provider owes sales or use tax on all tangible personal property and services that are used to provide the service. See §3.346 of this title (relating to Use Tax), §3.281 of this title (relating to Records Required; Information Required), and §3.282 of this title (relating to Auditing Taxpayer Records).

(h) Local tax.

(1) Subject to the provisions of paragraph (2) of this subsection, jurisdictions that impose local sales and use taxes may repeal the local sales tax exemption on telecommunications services. See Publication 96-339 (Jurisdictions That Impose Local Sales Tax on Telecommunications Services) for a list of jurisdictions that impose local taxes on telecommunications services.

(2) Taxable interstate long-distance telecommunications are only subject to state sales tax. Local taxing jurisdictions may not repeal the local sales tax exemption on interstate long-distance telecommunications services.

(3) A seller of taxable telecommunications services, with the exception of mobile telecommunications services as explained in paragraph (4) of this subsection and prepaid wireless telecommunications services as explained in paragraph (6) of this subsection, must collect local sales taxes based on the location from which the telecommunications service originates. If the point of origin cannot be determined, the telecommunications service provider must collect local taxes based on the address to which the telecommunications service is billed.

(4) A seller of mobile telecommunications services must collect local sales taxes based on the place of primary use as defined in subsection (a)(8) of this section and per Tax Code, §151.061. The location from which a mobile telecommunications service originates does not determine whether the service is exempt or is subject to state or local sales tax.

(5) A seller of telephone prepaid calling cards is not selling a telecommunications service and must collect state and local sales or use tax on the sale of the cards in the same manner as sales of other tangible personal property.

(6) A seller of prepaid wireless telecommunications services as defined in subsection (a)(9) of this section must collect local tax based on the business address of the seller when the sale occurs in Texas in person. However, if the sale occurs over the telephone or Internet, tax is due if the primary business address of the purchaser or residential address of the purchaser is in Texas.

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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For further information, please call: (512) 475-0387

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## SUBCHAPTER MM. TEXAS PREPAID WIRELESS 9-1-1 EMERGENCY SERVICE FEE

### 34 TAC §3.1271

The Comptroller of Public Accounts adopts new §3.1271, concerning prepaid wireless 9-1-1 emergency service fee, with changes to the proposed text as published in the April 2, 2010, issue of the *Texas Register* (35 TexReg 2733).

The new section will be in new Subchapter MM, Texas Prepaid Wireless 9-1-1 Emergency Service Fee. The new section implements House Bill 1831, 81st Legislature, 2009, which creates this new fee, effective June 1, 2010, through the creation of Health and Safety Code, §771.0712. The fee is imposed at the rate of 2.0% of the purchase price of prepaid wireless telecommunications services that permit access to 9-1-1 emergency services that are purchased through whatever means. The comptroller is required to adopt rules to implement the new fee by June 1, 2010 and administer the collection of the fee in a manner consistent with Tax Code, Chapter 151.

The agency received comments on the proposed rule. The comments and the agency's responses are as follows:

Stacy Sprinkle Vice President - State Tax Policy, Mid-west Area Verizon Wireless provided the following comments:

By being one of the first states to adopt a legislative solution to mandate collection of 911 fees at the retail point of sale ("POS") with respect to prepaid wireless service, Texas did not have the benefit of the trend, which has since become evident, of other states' enactments based on model prepaid wireless 911 retail POS statutory language from the National Conference of State Legislatures ("NCSL") Executive Committee Task Force on State & Local Taxation of Communications and Electronic Commerce (the "NCSL Model"), promulgated in July 2009. As more states adopt the retail POS solution, this will expand the universe of persons who collect and remit 911 fees from a relatively small group of historical collectors--generally, service providers--to general retailers. With the group of fee collectors expanding, we believe that greater uniformity across the states will enhance retailer compliance. We also believe that uniformity between the regulations required by THSC §771.0712 and other states' implementation of the NCSL Model is achievable, because there are no apparent inconsistencies between THSC §771.0712 and the NCSL Model. Thus, we advocate adopting a regulation that follows the NCSL Model, thereby accomplishing the Legislature's mandate to implement a POS method of collecting 911 fees on

prepaid wireless services when the services are sold while also providing retailers with the benefit of greater multistate uniformity.

As discussed in our meeting, we see three primary areas of concern where the proposed regulations unnecessarily deviate from the NCSL Model.

The first concern is with the definition of "prepaid wireless telecommunication service," which captures any 911-capable wireless service that is "paid for in advance." However, payment in advance is only one of the two fundamental aspects of prepaid wireless service. The other is that the service will only function, permitting calls to be made, if the customer has a positive prepaid balance. By incorporating only the first aspect of true prepaid wireless service, the proposed regulation's unnecessarily broad definition will arguably capture wireless service plans that are currently--and correctly--treated as postpaid wireless service plans that are subject to the monthly fee imposed under THSC §771.0711. The NCSL Model avoids this potential duplication by defining "prepaid wireless telecommunications service" as "a wireless telecommunications service that allows a caller to dial 911 to access the 911 system, which service must be paid for in advance and is sold in predetermined units or dollars of which the number declines with use in a known amount." That is, when the number of predetermined units or dollars declines to zero, there is no more service available to be used. Accordingly, we recommend that the proposed regulation incorporate the definition of prepaid wireless telecommunications service from the NCSL Model. Furthermore, given that the regulation will need to accommodate future pricing structures that are currently unknown, we also recommend that the regulation be amended to explicitly preclude the application of the fee imposed under THSC §771.0712 to any service that is subject to the emergency service fee for wireless telecommunications connections under THSC §771.0711.

The second concern is with the language contained in §3.1271(d)(4)(B). The purpose of this provision is unclear and appears to goes beyond the statutory mandate--which only extends the 911 fee to the purchase of wireless prepaid services sold in retail transactions. If your concern is that service could be purchased for resale but then consumed instead of sold, this can be addressed in the provision governing sales for resale, without creating a broad use-tax-type provision that is arguably not authorized by the statute.

The last concern is the requirement in §3.1271(e) that sellers determine "primary place of use" to source telephone and Internet sales. First, we note that the actual term is "place of primary use" ("PPU"), not "primary place of use." But, more importantly, we are concerned that by using this postpaid-only term in the prepaid context, the regulation seems likely to create uncertainty for sellers and for the Comptroller, which may even lead to unnecessary litigation. As the regulation notes, PPU is defined in Tax Code §151.061, which in turn implements the requirements of the federal Mobile Telecommunications Sourcing Act, 4 U.S.C. §§116 et seq. (the "MTSA"). Because the MTSA does not apply to prepaid services, id. §116(c)(1), the regulation's incorporation of PPU may unintentionally provide sellers with a legal basis for claiming that they have no obligation to collect the 911 fee with respect to Internet or telephone sales. The resulting uncertainty is unnecessary. Instead of creating grounds for future litigation, we recommend that the regulation simply incorporate the rules for sourcing sales to Texas for sales tax purposes. By doing so, the regulation will avoid the doubt created by incorporating the inapplicable MTSA PPU concept, and will also permit retailers to piggyback their existing sales-tax methods for sourcing sales to Texas--thereby enhancing compliance.

Response: The comptroller deviated from the NCSL model where and when it was necessary to secure the interest of this state and to more effectively administer the fee.

Gilbert Bernal, Attorney with Stahl, Bernal and Davies, L.L.P provided the following comments:

Subsection (b)(7). This subsection states the definition of "mobile telecommunications service." This definition is confusing in that it correctly references the definition of commercial mobile radio service ("CMRS") in 47 C.F.R. 20.3, but then it mentions the Mobil Telecommunications Sourcing Act ("MTSA"). Subsection (b)(7) then states that the definition of "mobile telecommunications service" does not include "telephone prepaid calling cards." There is a definition of "telephone prepaid calling service" in MTSA, which is generally believed to mean prepaid wireless. MTSA does not apply to such service. However, prepaid wireless is CMRS. The definition should just stop at the CFR reference to CMRS.

Response: The comptroller's office does not agree with the statement concerning the use of the term "telephone prepaid calling card" as a reference to prepaid wireless services but believes the reference in the MTSA to be a reference to long distance calling cards instead. No adjustment was made to the rule as proposed.

Subsection (d)(1). The proposed rule states: "(T)he fee shall be collected by the seller from the purchaser at the time of and with respect to each retail sale of prepaid wireless telecommunication services in this state and with respect to each sale of prepaid wireless telecommunication services whose primary place of use is in this state." It would be better to state here that the fee pertains to the "retail purchase" since that is the defined term, and not "retail sale." Further, "primary place of use" should be deleted because this term has no application to prepaid wireless.

Response: We accept the suggestion and subsection (d)(1) is amended for adoption to reflect that the fee pertains to a "retail transaction" instead of a "retail purchase." We do not agree that the sourcing provisions relating to place of primary use under the Mobile Telecommunications Sourcing Act do not apply to all prepaid wireless services. However, we are changing the sourcing provisions in subsection (e) to be consistent with those under §3.344 of this title relating to sales and use taxes imposed on telecommunications services.

Subsection (d)(4)(A) and (B). The proposed rule states: (4) A seller is liable for the fee on: (A) the retail price; or (B) the value of a prepaid wireless telecommunication service not sold at retail but used by a seller or other person in Texas. Subsection (d)(4)(A) of the proposed rule is very confusing and unnecessary in light of the fact that under subsection (d)(1), the fee is collected by the seller from the purchaser, and under subsection (f)(1), the sellers report the collected fees to the Comptroller. As for subsection (d)(4)(B), we simply do not understand what situation is meant to be covered by that subsection and would need an explanation of that in order to comment on whether the language used there works or not. In summary, we suggest that paragraph (4)(A) and (B) be deleted until such time as the proposed rule is redrafted so that it can be clarified and better understood.

Response: The general purpose of this rule is to clarify the treatment of and provide guidance on areas not clearly provided for

by statute. Subsection (d) addresses the imposition and collection of the fee and subsection (d)(4) addresses the use of prepaid wireless services that are not subject to a retail transaction, but on which the fee is also due.

Subsection (e). The proposed rule states: "(e) Sourcing. A sale of prepaid wireless telecommunication services is deemed to have occurred in this state when the transaction occurs at a business location in this state or if the transaction would be treated as occurring in the state as provided for under Tax Code, §151.061. Each seller of a prepaid wireless telecommunication service must determine the primary place of use for each purchase of prepaid wireless telecommunication service made by telephone and over the Internet. The fee is due when the primary place of use is in Texas. The term 'primary place of use' has the same meaning as in Tax Code, §151.061." The pertinent provisions of Tax Code §151.061 in subsection (a)(2) state: "'Place of primary use' means the street address that is representative of where the customer's use of the mobile telecommunications service primarily occurs. That location must be the residential street address or the primary business street address of the customer that is within the licensed service area of the home service provider." My comments regarding subsection (e) relate to the problem of attributing "place of primary use" to prepaid wireless service customers. As stated above, this term has no application to prepaid wireless. In fact, in the 911 fee litigation that is still pending against CSEC, the prepaid wireless carriers have argued that the concept of "place of primary use" as envisioned by the provisions of §151.061 does not apply to prepaid customers. Nothing in the Travis County District Court's ruling and judgment that the 911 fee in Chapter 771 of the Texas Health and Safety Code does not apply to prepaid wireless service in any way rejected those arguments. Further, there may be instances where it may not be possible to obtain the residential street address or primary business street address of the customer. Therefore, we suggest that the sourcing provisions of subsection (e) be based simply on the residential street address or primary business street address of the customer as provided by the customer, and if these addresses are not provided, then the address tied to the customer's credit card be used as an option for sourcing.

Response: As explained above, we are changing the sourcing provisions in subsection (e) to be consistent with those under §3.344 of this title relating to sales and use taxes imposed on telecommunications services.

Patrick Tyler, General Counsel, Texas Commission on State Emergency Communications (CSEC) submits the following comments to the Comptroller of Public Accounts' (Comptroller) on proposed new §3.1271. CSEC is the state's authority on emergency communications and is responsible for administering the implementation of 9-1-1 service to approximately eighty-nine percent of the geographical area of Texas and one-third of its population. The state 9-1-1 program is implemented by Texas' twenty-four Regional Planning Commissions and funded through CSEC's legislative appropriations. CSEC offers these comments to help ensure that the prepaid wireless 9-1-1 emergency service fee is competitively neutral and applied in a non-discriminatory manner.

Subsection (b)(1): Consumer: Modify to add the term "subscriber" to the definition as the term is used several times in Health and Safety Code Chapter 771 and is synonymous with "consumer." Delete the phrase "of prepaid wireless telecommunications service" because the phrase is included in the definition in subsection (b)(4) of "Retail purchase." Subsection (b)(3): Prepaid wireless telecommunication service: Change "mobile telecommunication service" to the defined term in subsection (b)(7) "mobile telecommunications service."

Response: The comptroller acknowledges the suggestion and the rule has been amended to add subscriber but declines to delete the phrase "of prepaid wireless telecommunications service." We are also making the correction so "mobile telecommunications service" is consistent with the defined term.

The phrase "paid for in advance," without further qualification, could be read as applying to some "post-paid" wireless telecommunications service. In some instances, customers "pay in advance" the base price for their wireless telecommunications services. The definition could be modified to clarify that in a prepaid arrangement the consumer is not obligated to make additional purchases and/or that payment for services, including taxes and fees, are entirely paid for in advance.

Response: The comptroller accepts the suggestion and subsection (b)(4) has been amended.

Retail Purchase: The phrase "sale for" should be inserted before the term "resale" in order to mirror the defined term in subsection (b)(5).

Response: The comptroller accepts the suggestion and subsection (b)(6) has been amended.

Subsection (b)(7) Seller: The second use of the term "person" should be replaced with the term "consumer," which is defined in subsection (b)(1) to include a person.

Response: The comptroller accepts the suggestion and the rule has been amended.

Subsection (b)(8) Mobile telecommunications service: The word "services" should be added to the term "prepaid wireless" in the second sentence in order to mirror the definition found in §3.344(b)(6).

Response: The comptroller does not accept the suggestion. Based on other comments received we are removing the term prepaid wireless from the definition of mobile telecommunications service in this section and under §3.344 of this title relating to sales and use taxes imposed on telecommunications services.

Subsection (c)(1): Delete the phrase "of prepaid wireless telecommunication services" after the word "seller" because "seller" is defined in subsection (b)(6) as a person "who sells prepaid wireless telecommunications service."

Response: The comptroller accepts the suggestion and the rule has been amended.

Subsection (d): Replace the term "purchaser" with the defined term "consumer" in subsection (b)(1). Replace both instances of the phrase "sale of prepaid wireless telecommunications services" with the defined term "retail purchase" in subsection (b)(4). Insert "of mobile telecommunications service" after the phrase "primary place of use" to make clear that the phrase applies specifically to mobile telecommunications service. Replace all instances of the phrase "primary place of use" with "place of primary use" in order to be consistent with the Tax Code, the Sourcing Act, and §3.344.

Response: The comptroller only accepts the suggestion to replace the term "purchaser" with the defined term consumer in subsection (b)(1) and the rule has been amended. Due to an-

other suggestion the term "place of primary use" is now deleted from the rule entirely.

Replace "prepaid wireless telecommunications service" in subsection (d)(1) with the defined term "retail purchase" in subsection (b)(4). Replace "service is purchased" with "retail transaction is made" in order to consistently use defined terms.

Response: The comptroller does not accept the suggestion and the rule has not been amended.

Modify the list of documents in subsection (d)(3) on which the fee may be separately stated to mirror those listed in subsection (b)(5).

Response: The comptroller accepts the suggestion and the rule has been amended.

In subsection (d)(4) delete "of prepaid wireless telecommunication services or wireless service provider," because the term "seller" is defined in the rule as "a person who sells prepaid wireless telecommunication services."

Response: The comptroller does not accept the suggestion and the rule was not amended.

Modify the list of documents in subsection (d)(5) on which the fee may be separately stated to mirror those listed in subsection (b)(3).

Response: The comptroller accepts the suggestion and the rule has been amended.

In subsection (d)(6), delete everything after the word "allowed" and insert "except as provided in Health and Safety Code §771.074." Section 771.074 exempts the state and federal government from any fee or surcharge imposed by Subchapter D of Chapter 771. Subchapter D includes new §771.0712. Accordingly, the state and federal government are exempt from the prepaid wireless 9-1-1 emergency service fee.

Response: The comptroller acknowledges the suggestion but only amends the rule to provide an exemption for this state and the federal government. No references to the Health and Safety Code were added.

Subsection (d)(7)(A): Replace the first sentence in its entirety with: "Any seller in this state must collect the fee unless a valid and properly completed resale certificate is received from the purchaser." The term "seller" is defined in the rule as a "person who sells prepaid wireless telecommunications service." The term "fee" is defined to mean "the prepaid wireless 9-1-1 emergency service fee a seller collects from a consumer in the amount required under Health and Safety Code, §771.0712."

Response: The comptroller accepts the suggestion and the rule has been amended.

Subsection (e) Sourcing: Insert "retail purchase" after "A" in the first sentence and then delete "of a prepaid wireless telecommunication services." "Retail purchase" is defined in subsection (b)(4) to mean an individual purchase of prepaid wireless telecommunications service. Delete "of a prepaid wireless telecommunication service" after the word "seller" in the second sentence because "seller" is defined in subsection (b)(6) as a "person who sells prepaid wireless telecommunications services." Insert "retail" between the words "each" and "purchase" in the second sentence to make clear that the obligation to determine place of primary use is only applicable to retail purchases.

Response: We did not adopt these suggested changes. We are omitting all references to primary place of use.

Subsection (f)(1): Delete "of prepaid wireless telecommunication services" following the word "sellers" as the term seller is defined in subsection (b)(6) as "a person who sells prepaid wireless telecommunication services."

Response: The comptroller accepts the suggestion and the rule has been amended.

Subsection (j)(1): Replace "persons subject to collecting the fee" with the defined term "sellers" in subsection (b)(6). Subsection (j)(2): Replace "person who is liable for collecting the fee" with the defined term "seller" in subsection (b)(6). Subsection (j)(3): Replace "person" with the defined term "seller" in subsection (b)(6).

Response: The comptroller acknowledges these suggestions but only amends the rule to add the seller as an option.

Subsection (k): Is the term "purchasers" intended to denote the defined term "consumer"? If not, is purchaser intended to denote a subset of consumers?

Response: The comptroller accepts the suggestion and the rule has been amended.

Subsection (l)(1), (2), and (3): Replace "taxpayer" with the defined term "seller" in subsection (b)(6). Alternatively, the definition of seller could be modified to include "taxpayer."

Response: The comptroller accepts the suggestion and the rule has been amended.

Subsection (m)(1) and (2): Replace "purchaser" with the defined term "consumer" in subsection (b)(1). Paragraph (4)(A)(ii): Modify to mirror the list of documents in subsection (d)(3) and (5). Paragraph (4)(A)(iii); Insert "retail" before the word transaction to make the reference be to a defined term. Paragraph (4)(A)(iv): Replace "item(s)" with "service(s)" to reflect that the fee is imposed on the purchase price of services.

Response: The comptroller accepts the suggestion and the rule has been amended.

Kathy Hamilton, General Attorney, AT&T Texas, following are Southwestern Bell Telephone Company d/b/a AT&T Texas' ("AT&T Texas") comments on the Comptrollers proposed new §3.1271 ("proposed rule") which Implements the prepaid 911 emergency services fee created by Texas Health and Safety Code §771.0712 ("§771.0712"). For ease of consideration, AT&T Texas' comments are presented below consistent with the order of the proposed rule.

Definitions: Proposed §3.1271(b). AT&T Texas recommends the following changes to the "definitions" section of the proposed rules. These changes are necessary to bring the rules in line with the statutory obligations under §771.0712.

Proposed §3.1271(b)(4) should be amended to define "retail transaction" and not "retail purchase." §771.0712 states that the fee shall be collected "at the time of each retail transaction ... ." Consequently, the rules should be amended to reflect this specific statutory language. Additionally, in order to ensure the consistent use of definitions throughout the rules, the reference to "resale" should be amended to state "a sale for resale," which is defined under proposed §3.1271(b)(5).

Response: The comptroller accepts the suggestion and the rule has been amended.

Similarly, the definition of "consumer" in proposed §3.1271(b)(1) should be amended to state "a customer, person, or purchaser who makes a retail transaction as defined by this section."

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

The definition of "mobile telecommunications service" should be amended to state that the "term includes, but is not limited to" the listed examples. This change will ensure the definition is not tied to any specific technologies. Further, "paging services" should be deleted a listed example of a "mobile telecommunication service."

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

A new definition for "purchase price" should be added as follows: "'Purchase Price' shall have the same meaning as 'sales price' in §151.007. Tax Code." This definition is necessary because proposed §3.1271(d)(2) implements the fee on the "purchase price of each prepaid wireless telecommunications service," and "purchase price" is not currently defined.

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

The proposed definition of "wireless service provider" should be deleted in whole because the definition is unnecessary. The term "wireless service provider" appears only one additional time in the proposed rule (see proposed §3.1271(d)(4)), which, as discussed further below, is improper in that instance as well). Section 771.0712 places no obligation on a "wireless service provider," instead placing all obligations on the "seller" to collect and remit the prepaid 911 emergency services fee.

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Registration: Proposed §3.1271(c): AT&T Texas' sole comment on this section is that any bond or other security required under proposed §3.1271(c)(2) shall be consistent with Chapter 151, Tax Code. Such a requirement is consistent with §771.0712's requirement that the fee be collected and remitted consistent with Chapter 151, Tax Code.

Response: The comptroller accepts the suggestion and the rule has been amended.

Imposition and Collection of Fee: Proposed §3.1271(d): AT&T Texas recommends the following changes to the "imposition and collection of fee" section of the proposed rules. These changes are necessary to make the rules consistent with the statutory obligations in §771.0712.

Proposed §3.1271(d)(1) should be amended to read as follows: "(1) Effective June 1, 2010, the fee shall be collected by the seller from the consumer at the time of and with respect to each retail transaction of prepaid wireless telecommunication service occurring in this state." These changes are necessary to make the proposed rules consistent with §771.0712, which states that the fee is "collected by the seller from the consumer at the time of each retail transaction of prepaid wireless telecommunications service occurring in this state." Additionally, the current reference to the "place of primary use" to source the fee is inappropriate. The issue of sourcing is addressed in proposed §3.1271(e). As discussed in detail below, the fee should be sourced consistent with any other retail transaction, and such sourcing does not involve identifying the "place of primary use."

Response: The rule is amended to strike the reference to place of primary use, but no other changes are made to this version as filed for adoption.

Proposed §3.1271(d)(3) should be amended to state that "the amount of the fee shall be separately stated on ... that is provided to the consumer by the seller, or otherwise disclosed to the consumer by the seller."

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Additionally, this subsection should be amended to state that, in addition to "any other tax or fee imposed by Tax Code, Title 2," the fee is not subject to any other tax or fee "by any political subdivision of this state, or by any intergovernmental agency." This provision will ensure that there is no double taxation of the fee, either at the state or local level.

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Proposed §3.1271(d)(4) should be deleted in its entirety. This section attempts to place an obligation on a seller or wireless service provider to "owe" the fee and is inconsistent with §771.0712. For the following reasons, this obligation is inappropriate and should be removed from the proposed rule. First, §771.0712 places the obligation on the seller to collect and remit. Thus, as with the sales tax (on which the prepaid 911 emergency services fee is modeled), the ultimate obligation to pay the fee is on the consumer, and the seller's obligation is to collect and remit to the Comptroller. Second, §771.0712 places no obligation on a "wireless service provider," instead placing all obligations on the "seller" to collect and remit the prepaid 911 emergency services fee. Thus including "wireless service provider" under this proposed section is inappropriate and inconsistent with §771.0712.

The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

In place of proposed §3.1271(d)(4), AT&T Texas recommends the Comptroller adopt the following, which accurately reflects responsibility under §771.0712: "The Fee is the obligation of the consumer and not of the seller or of any provider of prepaid wireless telecommunications service, except that the seller shall be obligated, as provided by this section. to remit to the comptroller the Fees that the seller collects from consumers. Consistent with Chapter 151. Tax Code, a seller has no obligation to pursue collection of the fee from the consumer if the consumer fails or refuses to pay."

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

For clarification, proposed §3.1271(d)(5) should be amended to read as follows: "If, on the invoice, receipt, other similar document, or disclosure related to a sale, charges for items that are not subject to the fee are combined with and not separately stated from charges subject to the fee, and a seller cannot identify the portion of the charges that are not subject to the fee through the seller's books and records kept in the regular course of business, then all charges related to the sale are subject to

the fee. The seller of prepaid wireless services has the burden of proving what charges are not subject to the fee. "

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Proposed §3.1271(d)(7) regarding "sale for resale" should be deleted and replaced with the following: "The comptroller shall establish procedures for a seller to document that a sale for resale is not a retail transaction under this section. The procedures shall substantially conform to procedures for documenting a sale for resale under Chapter 151 Tax Code." This change will ensure that, consistent with legislative intent, the sale for resale provisions conform with those already in place under Chapter 151, Tax Code. In order to ensure prepaid wireless service is not subjected to multiple 911 fees, the following new subsection should be added to proposed §3.1271(d) as follows: "Prepaid wireless telecommunications service subject to the fee is not subject to the C emergency services fee for wireless telecommunications connections in Section 771.0711, Health & Safety Code."

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Sourcing: Proposed §3.1271(e): As discussed above, proposed §3.1271(e) provides the necessary definition of what constitutes "occurring" in this state for purposes of the fee, i.e. sourcing of the fee. AT&T Texas agrees that the new prepaid wireless 911 emergency services fee should be sourced according to Chapter 151 of the Tax Code. However, for the following reasons §151.061, Tax Code (as in the proposed rule) is not the appropriate sourcing provision. Instead, the proposed rules should make generic reference to sourcing under Chapter 151 of the Tax Code in order to allow the fee to be applied in the same manner as the sales and use tax is applied to other Texas retail transactions.

First, §151.061, Tax Code reflects Texas' adoption of the Federal Mobile Telecommunications Sourcing Act, Pub. L. No. L06-252, 114 Stat. 626, codified at 4 U.S.C. §§116-126 ("MTSA"). MTSA §116(c)(1) specifically excludes prepaid wireless telecommunications service from the MTSA sourcing rules. This is because, by its nature, the place of primary use provisions in the mobile telecommunications sourcing rules are inapplicable to prepaid wireless service. Consequently, consistent with the federal rules, §151.061, Tax Code does not apply to prepaid wireless telecommunications service, and cannot serve as the basis for sourcing under the proposed rules. Rather, for purposes of the fee, the sale of prepaid wireless telecommunication services should be sourced in the same manner as the sale of prepaid telecommunications services (including prepaid wireless services) are sourced for purposes of the Texas sales tax, i.e., as the sale of tangible personal property.

Second, §771.0712 explicitly states that the fee is "two of the purchase price" and is "collected by the seller from the consumer at the time of each retail transaction." Further, §771.0712 states that the fee shall be collected and remitted "consistent with Chapter 151, Tax Code," which governs sales and use tax in Texas. Taken together, these provisions make it clear that the fee is to be collected on the "retail transaction" (and not the service itself) and should be administered consistent with existing sourcing procedures for the sales and use tax. Thus, the sourcing of the fee should be consistent with the sourcing of prepaid telecommunications services in Texas (i.e., as the sale of tangible personal property), which, as discussed above, is not governed by Tax Code §151.061.

Consequently, specific citation to §151.061 in the proposed rule is inappropriate. AT&T Texas instead recommends that this section of the proposed rule be amended to make generic reference to sourcing under Chapter 151 of the Tax Code. By doing so, retailers will be required to collect the fee consistent with how they currently collect the sales and use tax for other Texas retail sales of tangible personal property. This was the result mandated by §771.0712, and should thus be reflected in the adopted rule.

Response: We do not agree that the sourcing provisions relating to place of primary use under the Mobile Telecommunications Sourcing Act do not apply. However, we are changing the sourcing provisions in subsection (e) to be consistent with those under §3.344 of this title relating to sales and use taxes imposed on prepaid wireless telecommunications services.

Audits: Proposed §3.1271(k): AT&T Texas' sole comment on this section is that proposed §3.1271(k) should be amended to state that any audit may be performed concurrent with an audit performed pursuant to Chapter 151, Tax Code. Inclusion of this provision will ensure that synergies between audits performed pursuant to proposed §3.1271 and otherwise under Chapter 151, Tax Code can potentially be taken advantage of by the Comptroller.

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Ron Hinkle, Ratliff Company provided the following comments: By being one of the first states to adopt a legislative solution to mandate collection of 911 fees at the retail point of sale ("POS") with respect to prepaid wireless service, Texas did not have the benefit of the trend, which has since become evident, of other states' enactments based on model prepaid wireless 911 retail POS statutory language from the National Conference of State Legislatures ("NCSL") Executive Committee Task Force on State & Local Taxation of Communications and Electronic Commerce (the "NCSL Model"), promulgated in July 2009. As more states adopt the retail POS solution, this will expand the universe of persons who collect and remit 911 fees from a relatively small group of historical collectors--generally, service providers--to general retailers. With the group of fee collectors expanding, we believe that greater uniformity across the states will enhance retailer compliance. We also believe that uniformity between the regulations required by THSC §771.0712 and other states' implementation of the NCSL Model is achievable, because there are no apparent inconsistencies between THSC §771.0712 and the NCSL Model. Thus, we advocate adopting a regulation that follows the NCSL Model, thereby accomplishing the Legislature's mandate to implement a POS method of collecting 911 fees on prepaid wireless services when the services are sold while also providing retailers with the benefit of greater multistate uniformity.

The first concern is with the definition of "prepaid wireless telecommunication service," which captures any 911-capable wireless service that is "paid for in advance." However, payment in advance is only one of the two fundamental aspects of prepaid wireless service. The other is that the service will only function, permitting calls to be made, if the customer has a positive prepaid balance. By incorporating only the first aspect of true prepaid wireless service, the proposed regulation's unnecessarily broad definition will arguably capture wireless service plans

that are currently--and correctly--treated as postpaid wireless service plans that are subject to the monthly fee imposed under THSC §771.0711. The NCSL Model avoids this potential duplication by defining "prepaid wireless telecommunications service" as "a wireless telecommunications service that allows a caller to dial 911 to access the 911 system, which service must be paid for in advance and is sold in predetermined units or dollars of which the number declines with use in a known amount." That is, when the number of predetermined units or dollars declines to zero, there is no more service available to be used. Accordingly, we recommend that the proposed regulation incorporate the definition of prepaid wireless telecommunications service from the NCSL Model. Furthermore, given that the regulation will need to accommodate future pricing structures that are currently unknown, we also recommend that the regulation be amended to explicitly preclude the application of the fee imposed under THSC §771.0712 to any service that is subject to the emergency service fee for wireless telecommunications connections under THSC §771.0711.

The second concern is with the language contained in §3.1271(d)(4)(B). The purpose of this provision is unclear and appears to goes beyond the statutory mandate--which only extends the 911 fee to the purchase of wireless prepaid services sold in retail transactions. If your concern is that service could be purchased for resale but then consumed instead of sold, this can be addressed in the provision governing sales for resale, without creating a broad use-tax-type provision that is arguably not authorized by the statute.

The last concern is the requirement in §3.1271(e) that sellers determine "primary place of use" to source telephone and Internet sales. First, we note that the actual term is "place of primary use" ("PPU"), not "primary place of use." But, more importantly, we are concerned that by using this postpaid-only term in the prepaid context, the regulation seems likely to create uncertainty for sellers and for the Comptroller, which may even lead to unnecessary litigation. As the regulation notes, PPU is defined in Tax Code §151.061, which in turn implements the requirements of the federal Mobile Telecommunications Sourcing Act, 4 U.S.C. §§116 et seq. (the "MTSA"). Because the MTSA does not apply to prepaid services, id. §116(c)(1), the regulation's incorporation of PPU may unintentionally provide sellers with a legal basis for claiming that they have no obligation to collect the 911 fee with respect to Internet or telephone sales. The resulting uncertainty is unnecessary. Instead of creating grounds for future litigation, we recommend that the regulation simply incorporate the rules for sourcing sales to Texas for sales tax purposes. By doing so, the regulation will avoid the doubt created by incorporating the inapplicable MTSA PPU concept, and will also permit retailers to piggyback their existing sales-tax methods for sourcing sales to Texas--thereby enhancing compliance.

Response: The comptroller deviated from the NCSL model where and when it was necessary to secure the interest of this state and to more effectively administer the fee. We do not agree that the sourcing provisions relating to place of primary use under the Mobile Telecommunications Sourcing Act do not apply. However, we are changing the sourcing provisions in subsection (e) to be consistent with those under §3.344 of this title relating to sales and use taxes imposed on telecommunications services.

Ronnie Volkening, Texas Retailer's Association provided the following: This draft follows the earlier proposal's wording and requirements, and in-line with other states that have implemented the collection of the E-911 fee by retailers during the past year. The only area I see that may cause an issue is with an exemption; subsection (d)(7). The draft mentions that only purchases for "resale" are exempt with the completion of a valid resale certificate and the acceptance in good faith by the retailer. It does not mention about exempt organizations that may purchase prepaid wireless services, such as churches, or organizations working with the homeless, or other shelters. Since these organizations are exempt for sales tax purposes, are they exempt from the E-911 fee? We may request some type of clarification within the proposed ruling. I do not see any other problems with the regulation.

Response: The comptroller acknowledges the suggestion but only amends the rule to provide an exemption for this state and the federal government to be consistent with the exemption provided under Health and Safety Code, §771.074.

Peter Lurie, Senior Vice President, Sprint Nextel, Prepaid Legal and Business Affairs submitted the following comments on behalf of Virgin Mobile USA: Without prejudice to litigation between the Commission on State Emergency Communications and Virgin Mobile USA, LP concerning the applicability of §771.0711, Texas Health and Safety Code, to certain of Virgin Mobile's Services, Sprint would like to propose amendments to the new §3.1271, concerning prepaid wireless 9-1-1 emergency service fee, in new Subchapter MM, Texas Prepaid Wireless 911 Emergency Service Fee.

Please note the following suggestions.

Section 3.1271(a). This subsection states that Chapter 151 of the Tax Code applies "as deemed necessary by the Comptroller." The quoted language should be struck. The Comptroller should state beforehand what sections do or do not apply.

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Section 3.1271(c). This subsection states that the Comptroller may require at 'its discretion' a prepaid seller to post a bond. This language should be struck or the Comptroller should set forth the circumstances in which a bond would be required.

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Section 3.1271(d)(3). This subsection speaks to a transaction "invoice, receipt, or other similar document." This subsection should be changed to read 'invoice, receipt, acknowledgement of other similar document or electronic communication' to capture transactions evidenced without physical documents.

Response: The comptroller accepts the suggestion in part and amends the rule to address electronic communications.

Section 3.1271(d)(4). This subsection appears to impose a tax on the seller of prepaid wireless. This subsection is inconsistent with the remainder of the rule and with §771.0712(a), Texas Health and Safety Code, which imposes the fee on the customer at the time of a retail transaction.

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Section 3.1271(d)(5). This subsection places the burden of proof on the seller to prove what charges are subject to or not subject

to the fee and the proof must be made by records kept in the ordinary course of business of the company. This language should be struck. As a taxing statute, the state has the burden of proof to show that the tax applies and a taxpayer should not be limited to records kept in the ordinary course of business if a question arises as to the applicability of the fee.

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Section 3.1271(d)(6). This subsection states that there are no exemptions to the fee except for sales for resale. The subsection should just say there are no exemptions or be struck in its entirety. Sales for resale are not an exemption because §771.0712(a), Texas Health and Safety Code, only applies to retail transactions.

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Section 3.1271(e). This subsection refers to the 'place of primary use' of the customer. Because prepaid carriers does not have a place of primary use under the Federal Mobile Telecommunications Sourcing Act, language should be added to the Rule to make clear that a seller can determine a customer's 'place of primary use' for the purpose of the §771.0712(a) fee based upon the street address associated with the credit card purchaser uses for purchases or, where this information is not available, upon a phone number that is associated with Texas.

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Section 3.1271(f)(3). This subsection concerns extension of deadlines in the Rule due to disasters. Language should be added to make clear that the seller can apply for the extension.

Response: Subsection (f)(3) tells a seller how to apply for the extension. Therefore, the comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Section 3.1271(h)(3). This subsection imposes a 50% penalty for evasion of fee. The language should make clear that a fraudulent intent is required. The subsection also imposes a penalty where records are changed to affect the course of an audit. As written, even a change to correct an error would impose a penalty. The language should be changed to make clear that the change must be fraudulent.

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Section 3.1271(j)(3). This subsection imposes criminal liability for record keeping violations. As written, even if a person has no intent to defraud, it purports to impose criminal liability. This subsection should be struck or rewritten in its entirety.

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

Section 3.1271(m)(6)(B). This subsection says that a person may not re-file a refund claim for the same reason that was previously denied by the Comptroller. Because the Comptroller is not the final authority on the applicability of the fee, this subsection should be struck.

Response: The comptroller does not accept the suggestion and no rule amendment is made to the version proposed for adoption.

The comptroller has also made additional changes to the rule not based on comments received. In subsection (b) we have reorganized the order of the terms so all are in alphabetical order.

The new section is adopted under Health and Safety Code, §771.0712(b), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of Health and Safety Code, §771.0712.

The new section implements Health and Safety Code, §771.0712 (Prepaid 9-1-1 Emergency Service Fee).

*§3.1271. Prepaid Wireless 9-1-1 Emergency Service Fee.*

(a) Application of Tax Code, Chapter 151. The statutory provisions, administrative rules, and agency policies applicable to Chapter 151 will apply as deemed necessary by the comptroller for administration of the fee to the extent not addressed expressly in this section.

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

(1) "Consumer" means a customer, person, purchaser or subscriber of a prepaid wireless telecommunication service or the user of a prepaid wireless telecommunication service.

(2) "Fee" means the prepaid wireless 9-1-1 emergency service fee a seller collects from a consumer in the amount required under Health and Safety Code, §771.0712.

(3) "Mobile telecommunications service" means the provision of a commercial mobile radio service, as defined in 47 C.F.R. 20.3 of the Federal Communications Commission's (FCC) regulations in effect on June 1, 1999 under the Mobile Telecommunications Sourcing Act (4 U.S.C. §§116-126). The term includes cellular telecommunications services personal communications services (PCS), specialized mobile radio services, wireless voice over Internet protocol services, and paging services. The term does not include telephone prepaid calling cards or air-ground radio telephone services as defined in 47 C.F.R. 22.99 of FCC regulations in effect on June 1, 1999.

(4) "Prepaid wireless telecommunication service" means a mobile telecommunications service that allows a person to access 9-1-1 emergency communication services and is paid for entirely in advance.

(5) "Purchase price" means the total amount paid for a prepaid wireless service, valued in money without a deduction for:

(A) the cost of items sold, leased, or rented with the service;

(B) the materials used, labor or service employed, interest, losses, or other expenses;

(C) the transportation or delivery; or

(D) other charges incident to the performance of a prepaid wireless service.

(6) "Retail transaction" means an individual purchase of a prepaid wireless telecommunication service from a seller for any purpose other than a sale for resale.

(7) "Sale for resale" means a sale of a prepaid wireless telecommunication service to a purchaser who acquires the service for the purpose of reselling it in the United States in the normal course of

business either in the form or condition in which it is purchased or as an integral part of a taxable item as defined by Tax Code, Chapter 151.

(8) "Seller" means a person who sells prepaid wireless telecommunication services to any consumer. The term includes "seller" and "retailer" as defined by Tax Code, §151.008.

(9) "Wireless service provider" means a provider of commercial mobile service under the Federal Telecommunication Act of 1996, §332(d), (47 U.S.C. §151 et seq.), Federal Communications Commission rules, and the Omnibus Budget Reconciliation Act of 1993 (Pub. L. No. 103-66), and includes a provider of wireless two-way communication service, radio-telephone communications related to cellular telephone service, network radio access lines or the equivalent, and personal communication service. The term does not include a provider of:

(A) a service whose users do not have access to 9-1-1 emergency services;

(B) a communication channel used only for data transmission;

(C) a wireless roaming service or other nonlocal radio access line service; or

(D) a private telecommunications service.

(c) Registration.

(1) Every seller must register to collect and remit the fee by completing and submitting to the comptroller Form AP-201, Texas Application for Sales and Use Tax Permit. A seller's registration number for purposes of collecting the fee will be the same as the seller's sales and use tax permit number.

(2) A bond or other security may be required at the comptroller's discretion. If a bond or security is required the provisions of Tax Code, §§151.251 - 151.260 will apply. A seller who registers for the prepaid wireless fee may be required to post a bond or security in an amount that is equal to four times the amount of the average monthly tax liability but the minimum amount may not be less than $500 and the maximum cannot exceed $100,000.

(d) Imposition and collection of fee.

(1) Effective June 1, 2010, the fee shall be collected by the seller from the consumer at the time of and with respect to each retail transaction of prepaid wireless telecommunication services in this state.

(2) The fee is 2.0% of the purchase price of each prepaid wireless telecommunication service sold by way of retail transaction or used by a seller in this state.

(3) The amount of the fee shall be separately stated on an invoice, receipt, electronic communication, or other similar document that is provided to the consumer by the seller and is not subject to any other tax or fee imposed by Tax Code, Title 2.

(4) A seller or a wireless service provider is liable for the fee on:

(A) the retail price; or

(B) the value of a prepaid wireless telecommunication service not sold at retail but used by a seller or other person in Texas. Examples of prepaid wireless telecommunication service not sold at retail but used by a person in Texas include:

*(i)* a seller of prepaid wireless telecommunication service provides free prepaid wireless service to its employees;

*(ii)* a seller of prepaid wireless telecommunication service provides free of charge prepaid wireless service to participants at a local golf tournament in exchange for the tournament displaying a banner or sign with the retailer's logo or name; and

*(iii)* a seller of prepaid wireless telecommunication service donates prepaid wireless calling cards to a local high school sports team booster club to be used in a silent action as part of a fund raiser.

(5) If charges for items that are not subject to the fee are combined with and not separately stated from charges subject to the fee on the consumer's invoice, receipt, electronic communication, or similar document for prepaid wireless telecommunication services, the combined charge is subject to the fee unless the seller can identify the portion of the charges that are not subject to the fee through the seller's books and records kept in the regular course of business. If the charges that are not subject to the fee cannot reasonably be identified, all charges related to the sale are subject to the fee. The seller has the burden of proving what charges are not subject to the fee.

(6) Exemptions. The fee imposed by this section may not be imposed on or collected from this state or the federal government. A person operating under a contract with the federal government is not exempt from the fee.

(7) Sales for resale.

(A) Every seller must collect the fee on services sold unless a valid and properly completed resale certificate is received from the purchaser. Evidence that a purchaser is properly registered with the comptroller for the collection of the fee is not sufficient to relieve the seller from the responsibility for collecting the fee without the issuance of a properly completed certificate. A properly completed resale certificate must show:

*(i)* the name and address of the purchaser;

*(ii)* the registration number held by the purchaser or a statement that an application for a registration is pending before the comptroller with the date the application for registration was made. If the application is pending, the resale certificate is valid for only 60 days, after which time the resale certificate must be renewed to show the permanent registration number. If the purchaser registered for the 911 prepaid wireless fee, the number must consist of 11 digits that begin with a 1, or 3. Federal employer's identification (FEI) numbers or social security numbers are not acceptable evidence of a purchase for resale;

*(iii)* the signature of the purchaser or an electronic form of the purchaser's signature authorized by the comptroller and the date; and

*(iv)* the name and address of the seller.

(B) A seller may accept a resale certificate only from a purchaser who is in the business of reselling the prepaid wireless telecommunication services within the geographical limits of the United States of America, its territories, and possessions.

(C) The seller must act in good faith when accepting the resale certificate. If a seller has actual knowledge that the exemption claimed is invalid, the seller must collect the fee.

(D) A person who intentionally or knowingly makes, presents, uses, or alters a resale certificate for the purpose of evading the fee is guilty of a criminal offense. An offense is:

*(i)* a Class C misdemeanor if the tax evaded by the invalid certificate is less than $20;

*(ii)* a Class B misdemeanor if the tax evaded by the invalid certificate is $20 or more but less than $200;

*(iii)* a Class A misdemeanor if the tax evaded by the invalid certificate is $200 or more but less than $750;

*(iv)* a felony of the third degree if the tax evaded by the invalid certificate is $750 or more but less than $20,000; and

*(v)* a felony of the second degree if the tax evaded by the invalid certificate is $20,000 or more.

(e) Sourcing. A retail transaction is deemed to have occurred in this state when the transaction occurs at a business location in this state or when the consumer's primary business address or residential address is in Texas. Each seller must determine the consumer's address for each retail transaction made by telephone and over the Internet. The fee is due when the consumer's primary business address or residential address is in Texas.

(f) Reports and due dates.

(1) All sellers must report collections of the fee on comptroller form 54-104 (Texas Prepaid Wireless 9-1-1 Emergency Service Fee Report). The fact that a seller does not receive the form or does not receive the correct form from the comptroller does not relieve the seller of the responsibility of filing a report and remitting the fees collected.

(2) Each report is due on or before the 30th day of the month following the end of each calendar quarter which is January 30, April 30, July 30, and October 30. The first report is due on or before July 30, 2010 and will cover the calendar month of June. Reports and payments due on Saturdays, Sundays, or legal holidays may be submitted on the next business day.

(A) Reports submitted by mail must be postmarked on or before the due date to be considered timely.

(B) Reports filed electronically must be completed and submitted by 11:59 p.m., central time, on the due date to be considered timely.

(C) Electronic Funds Transfer (EFT) system payments. To be considered timely, a payment submitted through an EFT system must enter into the applicable EFT program by 6:00 p.m., central time, on any day on or before the due date other than a weekend or banking holiday.

(D) A person who files tax reports and makes payments through the electronic data interchange (EDI) system must enter the payment information into the EDI system by 2:30 p.m., central time, to meet the 6:00 p.m. central time requirement that is noted in subparagraph (A) of this paragraph.

(E) If the due date falls on a weekend or banking holiday, payment information must be submitted by the time parameters noted in subparagraphs (A) and (B) of this paragraph on the business date prior to the due date to be considered timely. For more information see §3.9 of this title (relating to Electronic Filing of Returns and Reports; Electronic Transfer of Certain Payments by Certain Taxpayers).

(3) Extensions due to disasters. The comptroller may grant to a seller or other person whom the comptroller finds to be a victim of a disaster an extension of not more than 90 days to make or file a report or pay the fee. The person owing the fee may file a written request for an extension at any time before the expiration of 90 days after the original due date. If an extension is granted, interest on the unpaid fee does not begin to accrue until the day after the day on which the extension expires and penalties are assessed and determined as though the last day of the extension were the original due date.

(g) Seller compensation. A seller may deduct and retain 2.0% of the fees it collects during each report period to offset its costs in collecting and remitting the fee.

(h) Penalties.

(1) A penalty of 5.0% of the fee due shall be imposed upon a seller who fails to timely remit the fee imposed or file a report required by this section.

(2) If a seller fails to file the report or remit the fee within 30 days after the day on which the fee or report is due, an additional 5.0% penalty shall be imposed.

(3) An additional penalty of 50% of the fee due shall be imposed if it is determined that:

(A) the failure to remit the fee or file a report when due was a result of fraud or an intent to evade the fee; or

(B) the seller alters, destroys, or conceals any record, document, or thing, or presents to the comptroller any altered or fraudulent record, document, or thing, or otherwise engages in fraudulent conduct, for the apparent purpose of affecting the course or outcome of an audit, investigation, redetermination, or other proceeding before the comptroller.

(i) Interest. Interest due on unpaid, unremitted, or delinquent fees shall be imposed as provided by Tax Code, §111.060.

(j) Records required.

(1) All sellers or other persons subject to collecting and/or remitting the fee must keep adequate records in order to accurately determine the amount of fee due for a period of four years.

(2) The comptroller has the right to examine, copy, and photograph any records or equipment of any seller or other person who is liable for collecting the fee in order to verify the accuracy or any report or to determine the fee liability in the event that no report is filed.

(3) A seller or other person commits a criminal offense by intentionally or knowingly concealing, destroying, entering false information in, or failing to make an entry in, records that are required to be made or kept under this section.

(k) Audits. Records of sellers or consumers may be audited by the comptroller or the comptroller's representative. The audit will be performed by examining any records, books, or other information which are maintained by the seller or consumer. If the records are inadequate or do not accurately reflect the fees due, the auditor will base the audit report on the best available information.

(l) Statute of limitations for assessments.

(1) Unless otherwise provided by this section, the comptroller has four years from the date the fee becomes due and payable in which to assess a liability for unpaid fees. Before the expiration of the statute of limitations, the comptroller and a seller or consumer may agree in writing to an extension. The agreement must comply with the provisions of Tax Code, §111.203. An extension applies only to the periods specifically mentioned in the agreement. Any assessment or refund request pertaining to periods for which limitations have been extended must be made prior to the expiration date of the agreement. Following expiration of the agreement, the statute of limitations applies to subsequent assessments and refund requests as if no extension had been authorized.

(2) In cases of fraud, or if reports have not been filed, the statute of limitations does not apply and the comptroller may assess and collect fees, penalties, and interest at any time. The statute of limitations does not apply when information contained in the report of a

seller contains a gross error and the amount of fee due and payable after correction of the error is 25% or more greater than the amount initially reported.

(3) The statute of limitations does not apply to any period for which a seller has filed a timely claim for a refund. If, while investigating the merits of the refund claim, the comptroller determines that additional fee is due, an assessment may be made for that period until a final decision is made on the claim for refund.

(4) A redetermination proceeding does not toll the statute of limitations, except for the issues contested.

(m) Refund claims by registered sellers.

(1) Fees, penalties, or interest will not be refunded by the comptroller to a registered seller who has collected the fee in error from a consumer until all such fees are first refunded or credited with the consumer's written consent. A registered seller is entitled to claim a credit or request a refund of fees equal to the amount of fees refunded to a consumer when the consumer receives a full or partial refund of the sales price of a returned item subject to the fee.

(2) After the registered seller has refunded or credited the fee to the account of the consumer or when a seller has incorrectly reported the amount of the fee due on a report, the registered seller may then seek reimbursement from the comptroller in accordance with the procedures that are outlined in paragraph (4) of this subsection, or take a credit on a future report filed by the seller in the amount refunded or credited to the account of the consumer.

(3) Reports and documentation. The registered seller must retain all documentation that is necessary to support the refund or credit claimed.

(4) Requirements for refund claims filed with the comptroller.

(A) A registered seller who requests a refund from the comptroller must submit a claim in writing that identifies the period during which the claimed overpayment was made and must state fully and in detail the specific grounds upon which the claim is based, including, at a minimum, each of the following about each transaction upon which a refund is requested:

*(i)* consumer or seller's name, as appropriate;

*(ii)* invoice, receipt, electronic communication or similar document, if applicable;

*(iii)* date of retail transaction;

*(iv)* description of the services purchased or sold;

*(v)* specific reason for the refund, such as applicable statutory authority;

*(vi)* purchase or sale amount subject to refund; and

*(vii)* total amount of fee refund requested.

(B) A registered seller must submit the claim within the applicable limitations period as provided by paragraph (7) of this subsection.

(C) Supporting documentation required by the comptroller to verify any refund claimed or credit taken must be maintained and made available upon request.

(5) Interest.

(A) Except as provided by subparagraph (B) of this paragraph, in a comptroller's final decision on a claim for refund, interest accrues at the rate that is set in Tax Code, §111.064, on the amount that is found to be erroneously paid:

*(i)* beginning on the later of 60 days after the date of payment or the due date of the fee report; and

*(ii)* ending on, as determined by the comptroller, either:

*(I)* the date of allowance of credit that results from a final decision that the comptroller has issued, or from an audit; or

*(II)* a date that is not more than 10 days before the date of the refund warrant.

(B) Credits taken by a fee payer on the fee payer's report do not accrue interest.

(6) Denial of refund.

(A) If the comptroller determines that the claim for refund cannot be granted either partially or fully, then the comptroller will notify the claimant of the denial. Claimant may request a refund hearing within 30 days of the denial.

(B) A person may not re-file a refund claim for the same transaction or item, fee type, period, and ground or reason that was previously denied by the comptroller.

(7) Statute of limitations for refund claims.

(A) A claim for refund must be made within four years from the date on which the fee was due and payable.

(B) A claim for refund for a fee paid pursuant to a jeopardy deficiency determination must be made by the later of:

*(i)* four years from the date on which the fee was due and payable; or

*(ii)* six months after the date on which the jeopardy deficiency determination for the periods becomes final, and is subject to the restriction imposed by subparagraph (C) of this paragraph.

(C) A refund claim filed within six months after the date on which a jeopardy deficiency determination becomes final is within the limitations period for all items included in the jeopardy deficiency determination. A refund claim for all other items is subject to the limitations period in subparagraph (A) of this paragraph.

(D) Extension of limitations period. Before the expiration of the statute of limitations, the comptroller and a fee-payer may agree in writing to extend the limitation period in accordance with Tax Code, §111.203. An extension applies only to the periods specifically mentioned in the agreement and no single extension agreement may be for a period that exceeds 24 months from the date of the expiration of the limitations period being extended. Any refund request pertaining to periods for which limitations have been extended must be made prior to the expiration date of the agreement. Following expiration of the agreement, the statute of limitations applies to subsequent refund requests as if no extension had been authorized.

(E) A refund proceeding does not toll the statute of limitations, except for the issues contested.

(F) Failure to file a claim within the limitations prescribed by this section constitutes a waiver of any demand against the state on account of the overpayment.

(G) The informal review of a refund claim by the comptroller is not a hearing or contested case and does not toll the limitation

period for any subsequent claim for refund on the same period and type of fee for which the claim was fully or partially denied.

(n) Payments under protest. A person subject to collecting this fee may file suit under Tax Code, Chapter 112, Subchapter B. A person who intends to file a protest suit must submit to the comptroller a letter of protest with the payment of the fee that is the subject of the protest. See §3.9(e) of this title. The letter of protest must state fully and in detail every reason that the fee-payer contends that the assessment is unlawful or unauthorized and must accompany the payment. If the payment and letter of protest do not accompany one another, the payment will not be deemed to have been made under protest. For the fee-payer's convenience, the comptroller will advise the fee-payer of the amount of payment under protest that the comptroller has received and the date of the payment.

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 October 1, 2010.

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# CHAPTER 4. TREASURY ADMINISTRATION
# SUBCHAPTER A. POOLED COLLATERAL PROGRAM

**34 TAC §§4.100 - 4.121**

The Comptroller of Public Accounts adopts new Chapter 4, Treasury Administration, §§4.100 - 4.121. Sections 4.101, 4.104 - 4.118 and 4.120 are adopted with changes to the proposed text as published in the April 9, 2010, issue of the *Texas Register* (35 TexReg 2835) and will be republished. Sections 4.100, 4.102, 4.103, 4.119 and 4.121 are adopted without changes and will not be republished. The new chapter includes new Subchapter A, Pooled Collateral Program. Subchapter A implements Senate Bill 638, 81st Legislature, 2009. The rules within the subchapter establish administrative and procedural guidelines for a new program for a centralized pooled collateralization of deposits of public funds and for monitoring collateral maintained by participating depository institutions.

Section 4.100 explains the purpose of the rules and §4.101 contains the definitions applicable to Subchapter A. Section 4.102 contains the criteria for public entity eligibility and participation.

Sections 4.103 through 4.106 relate to depository institutions. Section 4.103 includes the criteria for depository institutions eligibility and participation. Section 4.104 explains the application process for depository institutions, and §4.105 includes the criteria for the comptroller's approval of a depository institution to participate in the pooled collateral program. Section 4.106 sets out the process for an approved depository institution or a public entity to voluntarily withdraw from the pooled collateral program.

Sections 4.107 through 4.112 relate to the collateral requirements for depository institutions and the designation of a custodian trustee. Section 4.107 contains the general collateral requirements and §4.108 sets out acceptable collateral to pledge for the pooled collateral program. Section 4.109 explains the required amount of collateral needed to secure the deposit of public funds, and the comptroller's market valuation of collateral securities. Section 4.110 discusses the process and requirements for the pledge and withdrawal of collateral securities. Section 4.111 covers the recovery of public deposits in the event a participating depository institution fails to satisfy a claim against the deposits of public funds or becomes insolvent. Section 4.112 explains the criteria for designation to act as a custodian trustee, and related requirements for participation as a custodian trustee in the pooled collateral program.

Section 4.113 sets out the reporting requirements for both the participating depository institutions and the comptroller, and provides that the reports will be posted on the comptroller's website. Section 4.114 relates to a public entity's deposits and related responsibility to review and monitor the accuracy of posted itemized deposit reports. Section 4.114 also requires a public entity to inform its participating depository institution of a significant change in the amount or activity of its deposits within a reasonable time before the change occurs.

Section 4.115 sets out record keeping requirements for depository institutions, custodian trustees and permitted institutions, and allows a public entity with deposits or collateral held in that institution to review the records pursuant to the terms of its account agreement. Section 4.116 concerns certification of compliance requirements for a participating depository institution. Section 4.117 covers compliance with applicable laws and venue.

Section 4.118 sets out the process for imposing an administrative penalty against a depository institution for failure to maintain collateral, to timely file a report, or to pay an assessment as required. The rule provides for notice of a violation, informal resolution, and a contested case process. Section 4.119 discusses the formula to determine penalty amounts for an administrative violation.

Section 4.120 discusses the required annual assessment of participating depository institutions to pay the costs of administering the pooled collateral program. Section 4.121 discusses contact information for the comptroller and pooled collateral program participants.

The agency received comments from seven interested individuals and groups on various aspects of the new rules. Comments recommending changes were submitted by The Federal Home Loan Bank of Dallas, the Texas Bankers Association, the Independent Bankers Association of Texas, Patterson & Associates, Wells Fargo Bank, N.A., Bank of America, and J.P. Morgan Chase Bank, N.A.

The following comments and responses are broken down by subject matter.

DEPOSIT OF PUBLIC FUNDS DEFINITION.

Wells Fargo Bank, N.A. submitted a comment on the definition of Deposit of Public Funds under §4.101(4) stating that it should include the term "savings deposit." The agency responds that the definition of deposit of public funds is taken from the definitions in Government Code, Chapter 2257, which apply to the entire chapter, including Subchapter F, Pooled Collateral to Secure Deposits of Certain Public Funds. The definition of Deposit of Public Funds found in §2257.002(3), does not include the term "savings deposit," and the agency will not disturb the definition.

DEPOSITORY INSTITUTION APPLICATION PROCESS.

J.P. Morgan Chase Bank, N.A., the Independent Bankers Association of Texas, Texas Bankers Association, Wells Fargo Bank N.A., commented on the depository institution application process in §4.104. J.P. Morgan Chase Bank, N.A., Wells Fargo Bank, and the Texas Bankers Association commented on the need to apply every two years. J.P. Morgan Chase, N.A. asked if the comptroller would use a renewal process for a participating depository institution in good standing so they would not be required to reissue every document required in the application process, or if the renewal application would coincide with the application process. Wells Fargo Bank N.A. proposed lengthening the time period that a depository institution would be approved to participate in the program or providing an exemption from the renewal process for adequately capitalized depository institutions. Texas Bankers Association suggested providing a time line for the approval process, including approval of the Collateral Security Agreement, to provide some certainty for the length of the application process.

The Independent Bankers Association of Texas commented that the two year approval term will not match the terms of certain public entity deposit contracts authorized in the Local Government Code, which may have longer terms. They suggested that there be clearly identified deadlines in advance of the expiration so that a public entity's participation in the program will not lapse.

The agency responds that it will use a two-year application and approval cycle to provide for a complete review and approval process for depository institutions. The two years will begin on September 1 of each odd-numbered year and end on August 31 of the next odd-numbered year. This process will enable the agency to fully review the applicant's updated information and best insure the validity and integrity of the program, which is in the best interest of the participants. The agency has determined that using a two-year term for the depository institutions can be coordinated with the state depository institution application process, and provide greater efficiencies for both the agency and the financial institutions. For these reasons, the agency will not use a renewal process for depository institutions already participating in the program, and will require that a new application with supporting documentation be submitted every two years.

The agency agrees that a timeline for the application process would provide some certainty to the length of the application process. To provide a time line for the approval process, and to avoid a lapse in participation at the end of each two-year approval cycle, the agency has revised §4.104(c) to include a notification of the upcoming application process to the depository banks from the agency by June 1st and a deadline of August 1st of each odd-numbered year for the agency to receive the application. However, an applicant may apply at any time during the two-year cycle.

The Texas Bankers Association and the Independent Bankers Association of Texas commented on §4.104(h) and the need for a reapplication or an appeal process for a depository institution that is not approved to participate in the program. The Independent Bankers Association of Texas commented that there is not a process to appeal a disapproved application. The Texas Bankers Association commented that there was no process or criteria to reapply to participate in the program, and requested a subsection to address reapplication. The Texas Bankers Association also commented that §4.105(d) establishes that the agency's decision to deny approval for a depository institution application is final, but does not establish for how long the decision is final, and suggests that the rules specifically include the timeframe after which a bank can reapply to participate in the pooled collateral program.

The agency responds that during the application process it will notify the applicant of any deficiencies in its application. If the agency finally disapproves a depository institution's application to participate in the program, it will notify the depository institution in writing of the basis of its decision, as set out in §4.104(i).

The agency further responds that it will provide an informal review process to appeal a disapproved application. The agency will add §4.104(j) to provide for an informal review process. Except as provided in §4.104(i), during the informal review process an applicant may not act as a participating depository institution. An applicant must request an informal review in writing, including the basis for the request and evidence that it has cured the deficiency in its application. The comptroller will complete an informal review on written submission and issue a final written decision.

The agency has added §4.104(l) to provide that after the informal review process, an applicant disapproved for a deficiency in its application may reapply for approval once the deficiency is cured. However, after the informal review process an applicant that has been disapproved for administrative penalties for noncompliance under §4.118 would not be considered eligible to apply until the application process begins again in the next odd-numbered year.

Wells Fargo Bank, N.A. commented on §4.104(g) relating to the agency providing notice of its approval of the application to both the depository institution and the public entity. Wells Fargo Bank, N.A. stated that if a depository institution has many public funds customers, some of which may want to participate in the program and some of which may not, it was concerned that notification of all these customers could be quite awkward. Wells Fargo Bank, N.A. suggested that it would prefer to have the agency notify only the depository institution, and allow it to notify the appropriate public funds customers. The agency responds that each application is for one depository institution and one public entity. The agency will only provide notification of the outcome to the one specific public entity that is a party to application and has signed the Collateral Security Agreement together with the depository institution.

The Federal Home Loan Bank of Dallas asked if the agency will publish a list of depository institutions approved to participate in the pooled collateral program on its website. The agency responds that it will publish a current list of approved depository institutions on its website.

COLLATERAL SECURITY AGREEMENT.

Wells Fargo Bank, N.A. submitted a comment on the definition of a Collateral Security Agreement in §4.101(2), stating that participating depository institutions should be able to submit a form of a Collateral Security Agreement for approval to the agency. The agency agrees that a participating depository institution may either enter into a Collateral Security Agreement provided by the agency or submit its own form to the agency for approval under Government Code, §2257.103(3).

J.P. Morgan Chase Bank, N.A. recommended that the agency incorporate a standard uniform Collateral Security Agreement for all banks and entities participating in the program, to eliminate the need for the agency to approve other agreements created by the participants in the program as set out in §4.103(b)(2). The

agency agrees and has developed a standard uniform Collateral Security Agreement for use in the program to create greater efficiency for the program participants. The agency will review the form of the agreement every odd-numbered year and update it as appropriate.

Wells Fargo Bank N.A. and J.P. Morgan Chase Bank, N.A. commented on the form of a Collateral Security Agreement developed by the agency and the opportunity to comment or provide assistance on the agreement. The agency responds that it will publish the draft Collateral Security Agreement on agency's website and invite comments on the agreement before it is finalized.

BOOKS & RECORDS/AUDIT.

The Independent Bankers of Texas commented on §4.105 and §4.115 regarding the requirements that a depository institution applicant provide its most recent financial statement and that its books and records will be open at all times for inspection by the agency, a representative of the agency, and at reasonable times for the public entity depositing funds with the depository institution. They further commented that these provisions violate the visitorial powers provision of federal law for national banks and cited 12 USC, §484, and that states may not access the books and records of a national bank.

Wells Fargo Bank, N.A. commented on §4.105(a)(4) and §4.115(b) and (c) that the books and records of a depository institution should only be required to be open for inspection during regular business hours upon reasonable advance notice.

J.P. Morgan Chase Bank, N.A. commented on §4.115(c) regarding the public entity's right to examine and verify the depository institution's books and records, and expressed concern that it would be burdensome. The bank also indicated that the public entities have the right to verify its deposits under account agreements and applicable law, and will receive a daily report of the market value of the collateral pool on the agency's website, and will therefore have access to all of the information obtained in an examination.

J.P. Morgan Chase Bank, N.A. commented on §4.116(b) relating to audit that it was uncertain if their external auditors could be required by rule to report noncompliance to the agency, and suggested that there should be clarity that external auditors are not required to perform such examination. The bank suggested that it may be appropriate to require internal auditors to perform such an examination.

The agency agrees that 12 USC, §484 allows only the federal government to audit national banks or inspect their books and records, with a few specified exceptions. With regard to a public entity's inspection of books and records, the agency further agrees that public entities will have the right to review their account information as a bank customer as provided under the terms of their bank agreements and applicable law. The agency will revise §4.105(a)(4) to delete the statement that the books and records of the depository institution will be available for inspection and revise it to require a depository institution provide, upon request, the comptroller or a public entity information or confirmation regarding a deposit of public funds or a pledge of collateral.

The agency has also deleted §4.112(f)(7) which allowed the agency to examine and verify a pledge of collateral or the transaction records related to the collateral.

The agency will also delete §4.115(b), regarding inspection of books and records and replace it with a new subsection (b) stating that a depository institution, custodian trustee and a permitted institution will provide, upon request, the comptroller or a public entity information or confirmation regarding a deposit of public funds or a pledge of collateral. The agency will revise §4.115(c) to provide a public entity may, pursuant to the terms of its account agreement, review the records related to its deposit of its public funds in the pooled collateral program and the related pledge of collateral to secure those deposits.

The agency will change the title of §4.116 from Audit to Certification of Compliance. The agency will also delete §4.116(b) to eliminate the requirement that an external auditor or regulator examine compliance with the books and records requirements under Government Code, Chapter 2257 and report noncompliance to the agency. The agency will renumber subsection (c) of §4.116 as subsection (b) and revise it to state that the comptroller may require written confirmation from the depository institution, custodian trustee, or permitted institution that it is in compliance with the books and record requirements under Government Code, Chapter 2257 and this chapter.

However, the agency notes it has a duty to approve or disapprove a depository institution's participation in the program under Government Code, §2257.103, and as part of that duty the agency will determine the financial condition of the institution. The agency notes that in accordance with §4.105(d), it will designate those depository institution applicants that are acceptable and may reject those whose management or condition, in the opinion of the comptroller, does not warrant the placing of public funds in their possession. Accordingly, the agency will not revise the depository institution application requirement in §4.105(a)(2), which includes a statement of the applicant's condition according to the most recent financial statement.

VOLUNTARY WITHDRAWAL FROM THE PROGRAM.

The Independent Bankers Association of Texas, Texas Bankers Association and Wells Fargo Bank, N.A. commented on §4.106, and expressed concern that the public entity be required to give more than the "reasonable written notice" for voluntary withdrawal from the pooled collateral program, and each pointed out that the depository institution had to provide the public entity with 90 days written notice of withdrawal. Texas Bankers Association and Wells Fargo Bank, N.A. suggested that the public entities be required to provide 90 days notice, and the Independent Bankers Association suggested a 30 day notice.

The agency responds that the public entity may choose to withdraw its deposits from a depository institution at any time, making a mandatory notice of withdrawal unnecessary. The agency further responds that a public entity will require at least 90 days notice from the depository institution due to its requirements to timely transition deposits from one depository institution to another.

COLLATERAL REQUIREMENTS.

The Federal Home Loan Bank of Dallas, the Texas Bankers Association, the Independent Bankers Association of Texas, Patterson & Associates, Wells Fargo Bank, N.A., Bank of America, and J.P. Morgan Chase Bank, N.A. submitted comments regarding collateral requirements for the program in §§4.107 - 4.111. These comments concerned the timing of pledging and maintaining the collateral, the amount of collateral, valuation of the collateral, and other related collateral matters.

Timing of Pledging and Maintaining Collateral.

Texas Bankers Association and Wells Fargo Bank, N.A. commented on the timing of pledging and maintaining the collateral in §4.107(b). Texas Bankers Association expressed concern that §4.107(b) required that a participating depository institution pledge collateral before public deposits are received and stated that requirement could double the amount of collateral pledged for an existing bank customer moving to the pooled collateral program, since the depository institution would have to pledge collateral under its existing depository agreement and for the program. Texas Bankers Association suggested that instead the depository institution pledge collateral when public deposits are received, in a simultaneous transaction designed to protect the public entity and the depository institution. Wells Fargo Bank N.A. also suggested that the requirement to pledge collateral be concurrent with the time of deposit, in keeping with industry standards. Wells Fargo Bank, N.A. indicated that the advance pledging presents problems with their automated collateralization system, since the precise amount is not known until the deposit is actually made. The agency responds that it will revise §4.107(b) to require that a depository institution use its best efforts to pledge collateral at the same time as it receives the deposit, but no later than the close of business on the same day of the deposit.

J.P. Morgan Chase Bank, N.A. commented on the requirement in §4.107(b) to maintain collateral at all times, and stated it was not practicable due to fluctuating and unexpected deposits, market value fluctuations in security prices pledged as collateral and circumstances beyond a financial institution's control. The bank suggested the agency change or omit the language "at all times." J.P. Morgan Chase Bank, N.A. also recommended that the agency change the wording in §4.109(c), providing that when the market value of pledged collateral becomes less than the required amount, the agency shall require that additional collateral be pledged "immediately." The bank indicated that procurement of securities for pledging purpose is not always an immediate possibility, and suggested changing the word "immediately" to "promptly."

The agency responds that the depository institution must pledge collateral at the same time as public deposits are received, and has revised §4.07(b) with a requirement to use its best efforts to pledge collateral at the same time but not later than the close of business on the same day of the deposit.

The agency responds that §4.109(c) is written to ensure that the public funds in a depository institution are sufficiently collateralized at all times. By using the word "immediately," the intent of these rules is to convey the serious nature of this responsibility. The responsibility to maintain sufficient collateral at all times is upon the depository institution. The word "promptly" does not convey the same sense of urgency as "immediately." The agency believes this is an acceptable requirement to properly secure the public deposits in the pooled collateral program. The agency has revised §4.109(c) to include that the collateral must be pledged immediately, but no later than the close of business on the same day the comptroller notifies the depository institution that it does not meet collateral requirements.

The Independent Bankers Association of Texas commented that §4.107(g) provides most of the requirements of the Federal Deposit Insurance Act and the D'Oench Duhme doctrine protection of security interests for a participating depository institution's pledge of collateral, but it omits the requirement that the security interest be reflected in the bank's board minutes. The agency responds that this provision is based upon Government Code, §2257.048, which provides when a security interest arising from a pledge of collateral to secure a deposit of public funds is created, attaches, and is perfected. The agency notes that the Collateral Security Agreement will include the requirement that the security interest be reflected in the bank board's minute books, and other requirements to meet the terms of the Federal Deposit Insurance Act and the D'Oench Duhme doctrine protection. The agency declines to include this language in this subsection.

Patterson & Associates commented that the custodian trustee is the bailee for assets and that the bailee should have complete control over the pledged collateral as confirmed by §4.112(f)(2). Patterson & Associates expressed concern about §4.112(f)(5), which provides that the agreement between the comptroller and the custodian trustee provide that the custodian trustee shall surrender the collateral to the comptroller upon written demand, without any conditions set by the rules. Patterson & Associates suggested that the bailee must have the assets under its control and custody. The agency responds that Government Code, §2257.044 states that the custodian is for all purposes the bailee or agent of the public entity. The agency further responds that the pooled collateral program does not disturb the role of the custodian trustee.

However, to clarify the agency's role it will add §4.113(e) to provide that the public entity will authorize the comptroller to act as its agent to monitor collateral held in trust for the benefit of the pooled collateral program. The agency will renumber the §4.113(e) as subsection (f). The agency will also create a new §4.110(a) to provide that the public entity will authorize the comptroller to act as its agent to and that the comptroller may approve, as appropriate, the pledge and withdrawal of collateral into and out of the custodian trustee account. The agency will also revise the agreement between the comptroller and custodian trustee accordingly. The agency will renumber the subsections of §4.110 accordingly.

Acceptable Collateral vs. Eligible Collateral.

Bank of America, Federal Home Loan Bank of Dallas, Patterson & Associates, and Wells Fargo Bank, N.A. commented on the securities deemed acceptable to pledge as collateral by the agency in §4.108. Patterson & Associates and Wells Fargo Bank, N.A. objected to the agency's list of acceptable securities, which is a smaller subset of the collateral permitted under Government Code, Chapter 2257. Wells Fargo Bank, N.A. suggested the agency establish clear criteria for choosing acceptable securities and allow a depository institution to withdraw from the pool reasonably quickly if at any time the remaining acceptable securities as determined by the agency are not compatible with the institution's investment criteria.

Patterson & Associates objected to the agency's changes regarding the collateral that may be pledged under §4.108 as unacceptable without adding any safety value. Patterson & Associates indicated that the collateral deemed acceptable by the agency do not match bank portfolios eligible for pledging, and that this would lead to higher costs.

Patterson & Associates suggested that the collateral standards should be those set out by Chapter 2257, and objected to the agency's placing itself in a position to judge the efficacy of the collateral. Patterson & Associates commented that the agency has arbitrarily limited the acceptable collateral available to the banks, including those securities authorized under Chapter 2256. Patterson & Associates also commented that the list of acceptable collateral and the restrictions placed on the depos-

itory institutions do not reflect the reality of their portfolios, and can seriously impede the program by raising the cost of the collateral appreciably without justification. Patterson & Associates objected to §4.108(d), allowing a depository institution to request the agency's approval to pledge a security not currently deemed as acceptable, and expressed concern that the agency would change the rules on acceptable collateral over time and from institution to institution for unnamed or fully justified reasons.

The agency responds that its designation of acceptable collateral is a subset of those instruments that are already allowed under the definition of an eligible security in Government Code, §2257.002(4). The agency further responds that it intends to use the same standards for collateral required to secure the deposit of public entity funds in the pooled collateral program that it does for collateral to secure the deposit of state funds. The agency further responds that it will rely on its long-term experience of determining acceptable collateral for state deposits to determine the acceptable collateral for public deposits held in the pooled collateral program. The agency believes that collateral standards for deposits in the pooled collateral program should be no less secure than those required for state deposits.

In response to the comments received, the agency has elaborated on the criteria it will use to designate acceptable collateral for the program. The agency has revised §4.108(b) to provide that it will designate acceptable collateral based on its associated risks, its preservation of market value, its operational efficiencies, including the ability to determine its market value, and such other appropriate criteria that may be developed by the agency.

The agency further responds that in response to the concern expressed in the comments regarding the timing of designation of acceptable securities, it will revise §4.108(c) to provide that if the agency revises the list of acceptable securities it will provide 180 days notice to the participating depository institutions to allow substitution of collateral that is no longer deemed acceptable, unless a shorter notice is required to protect the security of public deposits.

Mortgage Backed Securities.

Bank of America objected to the rule's designation of a mortgage backed security with a remaining maturity of greater than 15 years as not acceptable to pledge as collateral under §4.108(e)(2). The bank pointed out that most mortgage backed securities are issued with a 30 year stated maturity term, and this restriction bars depository institutions from using a large share of their investment securities portfolio. The bank noted that the restriction does not exist in the Texas Public Funds Collateral Act and asked that the restriction be removed.

Patterson & Associates commented that §4.108(e)(2) should refer to mortgage backed securities "with a stated maturity of 15 years," rather than "with a remaining maturity of 15 years or less." Patterson & Associates indicated that maturity restrictions are an understandable attempt to manage volatility and objected to using maturity restrictions, and instead suggested the agency use the bank test used by the Federal Reserve to judge collateral which can then be pledged to the Federal Reserve by banks.

Wells Fargo Bank, N.A. commented that it would like to see the "remaining maturity" requirement for certain mortgage-backed securities be extended to 30 years rather than 15 years.

The agency responds that it intends to keep the rule that mortgage backed securities with a remaining maturity of 15 years or less are acceptable collateral for deposits covered in the pooled collateral program. This has been the agency's current policy for security of state deposits for many years, and the agency has determined that collateral standards for deposits in the pooled collateral program should be no less secure that those required for state deposits.

Letters of Credit.

The Federal Home Loan Bank of Dallas commented on the Federal Home Loan Bank Beneficiary letters of credit that may be pledged as acceptable collateral under §4.108(e)(4). The bank indicated it offers two types of standby letters of credit and asked if they would be considered acceptable collateral under the program, and asked what type of documentation would be required by the agency to sign off on a custodial standby letter of credit. The bank also requested guidance on the mechanics of how each type of letter of credit will be used in the program and to identify any additional documentation the agency may require.

Patterson & Associates objected to the use of Federal Home Loan Bank Beneficiary letters of credit as collateral, and requested they be eliminated from the list of acceptable security.

The agency responds that Federal Home Loan Bank Beneficiary standby letters of credit that are collateralized may be pledged as acceptable collateral, as they are considered secure collateral, and the agency will revise §4.108(e)(4) accordingly.

State of Texas Bonds.

Patterson & Associates commented that §4.108(e)(9) has arbitrarily limited municipal bonds only to those issued in Texas, and requests that this limitation be removed. Patterson & Associates indicted that the existing law protects the government entity by setting the standard of an "A" or equivalent rating by at least one nationally recognized rating agency and that is a better standard than limiting the bonds to those issued in Texas.

The agency responds that municipal bonds issued in Texas with a rating of not less than "A" or its equivalent value (that are issued by a nationally recognized investment rating firm) has been used by the agency to secure state deposits for many years. The agency believes that the collateral standards for deposits in the pooled collateral program should be no less secure than those required for state deposits.

List of Unacceptable Securities.

Patterson & Associates commented on the list of unacceptable securities in §4.108(f), objecting that it limits the banks from using their existing portfolios as collateral and adds to the ultimate costs for the public entity. Patterson & Associates specifically objected to eliminating Adjustable Rate Mortgages, Collateralized Mortgage Obligations, and step-ups, indicating they could rely on daily pricing and adjustments to allow these securities as collateral. Patterson & Associates also objected to the term "securities not found on common pricing systems" in §4.108(f)(5) as ambiguous, and stated that these issues may be totally safe and simply may not be on a standard search because of holding. Patterson & Associates commented that restrictions on the acceptable collateral ultimately add costs for the public entity.

The agency responds that the list of acceptable collateral has not substantially changed from the list in the statute, but has been reduced to create a subset of the list in the statute. The resulting list of approved instruments has been the current policy for securing state deposits for many years, and the agency believes that collateral standards for deposits in the pooled collateral pro-

gram should be no less secure than those required for state deposits. Government Code, §2257.105(c) requires the agency to provide a daily report of the market value of the securities held in each pool. The agency intends to price all collateral securities on a daily basis using an industry recognized pricing service. The agency responds that it would not be safe or efficient to determine the value of securities unless a common pricing system could be used.

Mark to Market Valuation of Securities.

Patterson & Associates and Wells Fargo Bank, N.A. commented on the agency's valuation of collateral in §4.108(b). Wells Fargo Bank, N.A. requested assurance that the agency will use a standard and accepted market valuation criteria or an industry recognized service to make its determination of value. Patterson & Associates objected that the on-going reporting of market value is from the banks and no daily or weekly verification appears to be forthcoming from the agency. Patterson & Associates requested a more proactive role by the agency in the valuation of collateral.

The agency responds that Government Code, §2257.105(c) and (d) requires the agency to provide a daily report of the market value of the securities held in each pool and requires that each report be posted on the agency's website. The agency will provide a daily report of the market value of the collateral pool on its website daily and will use an industry recognized pricing service to value the collateral.

Required Amount of Collateral.

The Federal Home Loan Bank of Dallas, the Texas Bankers Association, the Independent Bankers Association of Texas, Patterson & Associates, Wells Fargo Bank, N.A., Bank of America, and J.P. Morgan Chase Bank, N.A. commented on the amount of collateral that a depository institution would be required to pledge as collateral in §4.109.

Bank of America N.A., Patterson & Associates, Texas Bankers Association, and Wells Fargo Bank, N.A objected to the requirement in §4.109(d) to pledge acceptable collateral with a total value of at least 105% of the amounts on deposit in the pool, less federal deposit insurance. They pointed out that the agency did not adhere to the statutory language in Government Code, §2257.104(a) which provides that each depository institution in the pooled collateral program secure its deposits of public funds with eligible securities which equal at least 102% of the amount of deposits of public funds covered by the security agreement. Wells Fargo Bank, N.A. pointed out that the 105% requirement seemed inconsistent with Government Code, §2257.104(a) and that the proposed rule seems to exceed the scope of the statutory mandate. Patterson & Associates suggested a more reasonable position would be to apply a daily mark to market to collateral and maintenance at 102%.

J.P. Morgan Chase Bank, N.A. asked whether a financial institution would be considered deficient in collateral if it meets the statutory requirement of 102% but not the 105% requirement promulgated by §4.109(d).

The agency responds that §4.109(d) is consistent with Government Code, §2257.102(a), which sets a collateral requirement of at least 102% of the amount of deposits of public funds covered by the security agreement, reduced to the extent of federal deposit insurance coverage. The agency's proposed requirement of 105% of the amount of deposits of public funds is also consistent with current policy requirements for state deposits. The agency finds that collateral standards for deposits in the pooled collateral program should be no less secure than those required for state deposits. The 105% coverage margins will help to manage fluctuations in the market and in a shared pool of deposits in which participants have no control over the actions of their co-participants. If large deposits are made into the pool without adequate notification to the depository, the higher margins provide extra coverage to secure public deposits. A depository institution must comply with the 105% collateral requirement in §4.109(d).

Bank of America, the Independent Bankers Association of Texas, Wells Fargo Bank, N.A., and Patterson & Associates objected to §4.109(e) which requires that securities with a declining principal balance have a market value of not less than 125% of the amount of the deposits of public funds to be secured, reduced by the amount of federal deposit insurance.

Bank of America, N.A. mentioned that deposits of education based public agencies require a collateral margin of 110% when declining principal balance securities are pledged. The bank indicated that a 25% margin would be an expensive and unwarranted burden, and suggested that the option of marking to market value daily and a margin of 105% for all collateral types should be offered.

The Independent Bankers Association of Texas commented that the agency has significant flexibility under the statute with regard to collateral, with a minimum of 102%, and that 125% seemed excessive provided the agency regularly monitored the value of such securities. The Independent Bankers Association of Texas commented that a significant margin is appropriate to protect public entities, and suggested that a smaller amount such as 110% may be adequate in this area.

Patterson & Associates commented that the increased margins on declining principal bonds will only act to increase the cost of collateral and provides no additional safety. Patterson & Associates commented that had the legislature determined a 125% collateralization level was necessary for securities with declining principal balances, they would have specifically provided for it in the legislation, and that the language in §4.109(f) is outside the statutory scope of Chapter 2257, and requested that it be stricken in its entirety.

Wells Fargo also objected to §4.109(e) as being inconsistent with Government Code, §2257.104(a) and requested the required collateral percentage under §4.109 be established at 102%.

The agency responds that the state legislature mandated that the agency establish by rule a program for centralized pooled collateralization of deposits of public funds and for monitoring collateral maintained by participating institutions. The legislature has previously determined that 125% collateralization level was necessary for securities with a declining principal balances for state deposits as set out in Government Code, §404.0221(c). The agency has determined that collateral standards for deposits in the pooled collateral program should be no less secure than those required for state deposits.

Pledge and Withdrawal of Collateral.

Federal Home Loan Bank of Dallas and Wells Fargo Bank, N.A. commented on §4.110 and §4.112(f), regarding the pledge and withdrawal of collateral. Federal Home Loan Bank of Dallas indicated it acts as a custodian for a state depository institution and that as custodian, it does not hold pledged securities in one identifiable account for the agency, but rather in a safekeeping

account the state depository has with the Federal Home Loan Bank of Dallas, with the pledge of securities in that account denoted with a unique numeric code reporting system. The Federal Home Loan Bank of Dallas requested that the terms of the custodian trust agreement and the procedures for pledging and withdrawing collateral allow a custodian trustee to keep all collateral in the pooled collateral program in either one identifiable trust account as currently contemplated in the proposed rules, or in the safekeeping account that the depository institution has with the Federal Home Loan Bank of Dallas and identify the collateral as pledged using a unique numeric code reporting system. The Federal Home Loan Bank of Dallas asked to review the custodian trustee agreement and procedures to be posted on the agency's website in connection with this issue and §4.112.

The agency responds that it will add revise §4.107 and will add §4.112(g)(2) to provide that the custodian trustee must properly identify and hold the pledged collateral in trust for the benefit of the pooled collateral program. The agency will also require that the custodian trustee either keep all collateral pledged for the benefit of the program in one identifiable pooled collateral account or in an account in the name of the participating depository institution where the collateral is clearly pledged and identified for the pooled collateral program using a unique code reporting system. The agency further responds that it will include this requirement in the Collateral Security Agreement and the custodian trust agreement terms, as well as in §4.112(g)(2). The agency will also post the collateral security agreement and the custodian trustee agreement for comment on the agency's website.

Wells Fargo Bank, N.A. commented that in §4.110(a)(2) the word "withdrawal" in the second line should be "pledge." The agency agrees that this is correct and will change the word from "withdrawal" to "pledge" in the subsection of the rule, which is now renumbered to §4.110(b)(2).

Recovery of Public Deposits.

J.P. Morgan Chase Bank, N.A., Wells Fargo Bank, N.A., and Patterson & Associates offered comments regarding §4.111, concerning the recovery of public funds. J.P. Morgan Chase Bank, N.A. suggested that the agency change the wording in §4.111(a) from "...to satisfy a claim" to "to satisfy an uncured claim..." Wells Fargo Bank, N.A. suggested that the criteria for a custodian's surrender of collateral should focus exclusively on its insolvency or failure, and objected to the criteria in the rule of failure to satisfy a claim or of sustaining a loss as vague and overly broad, and could potentially permit a demand for turnover of collateral in inappropriate or unnecessary situations. Patterson & Associates objected to the rule and noted that the rules clearly establish the custodian trustee as the bailee and that the bailee should retain full control of the collateral and the process for dissolution of collateral if necessary for the recovery of public funds. Patterson & Associates objected to the agency's being able to take possession of the collateral, and stated that the agency should not involve itself in the bailee's responsibilities.

The agency responds that it has reconsidered the issue of recovery of public deposits in §4.111 and that the public entity is the secured party with the right to assert a claim for the recovery of public funds if the depository institution fails. The agency notes that accounts held by government depositors are treated in 12 CFR 330.15. The agency has revised §4.111 to provide that a public entity may make a claim for a deposit of public funds and has deleted the remaining subsections.

CUSTODIAN TRUSTEE.

The Federal Home Loan Bank of Dallas submitted a comment inquiring about the definition of a custodian trustee under §4.101(3) and §4.105(b) and whether the Federal Home Loan Bank of Dallas would be required to apply with the agency to be designated as a custodian trustee.

The agency responds that only a state or national bank is required to be designated by the agency under Government Code, §2257.041(d)(1) and (5). The Federal Home Loan Bank, as well as certain other entities, may act as a custodian trustee under Government Code, §2257.104(c) or §2257.041(d) without being designated by the agency, or being required to enter into a custodian agreement. The agency will revise the definition of custodian trustee in §4.101(3), as well as make changes to §§4.105(b)(4) and (5), 4.107(c), and 4.112(b) and (f) to clarify this issue.

Custodian Trustee Designation and Participation.

J.P. Morgan Chase Bank, N.A., the Federal Home Loan Bank of Dallas, and Wells Fargo Bank, N.A. commented on §4.112, regarding the custodian trustee designation and Participation. J.P. Morgan Chase Bank, N.A. objected to the public entity approving the custodian under §4.112(b) and suggested revising the rule to state that the agency will approve the custodian trustee. Wells Fargo Bank, N.A. requested a requirement that in §4.112(f)(5), any demand for surrender of collateral be accompanied by a statement of the basis for the surrender under §4.111(a). Wells Fargo Bank, NA. noted that the word "is" should be removed at the beginning of each of the subsections of §4.112(e)(3) - (5).

The agency responds that Government Code, §2257.041(d) requires that a public entity approve the custodian trustee, and will provide for this approval of the custodian trustee selected by the depository institution in the collateral security agreement so that no separate approval will be required. The agency responds that it has revised §4.111 to remove the agency's request for surrender of collateral, eliminating the need for a statement of the basis for surrender of collateral. The agency further responds that it has revised §4.112(b) and (f) and has added a new subsection (g) to clarify the custodian trustee qualification. The agency agrees with Wells Fargo Bank, NA., that the word "is" should be removed at the beginning of each of the subsections of §4.112(e)(3) - (5).

REPORTING REQUIREMENTS.

J.P. Morgan Chase Bank, N.A., Wells Fargo Bank, N.A., and Patterson & Associates commented on §4.113, Reporting Requirements for depository institutions. J.P. Morgan Chase Bank, N.A. asked if the agency employed a financial institution to evaluate collateral, would the financial institution still have to file the weekly reports required by §4.113. J.P. Morgan Chase Bank, N.A. also inquired whether the agency has finalized the reporting requirements, format, and data for the reports.

Patterson & Associates indicated they understood the need for disclosure and transparency, but expressed concern about posting individual public entity accounts on the agency's website daily. Patterson & Associates stated that posting such account information would not add to collateral safety, and would increase the public entity liability. Patterson & Associates also indicated that collateral is based on the entity's total accounts under their single tax-identification number, and that if posting of account balances is really needed, then only a single amount for the entity to be collateralized should be posted on the website.

Wells Fargo Bank, N.A. also inquired about posting of public entity balances under §4.113(b) and asked that the agency clarify whether those balances will only be accessible by the particular public entity and the particular depository institution to which a given report pertains. The bank also expressed concern about the reporting of ledger balances under §4.113(c)(1) and indicated it has historically collateralized collected balances on Texas public funds accounts, and believes this practice is consistent with Texas law. Wells Fargo Bank, N.A. indicated that it strongly believes that any collateralization requirement should be limited to deposits actually on hand, namely collected balances, rather than ledger balances. The bank also requested that some flexibility be built into the daily reporting requirements in §4.113(c)(1) and (e) to allow for the possibility of systems issues, and to permit a reasonable amount of time to address them. Wells Fargo Bank, N.A. suggested that the agency allow an alternate method of submitting reports at a slightly later deadline under such circumstances. The bank also inquired about the daily reporting deadlines being contemplated by the agency.

The agency responds that the online reporting requirements and format have been finalized and will be posted on the agency's website. There will be two methods of report submission, but both must be accomplished through the agency's website. If system issues on the part of the agency prevent report submission, the report deadline will be extended accordingly. Otherwise the depository institution must meet the reporting deadline by one of the two methods of submission.

With regard to reporting the collected versus ledger balance the agency notes that Government Code, §2257.105(a)(1), requires "a daily report of the aggregate ledger balance of deposits..." The agency will require that depository institutions report the ledger balance.

The agency will use an independent industry recognized third party pricing service to value the collateral, and a depository institution that chooses pursuant to §4.113(c)(2) to adopt by reference the agency's daily report indicating the market value of the collateral as its weekly summary report need not file a separate weekly summary report.

The agency will post a public entity's account balances on its website to facilitate account reconciliation by the public entity. Only the public entity that owns the account and their depository institution will able to access the public entity account information for review.

Public Entity Deposits & Notice to Participating Depository Institutions.

Patterson & Associates commented on the public entity's duty in §4.114 to monitor the daily reports of its deposits of public funds on the agency's website, verify the accuracy of the reports, and report any discrepancies to its depository institution. Patterson & Associates objected to the rule, and stated that it places all responsibility and liability on the public entity for monitoring the posted reports and verifying the amounts, adding significant work to the public entity.

Patterson & Associates also commented on §4.114(e) regarding the duty of the public entity to inform its depository institution of a significant change in the amount or activity of its deposits. Patterson & Associates stated that the rules have elevated this to an unacceptable level of liability by stating in that the failure to inform could be judged a "mitigating factor" if it causes the depository institution to be in violation of the collateral requirements under Government Code, §2257.104 and this chapter. Patterson & Associates expressed concern that this could represent a legal liability on one public entity that could inadvertently cause a system-wide failure of margins. Patterson & Associates suggested that the agency could provide a service by assuring that its receipt of balance and collateral value information daily is matched and problems identified, and indicated that without such a failsafe the agency is providing little value.

The agency responds that, with regard to the public entity's duty to monitor the daily reports of its deposits on the agency's website, since the agency will not have access to the public entity's account information or bank statements the agency must rely on the public entity to monitor and verify the accuracy of the balance reports submitted by its depository institution. This is to ensure the integrity and accuracy of the information reported by the depository institution, which is vital to the success of the pooled collateral program.

With regard to §4.114(d) and (e), relating to the failure of a public entity to properly inform the participating depository institution of a significant change in the amount or activity in its deposits, the agency responds that it will revise subsection (d) to add the word "repeatedly" so that the notice is only required if the public entity repeatedly fails to inform the depository institution of a significant change in the amount or activity in deposits. The agency believes that repeated violations may affect the stability of the pool.

The agency will revise §4.114(e) and renumber it as §4.118(b) to clarify that a public entity's failure to notify the depository institution may be considered a mitigating factor in an administrative penalty action under Government Code, §2257.108 against a depository institution for failure to meet collateral requirements. The agency further responds that there would be no liability for the public entity from the agency perspective (except as repeated instances could affect a future application to participate in the program). The agency notes that due to the renumbering of §4.114(e) as §4.118(b), it will renumber the remaining subsections of each rule.

With regard to the comment on the need to compare daily ledger balances and collateralization, the agency responds that, as part of its duty to monitor collateral, it will be comparing the daily ledger balances it receives against the collateral value daily and resolve any problems.

COMPLIANCE WITH LAWS.

Federal Home Loan Bank of Dallas commented on the requirement in §4.117(a) to comply with all applicable laws, including the Federal Reserve regulations and Operating Circulars, in connection with the pooled collateral program. The bank noted the requirement and inquired why the comptroller's office specifically mentioned the Federal Reserve regulations and Operating Circulars. Federal Home Loan Bank of Dallas noted that it is not subject to all laws applicable to commercial banks, and requested that the agency identify the particular federal and state statutes and regulations that the agency believes are applicable to the pooled collateral program.

The agency responds that the rule requires compliance with all applicable laws, and notes that not all laws may be applicable to each participant in the program. Each participant is responsible for compliance with those laws that are applicable to them only. The agency included federal statutes, Federal Reserve regulations and Operating Circulars in this rule because many of the participants in the program may be subject to those laws.

ADMINISTRATIVE PENALTIES.

Patterson & Associates expressed concern about §4.118 and the penalty against a depository institution for failure to meet the collateralization requirements and requested that under-collateralization be recognized by the agency and punished. Patterson & Associates noted that the rules underestimate the impact on local governments when under-collateralization occurs, and that the public entity is being held responsible for a situation over which it has no control and no effective means of monitoring. Patterson & Associates also commented that the long time frame allowed to report and react to this type of situation is not sufficient, and could leave a public entity under-collateralized for days, and is unacceptable. Patterson & Associates indicated that under-collateralization caused by the banks should not be allowed more than two or three times, and that multiple failures should eliminate the banks from designation as a public depository for at least two to three years. Patterson & Associates commented that the high fiduciary trust taken on by the banks must be emphasized and remembered by all parties.

The agency responds that the legislature provided the penalty provisions for failure to properly collateralize deposits of public funds in Government Code, §2257.108(b). This provision allows the agency to penalize the depository institution if it has not remedied the collateral violation before the third business day after the date a notice is issued of a violation of the collateral requirements under §2257.104 and the rules of the agency. The agency notes that it will assess such penalties to enforce compliance with the program rules. The rules also require a depository institution to be approved for participation in the pooled collateral program every two years. During the application process, the agency may consider the past performance of a participating depository institution in the program and disapprove its participation in the program under §4.105(c).

Texas Bankers Association commented that the penalty structure in §4.119 was unnecessarily complicated. The association commented that the language in §4.120(b) was confusing and it was unable to determine whether the agency is attempting to set a $200 baseline for all penalties or just for those for which there is a continuing violation after 14 business days. Texas Bankers Association suggested the agency adopt clarifying language to remove the confusion.

The agency responds that it drafted the rule in accordance with the penalty structure guidelines set out in Government Code, §2257.110. The agency further responds that the rules set a $200 baseline just for those penalties for which there is a continuing violation after 14 business days. The agency further responds that it may provide additional guidance on the penalty structure through its website or upon request.

ASSESSMENT.

The Independent Bankers Association of Texas, J.P. Morgan Chase Bank, N.A., and Wells Fargo Bank, N.A. offered comments on §4.120 dealing with the annual assessment of participating depository institutions under Government Code, §2257.106. The Independent Bankers Association of Texas commented in favor of a formula for the assessment that acknowledges the importance of the volume of activity for a particular depository institution. J.P. Morgan Chase Bank, N.A. requested the agency clarify §4.120(b) as to "...the assessment based on the number of public entity accounts a participating depository institution maintains..." and asked if this is the number of accounts within the pooled collateral program or overall accounts held at a financial institution. J.P. Morgan Chase Bank, N.A. also asked if the assessment fees for start-up will be prorated over a five year period, as discussed in a September 29, 2009 presentation. Wells Fargo Bank, N.A. requested further clarity on the specifics of the assessment procedures and calculation guidelines.

The agency responds that it will follow the assessment formula set out in Government Code, §2257.106, and will assess the fees in a fair and equitable manner. With regard to §4.120(b), the agency responds that it interprets the "number of public entity accounts a participating depository institution maintains..." to be the number of public entity accounts the depository institution maintains within the pooled collateral program. The agency will also publish information regarding the annual assessment on its website.

The agency has revised §4.120 to include a specific formula to assess the depository institutions based upon the cost of administering the pooled collateral program each state fiscal year. This formula is based on factors set out in Government Code, §2257.106. The assessment is based on each depository institution's participation in the program and the agency believes it is an equitable way to distribute the costs of operating the program. Because the assessment is based on a depository institution's participation in the program, there is no need to prorate an assessment if a depository institution has been in the program for less than a year, and the agency has deleted this provision from subsection (a).

The depository institution assessment formula is the sum of three items: the collateral transaction fee, the public entity account maintenance fee, and the depository institution's average weekly deposits fee based on its share of the total average weekly deposits of public funds collateralized in the program. The collateral transaction fee will be $5.00 per pledge or withdrawal of collateral, and the account maintenance fee will be $50.00 per month per public entity.

To determine each depository institution's average weekly deposits fee, the agency will calculate its average weekly deposits as a percentage share of the total average weekly deposits of the program for the state fiscal year, as detailed in the rule. The agency will next calculate the remaining program administration costs by subtracting all collateral transaction fees and public entity account maintenance fees from the total program administrative costs for the year. The agency will apply each depository institution's percentage share of average weekly deposits to the remaining program administration costs to obtain each depository institution's average weekly deposits fee. However, depository institutions with less than one million dollars of average weekly deposits over the year will be excluded from the average weekly deposit fee, but will still be assessed the collateral transaction fee and the public entity account maintenance fee.

With regard to allocation of program costs, the agency responds that it will, when appropriate, allocate program costs over a period of time, like start up costs. The agency will add this allocation language to §4.120(a).

The new sections are adopted under Government Code, §2257.102, which provides the comptroller with the authority to establish a program for centralized pooled collateralization of deposits of public funds and for monitoring collateral maintained by participating institutions.

The new sections implement Government Code, Chapter 2257, Subchapter F, §§2257.101 - 2257.114. The new pooled collat-

eral program requirements also incorporate related statutory requirements for depositories and custodians in Government Code, Chapters 404 and 2257.

*§4.101. Definitions.*

The following words and terms, when used in this chapter, have the following meanings:

(1) Acceptable collateral--An eligible security under Government Code, §2257.002(4) that is deemed acceptable by the comptroller to pledge as collateral to secure the deposit of public funds in the pooled collateral program.

(2) Collateral security agreement--A binding security agreement between a public entity and a participating depository institution to secure the deposit of public funds in the pooled collateral program. The collateral security agreement must be on a form provided or approved by the comptroller.

(3) Custodian trustee--A custodian as provided under Government Code, §2257.104(c) and §2257.041(d).

(4) Deposit of public funds--Public funds of a public entity that the comptroller does not manage under Government Code, Chapter 404 held as a demand or time deposit by a participating depository institution.

(5) Depository institution--A state or national bank, savings and loan association, federal savings bank, or credit union that is insured by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund, and maintains a home or branch office in Texas.

(6) Participating depository institution--A depository institution that has been approved by the comptroller for participation and holds deposits of public funds in the pooled collateral program.

(7) Permitted institution--A financial institution defined in Government Code, §2257.002(6).

(8) Pooled collateral program--The centralized pooled collateralization of deposits of public funds administered by the comptroller under Government Code, Chapter 2257, Subchapter F and this chapter.

(9) Public entity--A state or a political or governmental entity, agency, instrumentality, or subdivision of the state, including a municipality, a conservation or reclamation district created under Texas Constitution, Article XVI, Section 59, and a public hospital, but the term does not include an institution of higher education, as defined by Education Code, §61.003.

(10) State fiscal year--September 1st through August 31st.

*§4.104. Depository Institution Application Process.*

(a) The comptroller will post on its website the depository institution application, collateral security agreement, related documents, and guidance for application and participation in the pooled collateral program.

(b) The comptroller's approval of a depository institution's participation in the pooled collateral program is effective for two years from September 1 of each odd-numbered year until August 31st of the next odd-numbered year. A depository institution may apply for approval every two years in the pooled collateral program, according to the instructions posted on the comptroller's website, but may also apply at any time during the two-year period.

(c) The comptroller will notify a participating depository institution of the deadline for application by June 1st of each odd-numbered year. A depository institution must apply by August 1st of each odd-numbered year for the comptroller's approval to be effective for September 1 of each odd-numbered year for the next two-year term.

(d) The parent institution of a depository institution must apply to be a participating depository institution and be approved if deposits are to be held in any of its Texas branch locations. Branch institutions may not apply. The parent institution may apply for approval by submitting a completed application and executed collateral security agreement to the comptroller at any time.

(e) Once a depository has been approved for participation in the pooled collateral program, it will submit each new collateral security agreement with a public entity to the comptroller for approval before accepting its deposits as part of the pooled collateral program and in accordance with the comptroller's instructions on its website.

(f) A successor institution to a participating depository institution must apply for approval to act as a depository institution and comply with pooled collateral program law, rules and requirements as soon after the change in ownership as is practicable.

(g) The comptroller at its discretion may require the participating depository institution to update the application form and collateral security agreement.

(h) If the depository institution has been approved for participation, the comptroller will notify the depository institution and the public entity. The comptroller will provide them both with instructions and requirements for participation in the pooled collateral program, including access to the pooled collateral program website.

(i) If the depository institution has not been approved for participation, the comptroller will notify it in writing of the reason for disapproval. If the applicant that was not approved was a participating depository institution, it will comply with the requirements of §4.106(b) of this title (relating to Voluntary Withdrawal from the Pooled Collateral Program) for the orderly withdrawal from the pooled collateral program within ninety days of the comptroller's written disapproval.

(j) Within thirty days after the written disapproval of its application an applicant may request an informal review in writing. The applicant must include the basis for its request and submit evidence that it cured any deficiency in its application. The comptroller will conduct an informal review based on the applicant's written submission. Except as provided in subsection (i) of this section for a participating depository institution, an applicant may not act as a depository institution in the program during the informal review process.

(k) The agency's decision in the informal review is a final decision.

(l) After the informal review process is complete, an applicant that has been disapproved for a deficiency may reapply to act as a depository institution once the deficiency in its application has been cured; however an applicant that has been disapproved for violation of §4.118 of this title (relating to Administrative Penalties for Noncompliance by Participating Depository Institution) would not be considered eligible to apply to act as a depository institution until the next odd-numbered year.

*§4.105. Depository Institution Approval Criteria.*

(a) The depository institution will submit a completed application and required documents, with original signatures as required. The application must include a statement:

(1) of the amount of the applicant's paid capital stock and permanent surplus, if any;

(2) of the applicant's condition according to the most recent financial statement on the date the application is submitted;

(3) that the applicant will maintain a separate, accurate, and complete records relating to a pledge of collateral, a deposit of public funds, and a transaction related to a pledge of collateral;

(4) that the applicant will provide, upon request, the comptroller or a public entity information or confirmation regarding a deposit of public funds or a pledge of collateral; and

(5) that the applicant will provide such other information as the comptroller or public entity may require to verify the condition of the depository institution.

(b) The depository institution must also meet the following conditions before being approved to participate in the pooled collateral program:

(1) the applicant must maintain its main office or a branch office in Texas;

(2) the applicant shall submit a binding collateral security agreement for each public entity, with original signatures as required, using a form provided or approved by the comptroller;

(3) each related public entity must be eligible for participation in the pooled collateral program;

(4) the applicant shall provide for the collateral securities to be held by a custodian trustee in trust for the benefit of the pooled collateral program;

(5) the applicant's named custodian trustee qualifies under Government Code, §2257.104(c) or §2257.041(d)

(6) the comptroller and custodian trustee have executed a custodian trust agreement when the custodian trustee is qualified to act under Government Code, §2257.041(d)(1) or (5); and

(7) the applicant must meet the requirements in Government Code, Chapter 2257, this chapter, or other applicable law.

(c) In addition to the foregoing requirements for approval to participate in the pooled collateral program, if the applicant has previously participated in the pooled collateral program the comptroller may refuse to approve its participation in the pooled collateral program for:

(1) failure to maintain compliance with Government Code, Chapter 2257, this chapter, or other applicable law;

(2) failure to remedy a violation of Government Code, Chapter 2257 and this chapter within a reasonable time after receiving written notice of the violation;

(3) audit or examination findings that include noncompliance with Government Code, Chapter 2257 and this chapter;

(4) failure to comply with the terms of the collateral security agreement; or

(5) failure to provide information requested by the comptroller, which information the comptroller considers necessary to evaluate compliance with Government Code, Chapter 2257 and this chapter, and for the benefit of the pooled collateral program.

(d) The comptroller may approve those applicants that are acceptable and may reject those whose management or condition, in the opinion of the comptroller, does not warrant the placing of public funds in their possession or do not meet the requirements of this chapter. The comptroller may consider financial indicators that concern capital adequacy, asset quality, earnings and liquidity.

*§4.106. Voluntary Withdrawal from the Pooled Collateral Program.*

(a) An approved depository institution or public entity may withdraw from the pooled collateral program by providing written notice to the comptroller and the other named party to its collateral security agreement(s) (either the depository institution or public entity). The depository institution must provide notice in writing at least 90 days before the effective date of withdrawal. The public entity must provide reasonable written notice of withdrawal from the program as soon as practicable.

(b) As part of the withdrawal process a participating depository institution must:

(1) maintain the required amount of acceptable collateral in the pooled collateral program until the effective date of withdrawal;

(2) continue to provide the required reports detailing required information through the effective date of withdrawal;

(3) continue to comply with the terms of collateral security agreements through the effective date of withdrawal; and

(4) provide written notice to the comptroller that it has taken all appropriate steps to provide for the orderly transition of public entity deposits.

*§4.107. General Collateral Requirements.*

(a) A participating depository institution must enter into a binding collateral security agreement with each public entity to secure public deposits.

(b) A participating depository institution is responsible for pledging sufficient collateral when public deposits are received, and for maintaining sufficient collateral at all times. A depository institution must use its best efforts to pledge collateral at the same time it receives a deposit of public funds, but no later than the close of business on the same day of the deposit. Collateral is not required for deposits to the extent that the deposits are insured by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund. The comptroller will apply the full amount of federal deposit insurance coverage for a public entity to determine the amount of collateral required to secure the deposit of public funds in the program.

(c) A participating depository institution is required to pledge acceptable collateral with a custodian trustee qualified to act under Government Code, §2257.104(c) or §2257.041(d) to secure the deposits of public funds. The custodian trustee shall properly identify and hold the pledged collateral in trust for the benefit of the public entities participating in the depository institution's specific pooled custodian account in the pooled collateral program.

(d) A participating depository institution may pledge its pooled collateral to more than one participating public entity under contract with the participating depository institution. The collateral security may be pledged using a single custodial account instead of an account for each public entity.

(e) Each participating depository institution's collateral may not be combined, cross-collateralized with, or aggregated with, or pledged to any other depository institution's collateral pools.

(f) The custodian trustee may either keep all collateral pledged for the benefit of the program in one identifiable pooled collateral account or in an account in the name of the participating depository institution where the collateral is clearly pledged and identified for the pooled collateral program using a unique code reporting system.

(g) The security interest for a participating depository institution's pledge of collateral is created, attaches, and is perfected when the custodian trustee records the pledge on its books and records and issues a trust receipt.

(h) The custodian trustee is for all purposes the bailee or agent of the public entity depositing the public funds as part of the pooled collateral program.

*§4.108. Acceptable Collateral.*

(a) To properly secure the deposit of public funds and to preserve the integrity and viability of the pooled collateral program, the comptroller will designate those instruments in this section and on its website that it deems acceptable to pledge as collateral. The comptroller's decision regarding whether an instrument is deemed acceptable collateral, either on its own determination or upon petition by a participating depository institution, is final and not subject to review.

(b) The comptroller will designate acceptable collateral for the program from those instruments allowed as eligible collateral under Government Code, §2257.02(4). The comptroller will designate acceptable collateral based upon its associated risks, its preservation of market value, its operational efficiencies, and such other appropriate criteria that may be developed by the comptroller.

(c) The comptroller will review its designation of acceptable collateral each state fiscal year and more often if needed. At its discretion the comptroller may add or remove its designation of acceptable collateral from time to time as appropriate to protect the deposit of public funds and the integrity of the pooled collateral program. The comptroller will provide at least 180 days notice of the same to participating depository institutions to allow substitution of a pledged instrument that is no longer deemed acceptable collateral, unless a shorter notice is required to adequately secure the deposit of public funds.

(d) A participating depository institution may make a written request that the comptroller approve an instrument that is not currently deemed as acceptable collateral. The participating depository institution will provide appropriate documentation to substantiate its request. The comptroller will review the request and notify the participating depository institution of its decision of whether to add the instrument to the designation of acceptable collateral that may be pledged by a participating depository institution and the rationale for its decision. The comptroller may accept or reject a proposed instrument based on the criteria for designating acceptable collateral.

(e) Except as provided in subsection (c) or (f) of this section, the following instruments are deemed acceptable to be pledged as collateral in the pooled collateral program:

(1) United States Treasury obligations;

(2) Mortgage-backed securities (Federal National Mortgage Association discount notes, primary debt instruments or debentures) with a remaining maturity of 15 years or less;

(3) Federal Home Loan Bank system consolidated bonds and discount notes issued in book-entry form;

(4) Federal Home Loan Bank Beneficiary Standby Letters of Credit that are fully collateralized;

(5) Federal Farm Credit Banks consolidated system-wide bonds and discount notes issued in book-entry form;

(6) Government National Mortgage Association securities;

(7) Federal Home Loan Mortgage Corporation discount notes and primary debt instruments or debentures, and only those mortgage-backed securities with a remaining maturity of 15 years or less;

(8) State of Texas bonds issued by various state agencies and four year educational institutions of the State of Texas; and

(9) Municipal bonds issued by governmental entities of the State of Texas with a rated investment quality by a nationally recognized investment rating firm of not less than "A" or its equivalent. By way of illustration, and not limitation, governmental entities include independent school districts, junior colleges, incorporated cities, certain road districts, certain municipal water and/or utility districts, hospital districts (excluding health facility bonds), and water and air pollution control districts.

(f) The following instruments are not deemed acceptable to be pledged as collateral in the pooled collateral program:

(1) Adjustable Rate Mortgages (ARM);

(2) Collateralized Mortgage Obligations (CMO);

(3) step-up securities;

(4) variable rate securities; and

(5) securities not found on common pricing systems.

*§4.109. Required Amount of Collateral.*

(a) If the balance of deposits of public funds in a participating depository institution is increased, the participating depository institution will increase the collateral for the deposits to the required amount.

(b) The comptroller shall determine the market value of acceptable collateral pledged by participating depository institutions to determine if the collateral amount is adequate. The comptroller's valuation of acceptable collateral is final and not subject to review.

(c) If the market value of the collateral pledged by a participating depository institution becomes less than the required amount, the comptroller shall require that additional collateral be pledged immediately, but not later than the close of business on the same day the comptroller notifies the depository institution that it does not meet collateral requirements.

(d) Except as provided in subsection (e) of this section, each participating depository institution shall pledge acceptable collateral with a total value of at least 105% of the amount of deposits of public funds in its pool, reduced to the extent deposits are insured by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund.

(e) If pledged collateral consists of securities with a declining principal balance, the market value of the collateral pledged may not be less than 125% of the amount of the deposits of public funds to be secured, reduced to the extent deposits are insured by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund.

(f) The collateralization requirements of Government Code, §2257.022(b) do not apply to a deposit of public funds held by a participating depository institution and collateralized in the pooled collateral program.

*§4.110. Pledge and Withdrawal of Collateral.*

(a) The comptroller will, as the designated agent of the public entity, monitor collateral pledged as part of the program and approve as appropriate, the pledge and withdrawal of collateral into and out of the custodian trustee account for pooled collateral.

(b) The comptroller will post procedures for pledging acceptable collateral on its website. The procedures will address the following:

(1) the pledge of acceptable collateral by the participating depository institution;

(2) the comptroller's review of the proposed pledge of collateral and notification to a participating depository institution if the proposed pledge is not approved;

(3) the comptroller's authorization to the custodian trustee to accept the pledge of collateral; and

(4) the custodian trustee's identification of the pledge of collateral on its books and records and issuance of a safekeeping trust receipt to the comptroller in an acceptable manner.

(c) The comptroller will post procedures for withdrawal of collateral on its website. The procedures will address the following:

(1) notice by the participating depository institution of the proposed withdrawal of collateral from its pooled collateral program pool;

(2) the comptroller's review of the proposed withdrawal of collateral and notification to the participating depository institution if the comptroller rejects the withdrawal of collateral;

(3) the comptroller's authorization to the custodian trustee to allow the withdrawal of collateral; and

(4) the custodian trustee's acknowledgement to the comptroller of receipt of approval to withdraw collateral and confirmation of the withdrawal.

*§4.111. Recovery of Public Deposits.*

If a participating depository institution fails to satisfy a claim against a deposit of public funds or becomes insolvent, the official custodian of a public entity (as set out in 12 CFR 330.15) may make a claim to recover their deposits of public funds.

*§4.112. Custodian Trustee Qualification and Participation.*

(a) A custodian trustee holds in trust the collateral pledged to secure deposits of public funds by the participating depository institution.

(b) A custodian trustee must qualify as a custodian under Government Code, §2257.104(c) or §2257.041(d) before acting as a custodian trustee in the pooled collateral program.

(c) A custodian trustee must be approved by a public entity before the custodian trustee may accept collateral to secure the deposit of its public funds.

(d) A custodian trustee or a permitted institution may not own, may not be owned by, and must be independent of the participating depository institution or institutions for which it holds the public entity's collateral in trust.

(e) The comptroller shall ensure that the custodian trustee is:

(1) a state or national bank that:

(A) is designated by the comptroller as a state depository;

(B) has its main office or a branch office in this state; and

(C) has a capital stock and permanent surplus of $5 million or more;

(2) the Texas Treasury Safekeeping Trust Company;

(3) a Federal Reserve Bank or a branch of a Federal Reserve Bank;

(4) a banker's bank as defined by Texas Finance Code, §34.105;

(5) a federal home loan bank; or

(6) a financial institution authorized to exercise fiduciary powers and that is designated by the comptroller as a custodian pursuant to Government Code, §404.031(e).

(f) If the custodian trustee qualified is to act under the terms of Government Code, §2257.041(d)(1) or (5), the comptroller will enter into an agreement to protect the security interests of collateral pledged for the pooled collateral program. If the custodian trustee is qualified to act under Government Code, §2257.104(c)(1) - (3) or §2257.041(d)(2) - (4), it is not required to enter into such an agreement with the comptroller.

(g) A qualified custodian trustee will comply with the following requirements to participate in the pooled collateral program:

(1) the custodian trustee shall comply with all procedures for pledge or withdrawal of collateral in the pooled collateral program;

(2) the custodian trustee shall properly identify and hold the pledged collateral in trust for the benefit of the pooled collateral program. The custodian trustee may either keep all collateral pledged for the benefit of the program in one identifiable pooled collateral account or in an account in the name of the participating depository institution where the collateral is clearly pledged and identified for the program using a unique code reporting system;

(3) the custodian trustee shall issue a trust receipt, advice of transaction, or other evidence of transaction to the comptroller indicating the pledge or withdrawal of collateral in a manner acceptable to the comptroller;

(4) the custodian trustee shall not allow a withdrawal of the collateral without permission of the comptroller; and

(5) the custodian trustee shall keep accurate and detailed records of all transactions related to the collateral.

*§4.113. Reporting Requirements.*

(a) The comptroller will publish instructions on the required electronic reporting procedures, deadlines, requirements, and format on its website.

(b) The comptroller will provide an electronic acknowledgement of each report received and post each report on its website.

(c) Each participating depository institution will file the following reports in accordance with the comptroller's instructions:

(1) daily report--the participating depository institution will file a daily report of its prior business day's aggregate ledger balance of deposits of public funds. The daily report will be itemized by each public entity and account. The participating depository institution will report deposits by account type, indicating interest bearing and non-interest bearing accounts;

(2) weekly summary report--the participating depository institution will file a weekly report of the total par and market value of collateral held by a custodian trustee on its behalf. As part of the participating depository institution's weekly summary report, it may either report the market value itself or adopt by reference the comptroller's daily report indicating the market value of the collateral for the due date of the weekly report. If a participating depository institution elects to adopt the comptroller's reported market value of the collateral by reference, it must elect to do so either during the application process or if during the two-year term, in accordance with the comptroller's guidelines posted on its website;

(3) monthly report--the participating depository institution will file a monthly report listing the collateral instruments held by a custodian trustee on behalf of the participating depository institution, to-

gether with the par and market value of the securities with their CUSIP numbers if applicable; and

(4) annual reporting--during even-numbered years beginning in 2012 the participating depository institution will file appropriate annual reports as the comptroller may require, including its annual report and financial statements. The comptroller will post any such annual reporting requirements on its website.

(d) The comptroller will provide a daily report on the market value of the collateral held in each pool on its website.

(e) The comptroller will, as the designated agent of the public entity, monitor the reports and related collateral held in trust for the benefit of the public entity and the pooled collateral program.

(f) The comptroller may impose an administrative penalty against a participating depository institution that fails to timely file a report as required under Government Code, §2257.107 and this chapter.

*§4.114. Public Entity Deposits and Notice to Participating Depository Institutions.*

(a) A public entity is responsible for reviewing and monitoring the reports posted on the comptroller's website related to its deposits of public funds.

(b) A public entity is responsible for verifying the accuracy of the daily reports of its itemized deposits and reporting any discrepancies to its participating depository institution.

(c) A public entity shall inform its participating depository institution of a significant change in the amount or activity of its deposits within a reasonable time before the change occurs.

(d) A participating depository institution must notify the comptroller if a public entity repeatedly fails to inform it of a significant change in the amount or activity in deposits as required in subsection (c) of this section.

(e) The comptroller in its discretion may disapprove a collateral security agreement between a participating depository institution and a public entity if that public entity fails to comply with the notice requirement in subsection (c) of this section more than two times within a one-year period.

*§4.115. Books and Records.*

(a) A participating depository institution, custodian trustee, and a permitted institution will maintain separate, accurate and complete records relating to each deposit of public funds, each pledge of collateral, and each transaction related to a pledge of collateral.

(b) A depository institution, custodian trustee and a permitted institution will provide, upon request, the comptroller or a public entity with information or confirmation regarding a deposit of public funds or a pledge of collateral.

(c) A public entity may, pursuant to the terms of its account agreement, review the records of its participating depository institution, custodian trustee, and permitted institution related to that public entity's deposit and collateralization of public funds in the pooled collateral program.

*§4.116. Certification of Compliance.*

(a) The comptroller at its discretion may require annual certification by a participating depository institution that it is in compliance with Government Code, Chapter 2257, Subchapter F and this chapter.

(b) The comptroller may require written confirmation from a participating depository institution, custodian trustee, or permitted institution that it is in compliance with the books and records requirements under Government Code, Chapter 2257 and this chapter.

*§4.117. Compliance with Laws; Venue.*

(a) The comptrollers' office and all participants in the pooled collateral program will comply with all applicable laws, including the Federal Reserve regulations and Operating Circulars, in connection with the pooled collateral program.

(b) A legal action brought by or against a public entity that arises out of or in connection with the duties of a depository institution, custodian trustee or permitted institution must be brought and maintained as provided by the contract with the public entity.

(c) Venue for any suit brought in connection with the pooled collateral program will be in State District Court in Travis County, Texas, and no other county.

*§4.118. Administrative Penalties for Noncompliance by Participating Depository Institution.*

(a) The comptroller may, in addition to other penalties provided by law, impose an administrative penalty against a participating depository institution for:

(1) failure to maintain collateral in an amount and in the manner required by Government Code, §2257.104 and this chapter, if the participating depository institution has not remedied the violation before the third business day after the date the notice is issued;

(2) failure to timely file a report required under Government Code, §2257.105 and this chapter; or

(3) failure to pay an assessment within 45 calendar days after the date it receives the notice.

(b) In an action under Government Code, §2257.108, the comptroller may consider the failure of a public entity to properly inform the participating depository institution of a significant change in amount or activity in its deposits as a mitigating factor if it causes the participating depository institution to be in violation of the collateral requirements under Government Code, §2257.104 and the rules of the comptroller.

(c) The comptroller will notify a participating depository institution if it is in violation of any reporting requirements, collateral requirements, or in the event of failure to pay the annual assessment.

(d) The comptroller and the participating depository institution may agree to informally resolve a pending violation and penalty.

(e) A proceeding to impose a penalty under Government Code, §§2257.107, 2257.108, and 2257.109 and this section, is a contested case under Government Code, Chapter 2001.

(f) If, after a determination that a penalty is due, the participating depository institution fails to pay the penalty, the comptroller may refer the matter to the attorney general for enforcement.

(g) The participating depository institution may stay enforcement of the penalty during the time the order is under judicial review in the manner provided in Government Code, §2257.113.

*§4.120. Assessment.*

(a) In accordance with Government Code, §2257.106, the comptroller shall impose an annual assessment each state fiscal year on each participating depository institution in an amount sufficient to pay the costs of administering the pooled collateral program. The comptroller will publish instructions on the required assessment procedure, formula, deadlines, and requirements on its website. The comptroller may, in its discretion and when appropriate, allocate program costs over a period of years.

(b) The formula for determining the amount of the assessment will be based on the following factors:

(1) the number of collateral transactions a participating depository institution conducts;

(2) the number of public entity accounts a participating depository institution maintains in the program; and,

(3) the depository institution's average weekly deposits of public funds collateralized during that state fiscal year.

(c) The annual assessment formula is the sum of the: depository institution's collateral transaction fee, public entity account maintenance fee, and depository institution's average weekly deposits fee based on its share of the total average weekly deposits of public funds collateralized in the program. The cost to administer the program each state fiscal year will be the sum of these three fees for all participating depository institutions. The annual assessment formula includes the following:

(1) a collateral transaction fee of $5.00 per collateral pledge or withdrawal transaction;

(2) a public entity account maintenance fee of $50.00 per public entity per month, or any part of a month, for the months of participation during the state fiscal year; and

(3) an average weekly deposits fee based on each depository institution's percentage of the total average weekly deposits of public funds collateralized in the program. The average weekly deposits fee is determined as follows:

(A) calculate each depository institution's average weekly deposit of public funds collateralized in the program;

(B) exclude those depository institutions with less than a $1 million in average weekly deposits, as they will not be subject to this fee;

(C) calculate the percentage share for each depository institution (with average weekly collateralized deposits of at least $1 million or more) of the total average weekly deposits of public funds (for all depository institutions with average weekly deposits of at least $1 million or more);

(D) determine the remaining annual program costs by subtracting all collateral transaction fees and public entity account maintenance fees from the total annual program costs; and

(E) apply each depository institution's percentage share obtained in subparagraph (C) of this paragraph to the remaining annual program costs in subparagraph (D) of this paragraph to obtain each depository institution's fee based on its percentage share of the average weekly deposits of public funds collateralized in the program.

(d) The comptroller shall calculate the annual assessment based on the formula in subsection (c) of this section and send a notification to each participating depository institution after the close of the state fiscal year.

(e) The participating depository institution will remit payment to the comptroller by Automated Clearing House (ACH) credit according to the instructions provided by the comptroller within 45 calendar days after the date it receives the notice.

(f) The comptroller may impose an administrative penalty against a participating depository institution if it does not timely pay the assessment.

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 September 29, 2010.

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Ashley Harden
General Counsel
Comptroller of Public Accounts
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# TITLE 40. SOCIAL SERVICES AND ASSISTANCE

## PART 20. TEXAS WORKFORCE COMMISSION

### CHAPTER 809. CHILD CARE SERVICES
### SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

**40 TAC §809.91**

The Texas Workforce Commission (Commission) adopts amendments, without changes, to the following section of Chapter 809, relating to Child Care Services, as published in the July 30, 2010, issue of the *Texas Register* (35 TexReg 6642):

Subchapter E. Requirements to Provide Child Care, §809.91

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

On May 29, 2007, the Commission adopted Chapter 809 Child Care Services rules requiring relatives caring for children in the relative's home to be a listed family home with the Texas Department of Family and Protective Services (DFPS). The intent of the new requirement was to minimize the risk of having Commission-funded child care services provided by individuals with a history of child abuse or neglect or with a criminal background that could call into question the individual's suitability for providing publicly funded child care. DFPS conducts checks of listed family homes against its Child Protective Services' (CPS) central registry of neglect and abuse and also conducts a criminal history check. The background and criminal history checks are conducted on the relative caring for a child receiving subsidized care, and any individual age 14 years of age or older who resides in or is frequently present in the relative's home during the hours of child care.

However, because child care provided exclusively in the child's home (in-home child care) does not meet the statutory definition of a family home in Texas Human Resources Code, Chapter 42, there is no such background check for relatives providing in-home care. Instead, §809.91(f)(2) requires Boards to ensure that relative in-home care providers do not appear on the Texas

Department of Public Safety's (DPS) Sex Offender Registry, pursuant to Texas Code of Criminal Procedure, Chapter 62.

Because in-home child care providers are subject only to sex offender registry checks--but not criminal background checks or checks against the CPS central registry--this significantly weakens the background and criminal history check requirement for relative providers. As such, in-home providers pose a greater risk to children with regard to subsidies paid to providers who might not be eligible to provide care--especially when compared to relative providers caring for children in the relative's home who must undergo background checks every two years. Even when DPS Sex Offender Registry checks are required for caregivers, this does not ensure that all other individuals who regularly or frequently stay or work in the home are not on the Sex Offender Registry.

To ensure that Commission-funded child care services are provided in a safe environment, the Commission's adopted Chapter 809 amendments address the following:

--The frequency of DPS Sex Offender Registry Checks for relative in-home child care providers.

--The placement of additional requirements on the use of relative in-home child care.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

The Commission adopts the following amendments to Subchapter E:

§809.91. Minimum Requirements for Providers

Child Care and Development Fund (CCDF) regulations at 45 C.F.R. §98.30(e) require states to allow parents to choose from a variety of child care settings, including in-home care. Further, §98.30(f) states that CCDF funds will not be available to a Lead Agency if state or local rules, procedures, or other requirements significantly restrict parental choice by expressly or effectively excluding or limiting parent access to provider types.

However, CCDF regulations at 45 C.F.R. §98.30(e) allow states to impose limitations on the use of in-home care.

The preamble to the CCDF regulations states:

Child care administrators have faced a number of special challenges in monitoring the quality of care and the appropriateness of payments to in-home providers. For that reason, we give Lead Agencies complete latitude to impose conditions and restrictions on in-home care. We have revised §98.16(g)(2) to require that Lead Agencies, in their CCDF Plans, specify any limitations on in-home care and the reasons for those limitations. (Federal Register, Vol. 63, No. 142, Friday, July 24, 1998, p. 39949)

As allowed by regulation, and because DFPS does not regulate in-home child care, the Commission:

--has always limited in-home child care to eligible relatives who are exempt from CCDF-required health and safety standards; and

--does not allow in-home child care by unregulated nonrelatives such as friends, neighbors, babysitters, or nannies.

As further allowed by CCDF regulations, the Commission may impose additional, more-stringent standards on the use of in-home child care; thus, making fewer relatives exempt from a criminal history check and a check against the CPS central registry of child abuse and neglect conducted by DFPS. These limits on the use of in-home care meet the Commission's intent to minimize the risk of having Commission-funded child care services provided by suitable individuals.

However, the Commission recognizes there are a variety of situations in which in-home care may be the best or only option. For example, a child with disabilities, especially a very young child, may require access to special medical or adaptive equipment that is in the child's home. In most cases, it would be impractical or ill-advised to move the child and the child's equipment to a relative's home, and care in the child's home would be the only practical option. Also, given the scarcity of regulated infant care in many areas of the state, relative in-home care may be the only option for families with very young children. Additionally, parents who work evenings, nights, or weekends may experience considerable difficulty in locating child care arrangements and in-home care may be the only option available to the family.

Section 809.91(e), specifying the circumstances in which a relative child care provider can reside in the same household as the eligible child, is removed and incorporated in new §809.91(e)(3).

Section 809.91(e)(1) adds the phrase "which is not the child's home" to clarify that the eligible relative child care provider cannot reside in the same household as the eligible child unless the care is provided under the circumstances specified in §809.91(e)(3). This change in rule language reflects the current practice and guidance provided in Workforce Development (WD) Letter 40-07, Change 1, issued June 22, 2007, and entitled "Background Checks for Relative Child Care Providers: Implementation Timeline."

Section 809.91(e)(2) defines "caring for a child in the child's own home" as "in-home child care."

Section 809.91(e)(2)(A) - (C) specifies that a relative in-home child care provider must undergo a check against the DPS Sex Offender Registry at the following points:

(A) The parent's initial eligibility determination;

(B) The parent's redetermination; and

(C) When the parent changes to a different relative in-home child care provider.

The language reflects guidance in WD Letter 18-10, issued March 24, 2010, and entitled "Texas Department of Public Safety Sex Offender Registry Checks."

Requiring that relative in-home child care providers do not appear on the DPS Sex Offender Registry at these points aligns with the Commission's intent to:

--protect the health and safety of children served by Commission-funded child care; and

--minimize the risk of child care subsidies being paid to individuals who appear on the registry.

Section 809.91(e)(3) sets forth the situations under which Boards must allow relative in-home child care. CCDF regula-

tions require that states allow parents to choose in-home child care, but states can limit the use of in-home child care.

Section 809.91(e)(3)(A) - (D) requires that Boards allow relative in-home child care for the following:

(A) A child with disabilities as defined in §809.2(6), and his or her siblings;

(B) A child under 18 months of age, and his or her siblings;

(C) A child of a teen parent; and

(D) When the parent's work schedule requires evening, overnight, or weekend care, in which taking the child outside of the child's home for child care would be disruptive to the child.

Section 809.91(e)(4) provides a Board may allow relative in-home child care when the Board's child care contractor determines and documents that other child care arrangements are not available to the parent in the community. The Commission recognizes that in many communities in the state, particularly in rural communities and small towns, there are no regulated child care facilities available to parents.

Certain subsections, paragraphs, and subparagraphs in §809.91 have been relettered and renumbered to accommodate additions or deletions.

No comments were received.

The rule is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rule affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

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 September 28, 2010.

TRD-201005580
Reagan Miller
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Texas Workforce Commission
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For further information, please call: (512) 475-0829

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# TITLE 43. TRANSPORTATION

## PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

### CHAPTER 6. STATE INFRASTRUCTURE BANK

The Texas Department of Transportation (department) adopts amendments to §6.1, Purpose, §6.2, Definitions, and §6.3, General Policies, the repeal of §6.4, Applicability, new §6.4, Separate Subaccounts, and the repeal of §6.5, Separate Subaccounts; amendments to §6.11, Eligible Entities, and §6.12, Eligible Properties, and new §6.13, Eligibility for Financial Assistance from General Obligation Bond Proceeds; amendments to §6.21, Department Contact, §6.22, Requested Financial Assistance, and §6.23, Application Procedure, the repeal of §6.24, Suspension of Applications, new §6.24, Limitation on Applications - Loans from General Obligation Bond Proceeds, and new §6.25, Suspension of Applications; amendments to §6.31, Department Action, and §6.32, Commission Action, and new §6.33, Commission Action - Loans from General Obligation Bond Proceeds; amendments to §6.41, Executive Director, §6.42, Performance of Work, and §6.43 Design, Construction, and Procurement Standards, the repeal of §6.44, Maintenance and Operations, and new §6.44, Design and Construction - Loans from General Obligation Bond Proceeds, the repeal of §6.45, Financial and Credit Requirements, and new §6.45, Maintenance, the repeal of §6.46, Other Requirements, and new §6.46, Financial and Credit Requirements, all concerning the State Infrastructure Bank. The amendments to §6.41, §6.42, and new §§6.13, 6.33, and 6.44 are adopted with changes to the proposed text as published in the July 9, 2010, issue of the *Texas Register* (35 TexReg 6033). The amendments to §§6.1 - 6.3, 6.11, 6.12, 6.21 - 6.23, 6.31, 6.32, and 6.43, the repeal of §§6.4, 6.5, 6.24, and 6.44 - 6.46, and new §§6.4, 6.24, 6.25, 6.45, and 6.46, are adopted without changes to the proposed text and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS, REPEALS, AND NEW SECTIONS

A rules advisory committee was appointed by the Texas Transportation Commission (commission) in September 2009. The committee met three times, once in April and twice in May of 2010. Members representing the Alamo Regional Mobility Authority, the Central Texas Regional Mobility Authority, The Harris County Toll Road Authority, the North Texas Tollway Authority, the Texas Association of Counties, the Texas Municipal League, the Texas Water Development Board and a Texas public international bridge operator attended at least one of the meetings. The rules are believed to reflect the consensus agreement of the committee members, although four of these eight representatives did not vote on the final version of the rules. Of the other four representatives, two of them voted in favor of the rules, one representative voted in favor except for one provision, and one representative wished to be shown as not taking a position on the rules.

Transportation Code, Chapter 222, Subchapter D establishes the state infrastructure bank (bank) and authorizes the commission to provide financial assistance from money in the bank for qualified projects. The bank has been functioning since 1998 and was capitalized with federal funds and money from the state highway fund.

The Texas Constitution, Article 3, Section 49-p and Transportation Code, §222.004 authorize the commission to issue general obligation bonds for the purpose of paying all or part of the cost of highway improvement projects, and the General Appropriations Act, as amended by House Bill 1, 81st Legislature, First Called Session, 2009, appropriated $1 billion of proceeds of the general obligation bonds to be used to capitalize the bank for the purpose of making loans to public entities.

The capitalization of the bank with general obligation bond proceeds requires revisions to the rules governing financial assistance from the bank because the purposes for which the pro-

ceeds of the general obligation bonds can be used is limited, the size of loans from the proceeds is contemplated to be substantially larger than those made from existing sources, and proceeds from the repayment of loans are expected to be used to secure revenue bonds, the proceeds of which can be used to make additional loans.

Additionally, revisions to the existing sections are made to reflect changes in the department's practices and procedures since the rules were initially adopted and to clarify some of the existing provisions.

Amendments to §6.1, Purpose, clarify that there may be legal restrictions on the use of money deposited in the bank. As a result of the changes made by the amendment of the chapter, not all of the funds deposited into the bank can legally be used for all of the purposes set out in §6.1(a).

Amendments to §6.2, Definitions, update the "design manual" definition to reflect the names of the publications currently used by the department, and add definitions for "environmental permits, issues, and commitments (EPIC)," "general obligation bonds," and "program call." The definition of "financial assistance" is amended to clarify that financial assistance does not include all of the types of assistance listed in the definition for all sources of money. The definition of "Unified Transportation Program, Construct and Develop designations" is deleted as it is not used in Chapter 6.

Amendments to §6.3, General Policies, update the requirements for the bank to maintain an investment grade rating to be consistent with current federal law. Existing subsection (f), relating to the timing of repayment of financial assistance, is deleted and placed in §6.41, Financial Assistance Agreements, since it is more appropriately a contract term rather than a general policy, and becomes subsection (b) of that section.

Existing §6.4, Applicability, is repealed because the section is time sensitive and the period of its application has passed.

Section 6.5, Separate Subaccounts, is repealed and readopted as new §6.4, with clarifying changes in the language. The change provides for the creation of an additional subaccount capitalized with proceeds of the general obligation bonds and Secondary Funds derived from the repayments of loans made from general obligation bond proceeds. The additional subaccount is needed to keep these funds separate from federal and state highway funds because the purposes for and the limitations on these types of funds are distinct from the other funds due to constitutional restrictions on the use of general obligation funds.

Amendments to §6.11, Eligible Entities, clarify that eligibility to apply for financial assistance is limited by other provisions of Chapter 6.

Amendments of §6.12, Eligible Projects, provide for an exception from the eligibility criteria because, as addressed in new §6.13, financial assistance from general obligation bond proceeds is subject to additional limitations. Further changes clarify that, for a transit project, financial assistance is limited to bank funds that may be lawfully expended for that purpose.

New §6.13, Eligibility for Financial Assistance from General Obligation Bond Proceeds, creates limits, categories, and methods regarding loans from the bank. New §6.13(a) limits the use of general obligation bond proceeds to public entities of direct loans to pay costs of highway improvement projects on or off of the state highway system, as is required by Transportation Code, §222.004. New §6.13(b) establishes the categories of loans that may be made: 1) loans of sufficient credit quality to allow secondary funds to be the security for revenue bonds issued under Transportation Code, §222.075; and 2) loans of lesser credit quality, if the loan is anticipated to be refinanced by the applicant within three years of completion of the project, the loan is a part and represents not more than 20 percent of a much larger financing that would not be feasible unless the loan is made on a subordinate basis, or the loan is in the amount of $4 million or less. The commission intends that bank loans from general obligation bond proceeds "revolve" as soon as reasonably feasible, or be "leveraged" to the maximum extent feasible. New §6.13(b) provides two methods of leverage: 1) loans where the repayments of the loans are security for revenue bonds; and 2) loans that are smaller parts of larger financings that could not be completed without those loans. Section 6.13(b) provides one method for revolving loans: loans that are anticipated to be refinanced within three years of completion of the project. New §6.13(c) limits the use of repayments of loans to making new loans or securing revenue bonds issued for the purpose of funding highway improvement projects, because repayments of general obligation bonds are considered to be legally limited to these uses. New §6.13(d) requires that senior or parity debt, except for TIFIA loans, payable from the same revenue that would secure the loan from the bank, have an investment grade rating, because having an investment grade rating on such a debt is a good indication of the credit quality of the revenue source and, conversely, the absence of an investment grade rating may indicate the revenue source is of low credit quality. TIFIA loans are excluded as they are frequently not rated as a matter of U.S. Department of Transportation policy.

Amendments to §6.21, Department Contact, specify that the director of the department's finance division, or the director's designee, is the contact within the department for potential applicants for financial assistance because the finance division is responsible for administering the state infrastructure bank program.

Amendments to §6.22, Requested Financial Assistance, clarify that the form of financial assistance that may be provided by the bank is limited in accordance with other law and as set out by Chapter 6. The existing rule incorrectly implies that there is no limitation on the forms of financial assistance available.

Amendments to §6.23, Application Procedure, add to the information that must be submitted with the application. The requirements for additional information were added because a more sophisticated analysis of the ability of an applicant to repay is needed for the potentially large loans that will be made from the bank using general obligation bond proceeds, and the additional information is necessary to make such an analysis. Section 6.23(a)(5) requires submission of the most recent official statement for any outstanding debt of the applicant payable from the revenue proposed to be used to repay the financial assistance along with financial documents related to that debt. Section 6.23(b)(1) makes mandatory, unless the requirement is waived by the executive director as provided by §6.23(c), the submission of a financial feasibility study that, under the existing rules, need not be submitted unless requested. Section 6.23(b)(1)(C) is amended to clarify and modify what the pro forma analysis is required to show and to add a requirement for a preliminary traffic and revenue study for toll road projects so that the provision, as amended, will help ensure the information received will be of the type and in the form that is needed to enable the department to effectively analyze financial feasibility. Section 6.23(b)(1)(G)

is amended to limit interest rate subsidies to economically disadvantaged counties, cities within economically disadvantaged counties, or another public entity that has within its boundary at least one entire disadvantaged county. Section 6.23(b)(2) requires the submission of the applicant's most recent annual budget, the five most recent comprehensive annual reports or audits of the applicant, the applicant's current capital planning document that addresses uses of the revenue proposed to be used for repayment of the financial assistance, and additional information on any known environmental, social, economic, or cultural resource issues, plus an explanation of the status of obtaining environmental approvals. Section 6.23(c)(1) adds whether the source of the financial assistance will be general obligation bond proceeds as a factor the executive director is to consider in deciding whether to waive submission of any item of data required by the §6.23, because, if these proceeds are the source, it is more likely that the information will be needed.

New §6.24, Limitation on Applications - Loans from General Obligation Bond Proceeds, adds a "program call" by which the commission specifies the periods during which the department will accept applications, requires that the department publish a notice in the *Texas Register* soliciting applications, and specifying that the notice shall contain: the period for accepting applications, the estimated available amount of funds in the bank, the conditions for the submission of applications, and any other information the commission or the department considers appropriate. This section is needed to ensure that qualified applicants have an equal opportunity to have their application considered by the commission in an orderly fashion, rather than on a first-come, first-served basis that is appropriate for the smaller loans made from sources other than general obligation bond proceeds.

Current §6.24 is repealed and the language of that section is readopted without change as §6.25 because of the addition of the new §6.24.

Amendments to §6.31, Department Action, add a requirement that the department advise an applicant of any required information that is missing from the application and set out periods for analysis of an application by the department. The analysis must be completed in 30 days after the application process is completed, but the executive director may extend the time by up to 45 additional days if more time for analysis is needed. The executive director may further extend the time if additional time is needed because of the receipt of a substantial number of applications within a short period of time. These changes are made to provide definite time lines and an established process for reviewing applications and to retain some flexibility when extending the time is reasonable.

The amendments change the heading of §6.32 to "Commission Action - Financial Assistance from Other Than General Obligation Bond Proceeds" to clarify that the section does not apply to financial assistance provided from the proceeds of general obligation bonds, which is now covered by the new §6.33.

New §6.33, Commission Action - Loans from General Obligation Bond Proceeds, sets out the requirements for preliminary and final approval of such a loan. These new provisions establish parameters and procedures for commission action on loans from general obligation bond proceeds and are needed because the existing parameters and procedures for providing financial assistance from the bank are not appropriate for the larger, more complex loans anticipated to be made from general obligation bond proceeds.

New §6.33(a) sets out the factors to be considered by the commission and the requirements that must be met prior to granting preliminary approval, and, subject to §6.33(a)(4), the minimum amount of bank capital to be allocated to each category if there is insufficient capital to fund all of the qualifying loan applications.

Under §6.33(a)(1), the commission, prior to granting preliminary approval, will consider the need for and benefits of the proposed project, the availability of funding from all sources, the percentage of the project cost that will be covered by the requested loan, the financial feasibility of the project, the potential for leveraging the loan, including using secondary funds as security for revenue bonds issued under Transportation Code, §222.075, potential social, economic, and environmental impacts of the project, the interoperability of the toll collection system if the loan is for a toll project, evidence of public support, and the applicant's experience.

New §6.33(a)(2) provides a framework for the allocation of bank capital, and is intended to provide a basis for allocation if there are insufficient funds to make loans to all applicants with qualified projects. However, in order to give the commission and the department additional flexibility in allocating loan amounts for preliminary approval, §6.33(a)(3) states that the minimum allocations are target allocations and that the department may recommend and the commission may approve applications that are not within the target allocations based on the considerations set forth in §6.33(a)(1) if there are insufficient applications in one of the categories or if the department or the commission determines that a different allocation is warranted. The target allocations for each program call as provided for in §6.33(a)(2) are: (A) not less than 25 percent to loans of sufficient credit quality to be the security for, and source of repayment of, revenue bonds issued under Transportation Code, §222.075, as determined by the executive director; (B) not less than 25 percent to loans of credit quality below that described in (A), as determined by the executive director, such as loans that are subordinated to existing or proposed debt for a project or of an applicant, if, as determined by the commission, the loan is anticipated to be refinanced by the applicant within three years of completion of the project, or the loan is a part and represents not more than 20 percent of a larger financing that would not be feasible unless the loan is made on a subordinate basis; and (C) of the amount allocated subparagraph (A) or (B), not less than 10 percent shall be allocated to loans of $4 million or less.

New §6.33(a)(4) sets out the minimum requirements for granting of preliminary approval by the commission, including, to the extent applicable, that the project is consistent with the Statewide Transportation Plan, with the metropolitan transportation plan developed by an MPO, the Statewide Transportation Improvement Program, with the conforming plan and Transportation Improvement Program for the MPO in which the project is located, and with the State Implementation Plan; that the project will improve the efficiency of the state's transportation systems and expand the availability of funding for transportation projects or reduce direct state costs; and that the application shows that the project and the applicant are likely to have sufficient revenues to assure repayment of the loan. These provisions are consistent with requirements for other department financial assistance programs.

New §6.33(a)(5) provides that, by granting preliminary approval, the commission authorizes the executive director to take specified actions that are necessary for the application to receive final approval for funding of the loan, and without which the commis-

sion would have insufficient basis for granting final approval. The executive director will evaluate the project and identify any adverse features, negotiate the amount, type, and timing of loan disbursements, negotiate an interest rate, repayment schedule, collateral securing the loan, and default provisions, and negotiate provisions for subordination of the loan to other debt of the project if authorized to do so by the commission in the preliminary approval.

Under new §6.33(a)(6) if the executive director is seeking changes to the limits, scope, design, or other aspects of the project, the executive director must consider the applicant's past experience with similar projects and whether the project is intended to become part of the state highway system or otherwise be subject to the jurisdiction of the department.

New §6.33(b) requires an applicant to complete the environmental review, because delays in obtaining the required environmental approvals delay the construction of a project and delay the use of encumbered loan proceeds. For a toll project, §6.33(b) requires an applicant to obtain an investment grade traffic and revenue report for the project, because the ability of an applicant to repay the loan will depend on toll revenues, making a more sophisticated report important to the final approval. Section 6.33(b)(2) gives the executive director the authority to waive a requirement of subsection (b)(1) if the executive director determines that the requirement is inapplicable or unnecessary due to the nature of the requested assistance.

New §6.33(c) provides that the commission may grant final approval after completion of negotiations and compliance with the requirements of §6.33, if it determines that making the loan will prudently provide for the protection of public funds and the project will provide for all reasonable and feasible measures to avoid, minimize, or mitigate environmental impacts. Because the commission may desire to grant final approval only if certain conditions are met or if certain changes are made to the project, new §6.33(d) provides that the commission may make its preliminary approval contingent on the applicant's making changes or performing other acts, or establishing certain conditions necessary to provide for the adequacy of any required repayments and may make its final approval subject to the applicant's fulfilling specified conditions precedent to the release of loan funds. Since the financial viability of a toll road project can be determined in advance only through a traffic and revenue study and accurate cost information, §6.33(e) provides that the commission may make its preliminary or final approval contingent on the department's receiving an updated traffic and revenue report and updated cost information showing no changes have occurred that materially and adversely affect the financial status of the project or the applicant.

Amendments to §6.41, Executive Director, change the section title to Financial Assistance Agreements, designate the current section as subsection (b), move language relating to financial assistance from current §6.3, and add provisions that are permissible for or required in financial assistance agreements.

New §6.41(a) provides that an agreement evidencing a loan or other financial assistance may be in the form of a contract or similar document, or may be in the form of a bond, note, or other obligation issued by the applicant.

The language of current §6.3(f) is added as subsection (c). The subsection requires repayment at the earliest possible time, with an added exception allowing the commission to defer the initial repayment of financial assistance for up to five years after the date of initial funding of financial assistance to give additional flexibility to make loans that meet the needs of applicants.

New §6.41(d) requires interest to be paid semiannually on February 1 and August 1, and principal to be paid on February 1. New §6.41(e) allows prepayments without penalty on any February 1 or August 1 after the date specified in the financial assistance agreement. These provisions allow repayments and prepayments in a manner that is not as administratively complex or inefficient as accepting those payments on any date.

New §6.41(f) adds terms for assistance from general obligation bond proceeds, including requirements for a certified copy of the resolution of the applicant, certificates relating to federal tax and securities law and state law as specified by the executive director, and, if requested by the executive director, a bond counsel opinion and a certificate that the applicant will make reasonable efforts to obtain the approval of the financial assistance agreement by the Office of the Attorney General's Public Finance Division, because these terms are necessary for the loans to be eligible to secure revenue bonds.

New §6.41(g) requires the department to provide necessary, reasonable, and customary assurances in the financial assistance agreement if the assurances are consistent with the agreement and are necessary for the applicant to obtain funding from other sources.

Amendments to §6.42, Performance of Work, clarify that the department and the applicant may agree for the department to provide all or part of the work on a project. Section 6.42(a)(3) is amended to provide that disputes arising after the execution of a financial assistance agreement concerning the department's actions and decisions regarding the project may be addressed and resolved as provided in the financial assistance agreement. The provisions of §6.42(b) relating to work performed by the applicant are deleted and replaced by new paragraphs (1) - (7), which require the applicant to comply with applicable state and federal law and the agreement; to maintain, with some exceptions, its books and records in accordance with generally accepted accounting principles; to have, for loans of greater than $1 million, a full audit and provide a copy of the report to the department; to retain or cause the auditor to retain all work papers and reports for at least four years and make them available to the department; to retain all original project files until the later of the time that the project is completed, financial assistance has been repaid, or legally required retention periods have passed, unless the department agrees to a shorter period; and to maintain the project accordance with §6.45 if it will become part of the state highway system and the department will assume jurisdiction, and transfer the specified information to the department when it assumes jurisdiction. These changes are made to bring these provisions in line with current department requirements in other programs in which the department provides financial assistance to other governmental entities. For loans of $1 million or less, the previous requirements in §6.42(b)(3) and (4) are retained and placed in new §6.42(b)(4). With respect to the audit requirement of §6.42(b)(3), it should be noted that, for a county that has appointed an operating board and established a separate toll operating entity under Transportation Code, Chapter 284, the audit requirement applies to the toll operating entity rather than to the county.

The amendments change the heading of §6.43 to "Design, Construction, and Procurement Standards - Financial Assistance from Other Than General Obligation Bond Proceeds" to indicate that the section does not apply to financial assistance provided

from the proceeds of general obligation bonds, which is now covered by the new §6.44.

Current §6.44, Maintenance and Operations, is repealed and replaced with a new §6.44. New §6.44, Design and Construction - Loans from General Obligation Bond Proceeds, sets out the requirements for the design and construction of a project. New §6.44(a) makes the applicant solely responsible for the design and construction of the project, except to the extent the department provides the work. New §6.44(b) requires project plans and specifications to be in compliance with the design manuals or American Association of State Highway and Transportation Officials standards, unless an exception is approved by the executive director after determining that the particular criteria could not reasonably be met and that the proposed design is a prudent engineering solution, or that the deviation meets some other design criteria acceptable to the department.

New §6.44(c) requires, for projects that will change access to an interstate highway, that the applicant submit data necessary for the department to request Federal Highway Administration approval, and, when the design is 30 percent complete, that the applicant submit design details including a completed design summary report form; a design schematic; typical sections showing dimensions, cross slopes, location of profile grade line, pavement thickness and composition, and right of way lines; bridge, retaining, and sound wall layouts; hydraulic studies; anticipated handling of traffic during construction; the structural capacity of each bridge; and the location and text of mainlane guide signs. Section 6.44(c) further requires that all plans, specifications, and estimates conform to the latest version of the department's standard specifications, and, if applicable, alternative specifications approved by the executive director. Subsection (c) additionally requires that the applicant must submit for approval final design plans and contract administration procedures in accordance with the financial assistance agreement, including seven copies of the plans, specifications, and engineer's estimate (PS&E) with summarized or highlighted revisions, showing the locations and descriptions of all EPIC, and a proposal for bidding in compliance with state and federal requirements. Subsection (c) further requires that the applicant oversee construction inspection and oversight, that all contract revisions comply with the latest versions of applicable national or state administration criteria and manuals, that as-build plans be filed with the department, that all materials be delivered electronically, if available, that the applicant provide or obtain all required permits, plans, and other documentation, and that all work on state right of way be done pursuant to written agreement with the department. These added provisions are appropriate for the larger loans anticipated to be made from general obligation bond proceeds, and are consistent with current department requirements in other programs in which the department provides financial assistance to other governmental entities.

Current §6.45, Financial and Credit Requirements, is repealed and replaced with a new §6.45. New §6.45, Maintenance, allows the department to require minimum maintenance standards, and requires that all bridges be maintained in compliance with applicable requirements and that the department perform safety inspections of the bridges. New §6.45(c) requires the department, in determining minimum maintenance standards, to consider the applicant's past experience and whether the project is intended to be subject to the jurisdiction of the department. The new provisions are needed to have maintenance requirements that are consistent with current department requirements in other programs in which the department provides financial assistance to other governmental entities.

Current §6.46, Other Requirements, is repealed as unnecessary because the requirements of the section are addressed in other sections and is replaced with a new §6.46. New §6.46, Financial and Credit Requirements, requires an applicant to repay financial assistance in accordance with the financial assistance agreement; to submit annual and supplemental operating and capital budgets within 30 days of their adoption; to submit to the department, for all debt payable from the same revenue that is to repay the financial assistance, annual financial information and notices of material events within 30 days after their submission to Electronic Municipal Market Access System (EMMA) of the Municipal Securities Rulemaking Board, or advise the department in writing that the submission to EMMA has been made and provide in that writing the associated CUSIP number; and to abide by provisions governing default. These provisions are similar to those of the repealed §6.45, but are updated to be consistent with current department requirements in other programs in which the department provides financial assistance to other governmental entities

COMMENTS

Comments on the proposed amendments, repeals, and new sections were received from the North Texas Tollway Authority (NTTA).

Comment: NTTA recommended that environmental remediation and mitigation be added to the list of eligible costs in Section 6.13(a).

Response: Texas Constitution, Article 3, Section 49-p and Transportation Code, §222.004 generally limit the commission to issuing general obligation bonds for the purpose of paying all or part of the cost of highway improvement projects. Section 6.13(a) has been amended to clarify that other costs directly resulting from the construction or reconstruction of a highway improvement project may be paid for from the proceeds of these bonds.

Comment: NTTA recommended that Section 6.13(b)(1) be modified to provide that SIB loans may not be sold, assigned, or otherwise conveyed to third parties, and that only the proceeds from the repayment of loans, and not the loans themselves, may be used to secure revenue bonds.

Response: The department does not have the authority to sell, assign, or otherwise convey loans to third parties, but wants to retain the flexibility to consider the sale of loans should the department obtain that authority. No change will be made. Section 6.13(b)(1) has been amended to provide that general obligation bond proceeds may be used for a loan of sufficient credit quality to allow secondary funds, including funds derived from the repayment of a loan and investment income generated from secondary funds deposited to the credit of the SIB, to be the security for, and source of repayment of, revenue bonds issued under Transportation Code, §222.075.

Comment: NTTA recommended that Section 6.13(c)(2) be modified to provide that the proceeds of revenue bonds issued under Transportation Code, §222.075 may only be used for the same purposes of general obligation bond proceeds under Section 6.13(a).

Response: The General Appropriations Act, as amended by House Bill 1, 81st Legislature, First Called Session, 2009, appropriated $1 billion of proceeds of the general obligation bonds

to be used to capitalize the bank for the purpose of making loans to public entities. The limitation on making loans to public entities for highway improvement projects by its terms only applied to the proceeds of general obligation bonds, and not to the proceeds of revenue bonds issued under Transportation Code, §222.075. Section 6.13(c)(2) has been amended to limit the use of repayments of loans to making new loans or securing revenue bonds issued for the purpose of funding highway improvement projects. Repayments of general obligation bonds are considered to be legally limited to securing revenue bonds for which the proceeds will also be used to fund highway improvement projects.

Comment: NTTA recommended that Section 6.31(b) include a time limit in the event the executive director needs additional time to evaluate applications beyond the 75 days permitted in the rule.

Response: The department recognizes the need to provide, to the extent possible, certainty to applicants as to when a decision on an application will be made. Once the program to provide loans from the proceeds of general obligation bonds has been established, the department will reevaluate the time limits to evaluate an application, and make changes where appropriate. No change will be made at this time.

Comment: NTTA notes that Section 6.33(a)(1)(E) permits the commission to consider the potential for leveraging the loan in making a decision to approve an eligible project. NTTA would like to see language providing that leveraging the loan does not include selling, assigning, or otherwise conveying the loan to third parties, and that TxDOT may use the proceeds from the repayment of loans, but not the loans themselves, to secure revenue bonds.

Response: The department does not have the authority to sell, assign, or otherwise convey loans to third parties, but wants to retain the flexibility to consider the sale of loans should the department obtain that authority. No change will be made. Section 6.33(a)(1)(e) has been amended to provide that prior to granting preliminary approval of an eligible project, the commission will consider the potential for leveraging the loan, such as by using secondary funds, including funds derived from the repayment of a loan and investment income generated from secondary funds deposited to the credit of the SIB, to be the security for revenue bonds issued under Transportation Code, §222.075.

Comment: NTTA notes that Section 6.42(a)(3) states that the department's actions and decisions regarding a project for which TxDOT is performing work shall not be contestable by the applicant. NTTA suggests this provision apply only prior to the execution of a financial assistance agreement. NTTA states that disputes arising after execution of a financial assistance agreement should be addressed in accordance with the terms of the agreement, including any dispute resolution provisions.

Response: Section 6.42(a)(3) has been amended to provide that disputes arising after the execution of a financial assistance agreement concerning the department's actions and decisions regarding the project may be addressed and resolved as provided in the financial assistance agreement.

In addition to the changes to the proposed rules described above, the cross reference in §6.42(b)(4)(B) was corrected and a grammatical change was made in the last sentence of §6.44(b)(2).

## SUBCHAPTER A. GENERAL PROVISIONS

**43 TAC §§6.1 - 6.4**

STATUTORY AUTHORITY

The amendments and new section are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §222.004, which authorizes the commission to issue general obligation bonds for the purpose of paying all or part of the cost of highway improvement projects, and Transportation Code, §222.077, which authorizes the commission to adopt rules to implement Transportation Code, Chapter 222, Subchapter D relating to the state infrastructure bank.

CROSS REFERENCE TO STATUTE

Transportation Code, §222.004 and Chapter 222, Subchapter D.

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 October 1, 2010.

TRD-201005660
Bob Jackson
General Counsel
Texas Department of Transportation
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Proposal publication date: July 9, 2010
For further information, please call: (512) 463-8683

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**43 TAC §6.4, §6.5**

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §222.004, which authorizes the commission to issue general obligation bonds for the purpose of paying all or part of the cost of highway improvement projects, and Transportation Code, §222.077, which authorizes the commission to adopt rules to implement Transportation Code, Chapter 222, Subchapter D relating to the state infrastructure bank.

CROSS REFERENCE TO STATUTE

Transportation Code, §222.004 and Chapter 222, Subchapter D.

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. ELIGIBILITY

**43 TAC §§6.11 - 6.13**

STATUTORY AUTHORITY

The amendments and new section are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §222.004, which authorizes the commission to issue general obligation bonds for the purpose of paying all or part of the cost of highway improvement projects, and Transportation Code, §222.077, which authorizes the commission to adopt rules to implement Transportation Code, Chapter 222, Subchapter D relating to the state infrastructure bank.

CROSS REFERENCE TO STATUTE

Transportation Code, §222.004 and Chapter 222, Subchapter D.

*§6.13. Eligibility for Financial Assistance from General Obligation Bond Proceeds.*

(a) General. General obligation bond proceeds may be used only to provide to public entities direct loans to pay costs of highway improvement projects on or off of the state highway system, including acquisition of the highway, construction, reconstruction, and major maintenance, including any necessary design, the acquisition of rights-of-way, and other costs directly resulting from the construction or reconstruction of a highway improvement project.

(b) Loan categories. General obligation bond proceeds may be used for the following categories of loans:

(1) a loan of sufficient credit quality to allow secondary funds to be the security for, and source of repayment of, revenue bonds issued under Transportation Code, §222.075, as determined by the executive director;

(2) a loan of credit quality below that described in paragraph (1) of this subsection, as determined by the executive director, such as loans that are subordinated to existing or proposed debt for a project or of an applicant, if, as determined by the commission:

(A) the loan is anticipated to be refinanced by the applicant within three years of completion of the project;

(B) the loan is a part and represents not more than 20 percent of a larger financing, and the larger financing would not be feasible unless the loan is made on a subordinate basis; or

(C) the loan is in the amount of $4 million or less.

(c) Eligibility - secondary funds. Secondary funds derived from repayments of loans made from general obligation bond proceeds may only be used:

(1) to make loans in the same manner and subject to the same provisions of this chapter as loans made from general obligation bond proceeds; or

(2) to secure, including as reserves, revenue bonds issued under Transportation Code, §222.075 for the purpose of funding highway improvement projects.

(d) Required ratings on other debt. All senior or parity debt payable from the same revenue that would secure the loan, including any senior or parity debt that will be part of the financing of the project for which the loan has been requested, but excluding loans for the project received under the Transportation Infrastructure Finance and Innovation Act or under a successor or similar federal program, must have an investment grade rating.

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. PROCEDURES

### 43 TAC §§6.21 - 6.25

STATUTORY AUTHORITY

The amendments and new sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §222.004, which authorizes the commission to issue general obligation bonds for the purpose of paying all or part of the cost of highway improvement projects, and Transportation Code, §222.077, which authorizes the commission to adopt rules to implement Transportation Code, Chapter 222, Subchapter D relating to the state infrastructure bank.

CROSS REFERENCE TO STATUTE

Transportation Code, §222.004 and Chapter 222, Subchapter D.

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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### 43 TAC §6.24

STATUTORY AUTHORITY

The repeal is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §222.004, which authorizes the commission to issue general obligation bonds for the purpose of paying all or part of the cost of highway improvement projects, and Transportation Code, §222.077, which authorizes the commission to adopt rules to implement Transportation Code, Chapter 222, Subchapter D relating to the state infrastructure bank.

CROSS REFERENCE TO STATUTE

Transportation Code, §222.004 and Chapter 222, Subchapter D.

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-201005664
Bob Jackson
General Counsel
Texas Department of Transportation
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Proposal publication date: July 9, 2010
For further information, please call: (512) 463-8683

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## SUBCHAPTER D. DEPARTMENT AND COMMISSION ACTION

### 43 TAC §§6.31 - 6.33

STATUTORY AUTHORITY

The amendments and new sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §222.004, which authorizes the commission to issue general obligation bonds for the purpose of paying all or part of the cost of highway improvement projects, and Transportation Code, §222.077, which authorizes the commission to adopt rules to implement Transportation Code, Chapter 222, Subchapter D relating to the state infrastructure bank.

CROSS REFERENCE TO STATUTE

Transportation Code, §222.004 and Chapter 222, Subchapter D.

*§6.33. Commission Action - Loans from General Obligation Bond Proceeds.*

(a) Preliminary approval.

(1) Considerations. Prior to granting preliminary approval of an eligible project, the commission will consider:

(A) the transportation need for and anticipated public benefit of the project, including factors such as the project's potential ability to accelerate needed transportation facilities or to reduce financial and other burdens on the commission and the department regarding the development, operation, and maintenance of those facilities;

(B) availability of funding from all sources;

(C) the percentage of the total project cost that is represented by the requested loan;

(D) the financial feasibility of the project;

(E) the potential for leveraging the loan, including using secondary funds as security for revenue bonds issued under Transportation Code, §222.075;

(F) potential social, economic, and environmental impacts of the project;

(G) for a toll project, the extent to which the applicant's toll collection system or plan for a toll collection system provides interoperability;

(H) evidence of local public support; and

(I) the applicant's past experience with similar projects and past performance working in collaboration with the department in the development of similar projects, if applicable.

(2) Allocation of bank capital. For each program call, if there is insufficient bank capital to fund all of the qualifying loan applications, the commission shall, subject to paragraph (3) of this subsection, allocate the available bank capital as follows:

(A) not less than 25 percent to the category of loan described in §6.13(b)(1) of this chapter (relating to Eligibility for Financial Assistance from General Obligation Bond Proceeds);

(B) not less than 25 percent to the category of loan described in §6.13(b)(2) of this chapter; and

(C) of the amounts allocated in subparagraphs (A) and (B) of this paragraph, not less than 10 percent of each amount shall be allocated to loans of $4 million or less within the category.

(3) Allocations as targets. The allocations set forth in paragraph (2) of this subsection are target allocations and the department may recommend and the commission may approve applications that are not within the target allocations if applications in one of the categories are insufficient to use the bank capital for that category or if, based on the considerations set forth in paragraph (1) of this subsection, the department or the commission determine that a different allocation is warranted.

(4) Project requirements. The commission may grant preliminary approval of a project for financing if it finds that:

(A) the project is consistent with the Statewide Transportation Plan and, if appropriate, with the metropolitan transportation plan developed by an MPO;

(B) if the project is in a nonattainment area, the project will be consistent with the Statewide Transportation Improvement Program, with the conforming plan and Transportation Improvement Program for the MPO in which the project is located (if necessary), and with the State Implementation Plan;

(C) the project will improve the efficiency of the state's transportation systems;

(D) the project will expand the availability of funding for transportation projects or reduce direct state costs; and

(E) the application shows that the project and the applicant are likely to have sufficient revenues to assure repayment of the loan according to the terms of the agreement.

(5) Authorized actions. By granting preliminary approval, the commission authorizes the executive director to:

(A) evaluate the project's limits, scope, definition, design, and other features, and identify any that adversely affect the financing of the project, including EPIC, and determine whether to negotiate changes in accordance with paragraph (6) of this subsection;

(B) negotiate the amount, type, and timing of disbursements of the loan;

(C) negotiate an interest rate, a repayment schedule, collateral securing the loan, including any reserve, and default provisions;

(D) negotiate provisions providing for the subordination of loan financing provided under this chapter to any other debt financing for the project, whether the other financing is currently in place or will be incurred concurrently with the loan or after the loan is made, but only if authority to negotiate those provisions is provided to the executive director in the preliminary approval and if subordination is necessary for the project's financial feasibility; and

(E) negotiate all other provisions that are necessary to complete an agreement under this chapter.

(6) Factors for changes to project's features. In determining the extent to which the executive director will seek changes to the features described in paragraph (5)(A) of this subsection, the executive director will consider:

(A) the applicant's past experience with similar projects; and

(B) whether the project is intended to become part of the state highway system or otherwise be subject to the jurisdiction of the department.

(b) Environmental documents; traffic and revenue report.

(1) Prior to receiving final approval under subsection (c) of this section for the loan of funds for the construction of a project, the applicant shall:

(A) complete the environmental review and public involvement requirements in Chapter 2, Subchapter A of this title (relating to Environmental Review and Public Involvement for Transportation Projects); and

(B) for a toll project, obtain an investment grade traffic and revenue report for the project from a nationally recognized traffic engineer.

(2) The executive director may waive the requirements of paragraph (1)(A) or (B) of this subsection if he or she determines that the study or report is inapplicable or unnecessary due to the nature of the requested assistance.

(c) Final approval. After preliminary approval, completion of negotiations, and compliance with this section, the commission may grant final approval if it determines that:

(1) making the loan will prudently provide for the protection of public funds; and

(2) the project will provide for all reasonable and feasible measures to avoid, minimize, or mitigate adverse environmental impacts.

(d) Contingencies - general. The commission may make its preliminary approval contingent on the applicant's making changes, performing other acts, or establishing certain conditions necessary to provide for the adequacy of any required repayments. The commission may make its final approval subject to the applicant's fulfilling specified conditions precedent to the release of loan funds and, if so, the conditions precedent will also be in the financial assistance agreement. The necessity and nature of the changes, acts, or conditions under this subsection will be determined after considering the applicant's past experience with similar projects and past performance working in collaboration with the department in the development of similar projects, especially with regard to the applicant's previous use of the commission's financial assistance.

(e) Contingencies - toll projects. The commission may make its preliminary or final approval contingent on the department's receiving updated cost information and an update of the traffic and revenue report required by subsection (b) of this section that together show no changes have occurred that materially and adversely affect the financial status of the project or the applicant. If this contingency is in the final approval it will also be in the financial assistance agreement as a condition precedent to funding the loan.

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. FINANCIAL ASSISTANCE AGREEMENTS

### 43 TAC §§6.41 - 6.46

STATUTORY AUTHORITY

The amendments and new sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §222.004, which authorizes the commission to issue general obligation bonds for the purpose of paying all or part of the cost of highway improvement projects, and Transportation Code, §222.077, which authorizes the commission to adopt rules to implement Transportation Code, Chapter 222, Subchapter D relating to the state infrastructure bank.

CROSS REFERENCE TO STATUTE

Transportation Code, §222.004 and Chapter 222, Subchapter D.

*§6.41. Financial Assistance Agreements.*

(a) Form of agreement. An agreement evidencing a loan or other financial assistance may be in the form of a contract or similar document, or may be in the form of a bond, note, or other obligation issued by the applicant.

(b) Negotiation of terms. The executive director will negotiate the terms of agreements deemed necessary to comply with any requirements of preliminary approval, to protect the public's safety, and to prudently provide for the protection of public funds while furthering the purposes of this chapter. These agreements shall include, but not be limited to, terms provided for in this subchapter, as applicable to a particular project.

(c) Initial repayment date. Unless the commission defers the beginning of repayment, repayment of any financial assistance from the bank will begin on the earliest reasonable date consistent with applicable federal and state law, rules, and regulations. If approved by the commission, the initial repayment of financial assistance may be deferred to the date specified by the commission, which may not be later than the fifth anniversary of the date of the initial funding of the financial assistance. The term for repaying any financial assistance will not exceed 30 years after the date of the first scheduled payment.

(d) Payment dates. Interest shall be paid semiannually, on February 1 and August 1. Principal shall be paid annually on February 1. If a date for payment is not a business day the payment shall be made on the next following business day.

(e) Prepayments. Principal and interest may be prepaid without penalty on the first business day of any February or August as provided in, and after the date specified in, the financial assistance agreement.

(f) Terms for assistance from general obligation bond proceeds. Agreements for loans from general obligation bond proceeds also must require that the applicant will provide:

(1) a certified copy of the resolution of the applicant, in the form specified by the executive director, authorizing execution of the financial assistance agreement and containing, if applicable, covenants relating to the status of the applicant's repayment obligation in relation to federal tax law;

(2) any other certification of the applicant concerning federal tax law, federal securities law, and state law in relation to authorization of the financial assistance agreement as specified by the executive director;

(3) if requested by the executive director, a bond counsel opinion from a recognized bond counsel in a form satisfactory to the executive director;

(4) a certification that the applicant will, if requested by the executive director, cooperate with the department and make all reasonable efforts requested by the department for obtaining the approval of the financial assistance agreement by the Public Finance Division of the Office of the Attorney General of the State of Texas.

(g) Assurances. The department will provide in a financial assistance agreement assurances that are reasonably and customarily required by the applicant and that are necessary for obtaining financing for, developing, or operating a particular project, if, in the department's reasonable judgment, the assurances are consistent with the agreement.

*§6.42. Performance of Work.*

(a) Work performed by the department. The department and the applicant may agree that the department will, consistent with state law, provide all or part of the work connected with the project in the department's normal course of business. For work performed by the department, the following provisions will apply.

(1) The department will account for all costs of the project in the normal course of business in accordance with applicable law. Financial assistance proceeds shall not be used to pay for project costs incurred prior to execution of the financial assistance agreement.

(2) The department will make progress payments or set aside funds from the bank on behalf of the applicant as the department deems necessary. Such actions shall bind the applicant to repayment according to the terms of the agreement(s). Interest shall accrue from the date of the payment or setting aside of funds.

(3) The department's actions and decisions regarding the project shall not be contestable by the applicant, except as expressly provided in the financial assistance agreement.

(4) The applicant shall provide the department, and if applicable, the Federal Highway Administration, and the Federal Transit Administration, or their authorized representatives as applicable, with right of entry or access to all properties or locations necessary to perform activities required to execute the work, inspect the work or aid otherwise in the prompt pursuit of the work.

(b) Work performed by applicant. For work performed by the applicant, the following provisions apply.

(1) The applicant shall comply with applicable state and federal law, and with all terms and conditions of an applicable agreement. If approval or concurrence of the Federal Highway Administration, the Federal Transit Administration, or any other federal agency is required, the department may require that the applicant seek that approval or concurrence through the department.

(2) The applicant shall maintain its books and records in accordance with generally accepted accounting principles in the United States, as promulgated by the Governmental Accounting Standards Board, the Financial Accounting Standards Board, or pursuant to applicable federal or state laws or regulations, and with all other applicable federal and state requirements, subject to any exceptions required by existing bond indentures of the applicant that are applicable to the project, and any exceptions the applicant has historically implemented that have been acceptable to the public debt markets.

(3) For loans of more than $1 million, the applicant shall, at the applicant's cost, have a full audit of its books and records performed annually by an independent certified public accountant selected by the applicant and reasonably acceptable to the department. The audit must be conducted in accordance with generally accepted auditing standards promulgated by the Financial Accounting Standards Board, the Governmental Accounting Standards Board, or the standards of the Office of Management and Budget Circular A-133, Audits of States, Local Governments and Non-profit Organizations, as applicable, and with all other applicable federal and state requirements. The applicant shall cause the auditor to provide a full copy of the audit report and any other management letters or auditor's comments directly to the department within a reasonable period of time after they have been provided to the governing body of the applicant.

(4) For loans of $1 million or less, the applicant shall:

(A) at the applicant's cost and in a format prescribed by the department, submit an annual report to the department listing project expenditures, providing an accounting of financial assistance proceeds, and providing any other information requested by the department;

(B) on request of the department and at the applicant's cost, provide a report containing the same or similar information as required in the annual report under paragraph (4)(A) of this subsection or information relating to project expenditures that the applicant is required to provide to another local, state, or federal agency;

(C) hold all project records, accounts, and supporting documents open for state or federal audits until project completion; and

(D) forward to the department, upon completion of the project, all project files and reports as requested by the department.

(5) If required to have an audit under paragraph (3) of this subsection, the applicant shall retain, or cause the auditor to retain, all work papers and reports until the fourth anniversary of the date of the audit report, unless the department notifies the applicant in writing of a later date for the end of the retention period. During the retention period, the applicant shall make audit work papers available to the department within 30 days of the date that the department requests those papers.

(6) Unless the department in writing provides a shorter period, the applicant shall retain all original project files, records, accounts, and supporting documents until the later of the date that:

(A) project is completed;

(B) all financial assistance under this chapter has been repaid, if applicable; or

(C) the retention period required by applicable federal and state law ends.

(7) If a project will become a part of the state highway system and the department will assume jurisdiction of the project, the applicant shall ensure that the project, including all its components and appurtenances, is maintained in accordance with §6.45 of this subchap-

ter (relating to Maintenance). The applicant shall transfer all design data, surveys, construction plans, right of way maps, utility permits, and agreements with other entities relating to the project to the department when the department assumes jurisdiction of the project.

*§6.44. Design and Construction - Loans from General Obligation Bond Proceeds.*

(a) Responsibility.

(1) Except to the extent the department and the applicant have agreed in writing that the department will provide all or part of the work connected with the project, as provided in §6.42 of this subchapter (relating to Performance of Work), the applicant is solely responsible for the design and construction of the project, including:

(A) ensuring that all EPIC are addressed in the project design;

(B) assessing field changes for potential environmental impacts; and

(C) obtaining any necessary EPIC required for field changes.

(2) All construction plans must be signed, sealed, and dated by a professional engineer licensed in Texas.

(b) Design criteria.

(1) Plans and specifications. Project plans and specifications must be in compliance with either the latest version of the design manuals or the latest version of the American Association of State Highway and Transportation Officials (AASHTO) standards, including the AASHTO Policy on Geometric Design of Highways and Streets, the AASHTO Pavement Design Guide, and the AASHTO Bridge Design Specifications.

(2) Exceptions to design criteria. An applicant may request approval to deviate from the required design criteria for a particular design element on a case-by-case basis. The request for approval must state the criteria for which an exception is being requested and must include a comprehensive description of the circumstances and engineering analysis supporting the request. The executive director may approve an exception request after determining that the particular criteria could not reasonably be met due to physical, environmental, or other relevant factors and that the proposed design is a prudent engineering solution, or that the deviation meets some other design criteria acceptable to the department. In making a determination under this paragraph, the executive director shall consider whether the project is intended to become part of the state highway system or otherwise be subject to the jurisdiction of the department, and the applicant's experience with similar projects.

(c) Project development.

(1) Access. For proposed projects that will change the access to an interstate highway, the applicant shall submit to the department all data necessary for the department to request Federal Highway Administration approval.

(2) Preliminary design submission and approval. When design is approximately 30 percent complete, the applicant shall send to the department for review and approval in accordance with the procedures and time line established in the financial assistance agreement:

(A) a completed design summary report form as contained in the department's Project Development Process Manual or an equivalent document as contained in or authorized by another appropriate department manual;

(B) a design schematic depicting plan, profile, and superelevation information for each roadway;

(C) typical sections showing existing and proposed horizontal dimensions, cross slopes, location of profile grade line, pavement layer thickness and composition, earthen slopes, and right of way lines;

(D) bridge, retaining wall, and sound wall layouts;

(E) hydraulic studies and drainage area maps showing the drainage of waterways entering the project and local project drainage;

(F) an explanation of the anticipated handling of existing traffic during construction;

(G) if a structure meeting the definition of a bridge as defined by the National Bridge Inspection Standards is proposed, an indication of structural capacity in terms of design loading;

(H) an explanation of how the U.S. Army Corps of Engineers permit requirements, including associated certification requirements of the Texas Commission on Environmental Quality, will be satisfied if the project involves discharges into waters of the United States; and

(I) the location and text of proposed mainlane guide signs shown on a schematic that includes lane miles or arrows indicating the number of lanes.

(3) Construction specifications.

(A) All plans, specifications, and estimates developed by or on behalf of the applicant must conform to the latest version of the department's Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges, and to all alternative specifications applicable under subparagraph (B) of this paragraph.

(B) The executive director may approve the use of an alternative specification if the proposed specification is determined to be sufficient to ensure the quality and durability of the finished product for the intended use and the safety of the traveling public. In deciding whether to approve the use of an alternative specification, the executive director shall consider whether the project is intended to become part of the state highway system or otherwise to be subject to the jurisdiction of the department, and the applicant's experience with similar projects.

(4) Submission and approval of final design plans and contract administration procedures. When final plans are complete, the applicant shall send to the executive director for review and approval in accordance with the procedures and time line established in the financial assistance agreement:

(A) seven copies of the final set of plans, specifications, and engineer's estimate (PS&E) that have been signed and sealed by the responsible engineer;

(B) summarized or highlighted revisions to information provided with the preliminary design submission;

(C) a proposal necessary for bidding the project in compliance with applicable state and federal requirements;

(D) contract administration procedures containing criteria that comply with the applicable national or state administration criteria and manuals; and

(E) the location and description of all EPIC addressed in construction.

(5) Contract bidding and award. The applicant may not advertise the project for receipt of bids until it has received approval of

the PS&E from the department. Procedures relating to bidder qualification, bidding, award, and execution of a contract for the development and maintenance of a project that is financed with state or federal funds must comply with:

(A) the policies and procedures prescribed in Chapter 9, Subchapter B of this title (relating to Highway Improvement Contracts); or

(B) policies and procedures that comply with the applicable requirements of federal law and with the applicable requirements of state law that are intended to ensure fair and open competition.

(6) Construction inspection and oversight. The applicant shall oversee all construction operations, including the oversight and follow-through with all EPIC. Inspection and project oversight shall be performed in accordance with requirements prescribed in the financial assistance agreement.

(7) Contract revisions. All contract revisions must comply with the latest version of the applicable national or state administration criteria and manuals. The applicant shall submit all contract revisions to the department for its records. The applicant shall submit any revision that affects prior environmental approvals or significantly revises the project scope or the geometric design to the executive director and must receive the executive director's approval before the revised construction work may begin. Procedures governing the executive director's approval, including time limits for department review, shall be included in the financial assistance agreement.

(8) As-built plans. On completion of construction of the project, the applicant shall file with the department a set of the as-built plans incorporating all contract revisions. The plans must be signed, sealed, and dated by a licensed professional engineer in Texas, who certifies that the project was constructed in accordance with the plans and specifications.

(9) Document and information exchange. If available, the applicant shall deliver electronically to the department all materials used in the development of the project including, but not limited to, aerial photography, computer files, surveying information, engineering reports, environmental documentation, general notes, specifications, and contract provision requirements.

(10) State and federal law. The applicant shall comply with all federal and state laws and regulations applicable to the project, and shall provide or obtain all applicable permits, plans, and other documentation required by a federal, state, or local governmental entity.

(11) Work on state right of way. All work required within the limits of state owned right of way shall be accomplished only pursuant to express written agreement 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.

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TRD-201005666
Bob Jackson
General Counsel
Texas Department of Transportation
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**43 TAC §§6.44 - 6.46**

The repeals are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §222.004, which authorizes the commission to issue general obligation bonds for the purpose of paying all or part of the cost of highway improvement projects, and Transportation Code, §222.077, which authorizes the commission to adopt rules to implement Transportation Code, Chapter 222, Subchapter D relating to the state infrastructure bank.

CROSS REFERENCE TO STATUTE

Transportation Code, §222.004 and Chapter 222, Subchapter D.

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

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General Counsel
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## CHAPTER 31. PUBLIC TRANSPORTATION
## SUBCHAPTER C. FEDERAL PROGRAMS

**43 TAC §31.36**

The Texas Department of Transportation (department) adopts amendments to §31.36, Section 5311 Grant Program. The amendments to §31.36 are adopted without changes to the proposed text as published in the July 9, 2010, issue of the *Texas Register* (35 TexReg 6049) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §456.022 requires the Texas Transportation Commission (commission) to adopt rules to establish a formula allocating state and federal funds among individual eligible public transportation providers. The statute states that the formula may take into account a transportation provider's performance, the number of its riders, the need of residents in its service area for public transportation, population, population density, land area, and other factors established by the commission. Transportation Code, §456.008 states that the commission may establish different performance measures for different sectors of the transit industry and also states that the performance measures shall assess the efficiency, effectiveness, and safety of the public transportation providers.

On June 29, 2006, the commission amended §31.36 regarding formulas for the distribution of state and federal funds. The commission now desires to further change the formulas to better allocate funding resources.

The amendments to §31.36, Section 5311 Grant Program, clarify the current formula for federal funds and limit the discretionary portion to no more than 10 percent of the annual apportionment after subtracting funds for intercity bus allocation and state administrative expenses. In addition, the percentage figures in

§31.36 are adjusted for style to spell out "percent" rather than using the symbol "%".

Amendments to §31.36(g) clarify that state administrative expenses are subtracted prior to the allocation of funds to subrecipients.

Amendments to §31.36(g)(1) change the paragraph name to "Intercity bus allocation" to better describe the purpose of the paragraph. Changes mirror the language in the federal statute and federal circular regarding the certification process and level of authority that may certify. Lastly, the words "allocate" and "annual" are added to provide clarity.

Amendments to §31.36(g)(2) change the paragraph name from "Remaining balance allocation" to "Need and performance allocation" to better describe the purpose of the paragraph. The amendments delete obsolete and outdated language referring to state funds. State funds language was added as a result of a special state appropriation rider passed by the 73rd Legislature, 1993. The department has not received funding of the same nature since that biennium and therefore the language is being deleted. Amendments to §31.36(g)(2) also move the reference to the maximum amount of Section 5311 federal apportionments, $20,104,352, from §31.36(g)(2)(C) to paragraph (2) to clarify that the entire paragraph is subject to the maximum amount and not just the subparagraph. In addition §31.36(g)(2)(A) and (B) delete outdated references to fiscal years 2008 and 2009.

Amendments to §31.36(g)(3) create §31.36(g)(2)(C) and delete the reference to the maximum amount of Section 5311 federal apportionments subject to this paragraph and verbiage describing the discretionary award. The maximum amount is moved to §31.36(g)(2) and the discretionary allocation is now covered by new §31.36(g)(3).

Language from current §31.36(g)(2)(C) is added to new §31.36(g)(3) to describe the discretionary allocation. A new provision is added limiting the discretionary portion to no more than 10 percent of the annual apportionment after subtracting funds for intercity bus allocation and state administrative expenses. Limiting the discretionary allocations to no more than 10 percent provides a more reasonable level of funds set aside for discretionary award as compared to the overall funding in the program.

New paragraph (4) is added to §31.36(g) to describe the vehicle revenue mile allocation. This new paragraph outlines the procedures for allocating funds not allocated by the previous paragraphs. Funds allocated under this new section will be calculated on a pro rata basis using individual system revenue miles as compared to the sum of all systems. This new allocation will provide the recipients of funds from this program a more predictable distribution of funds in future years. The amendments codify the funding allocation process that has been used for the past two years under the discretionary allocation, making it a stand alone allocation.

Subsequent paragraphs in §31.36(g) are renumbered and cross references are updated as a result of the above changes.

The statutory duties of the Public Transportation Advisory Committee's (PTAC) include advising the commission on the needs and problems of the state's public transportation providers, including recommending methods for allocating public transportation funds, and providing feedback on rule changes involving public transportation matters during development and prior to final adoption.

PTAC met on September 8, 2010, and by motion recommended to the commission all of the above amendments in the allocation funding formula.

COMMENTS

A public hearing was held on August 6, 2010. No comments on the proposed amendments were received at the hearing and no written comments were received by the department.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §456.022, which requires the commission to adopt rules establishing a formula allocating funds among eligible public transportation providers.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 456.

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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Bob Jackson
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# TEXAS DEPARTMENT OF INSURANCE

**Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L**

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Department of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the proposal is adopted. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the proposal is adopted. The Administrative Procedure Act, Government Code, Chapters 2001 and 2002, does not apply to department action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

## Texas Department of Insurance

Proposed Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96

The Commissioner of Insurance (Commissioner) will hold a public hearing under Docket No. 2720 on November 10, 2010, at 9:30 a.m., in Room 100 of the William P. Hobby Building, 333 Guadalupe Street in Austin, Texas to consider a petition by the staff of the Texas Department of Insurance (Department) proposing the adoption of (i) revised Texas Workers' Compensation Classification Relativities (classification relativities) to replace those adopted pursuant to Commissioner's Order No. 09-0104, dated February 19, 2009, as amended by Commissioner's Order No. 09-0181, dated March 20, 2009; and (ii) a revised table to amend the Texas Basic Manual of Rules, Classification, and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance (Basic Manual) concerning the Expected Loss Rates and Discount Ratios used in experience rating. Staff's petition (Reference No. W-0910-09-I) was filed on September 30, 2010.

Staff requests that the proposed revised classification relativities be available for adoption by insurers immediately, but that their use be mandatory for all policies with an effective date on or after May 1, 2011, unless the insurer files an alternative classification rate basis. Staff further requests that the revised table amending the Basic Manual be made effective for workers' compensation experience modifiers with an effective date on or after May 1, 2011.

Texas Insurance Code §2053.051 requires the Department to determine hazards by class and establish classification relativities applicable to the payroll in each class for workers' compensation insurance. Section 2053.052 requires the Commissioner to adopt a uniform experience rating plan for workers' compensation insurance. Sections 2053.051 and 2053.052 further provide that the classification system and experience rating plans be revised at least once every five years.

The classification relativities currently in effect are based on experience data reflecting workers' compensation experience from policies with effective dates in 2001 through 2005. The proposed classification relativities are based on the analysis of experience data from policies with effective dates in 2003 through 2007. Staff's proposed classification relativities reflect changes in experience that have occurred.

Staff recommends capping changes in the proposed classification relativities to +25 percent and -25 percent of the current classification relativities.

Modifications to the classification relativities require concurrent changes in the expected loss rates and discount ratios, which are contained in Table II of the Basic Manual. The proposed expected loss rates are based on the anticipated level of the losses that would be used to experience-rate the average policy effective in 2011. Staff also proposes to cap changes in the expected loss rates to +25 percent and -25 percent from the current expected loss rates. Staff also proposes to revise the discount ratios in Table II to reflect the ratios that will exist for losses used to experience-rate policies effective in 2011. The changes in the discount ratios are not subject to capping.

Copies of the full text of the staff petition and a schedule of the proposed revised classification relativities and a table of the proposed expected loss rates and discount ratios are available for review in the Office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104. For further information or to request copies of the petition and proposed revised schedule and table, please contact Sylvia Gutierrez at ChiefClerk@tdi.state.tx.us, (512) 463-6327 (Reference No. W-0910-09-I).

Comments on the proposed changes may be submitted in writing by 5:00 p.m. on November 15, 2010, to Gene C. Jarmon, General Counsel and Chief Clerk, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy should be simultaneously submitted to J'ne Byckovski, Chief Actuary, Property and Casualty Program, P.O. Box 149104, MC 105-5F, Austin, Texas 78714-9104. Interested persons may also submit oral and/or written comments at the hearing.

This notification is made pursuant to the Texas Insurance Code, Article 5.96, which exempts action taken under this article from the requirements of the Administrative Procedure Act (Government Code, Title 10, Chapter 2001).

TRD-201005726
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 6, 2010

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# REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

## Proposed Rule Reviews

### General Land Office

**Title 31, Part 1**

The General Land Office (GLO) submits this notice of its intent to review and consider for re-adoption, revision, or repeal Chapter 15, concerning Coastal Area Planning in accordance with the Texas Government Code §2001.039.

The rules to be reviewed are found in Chapter 15, Subchapter A, concerning Management of the Beach/Dune System, Subchapter B, concerning Coastal Erosion Planning and Response, and Subchapter D, concerning Certification of Coastal Wetlands, located at Title 31, Part 1 of the Texas Administrative Code.

During the review process, the GLO will determine whether the reasons for adoption of the rules continue to exist, whether amendments or changes are needed, or whether repeal of the chapter is appropriate. Existing rules may be amended for simplification or clarity. This review of Chapter 15 is filed in accordance with the GLO's rule review plan published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3297).

The GLO will consider comments related to whether the reasons for adoption of these rules continue to exist, whether amendments or changes are needed, or whether repeal of the chapter is appropriate. Any changes to the rules will be proposed by the GLO after reviewing the rules and considering the comments received in response to this notice. Any proposed rule changes will then appear in the "Proposed Rules" section of the *Texas Register* and will be adopted in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

The GLO will accept written comments on this rule review for a thirty-day period beginning on the date of publication of this notice of intent to review in the *Texas Register.* Any comments or questions should be directed to Walter Talley, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 463-6311, email address walter.talley@glo.state.tx.us. Comments received later than thirty days (30) following the date of publication of this notice will not be considered.

TRD-201005733
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Filed: October 6, 2010

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### Texas Department of Insurance, Division of Workers' Compensation

**Title 28, Part 2**

The Texas Department of Insurance, Division of Workers' Compensation files this notice of intention to review the rules contained in Chapter 65 concerning Unethical or Fraudulent Claims Practices. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB 178, 76th Legislature.

The Division's reason for adopting the rules contained in this chapter continues to exist and it proposes to readopt the following rules:

§65.5. Practicing before the Board.

§65.10. Actions by Carrier, Claimant's Attorney, and/or Agent.

§65.15. Filing of Violation Report.

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on November 15, 2010 and submitted to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, MS-4D, Austin, Texas 78744-1609.

TRD-201005734
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: October 6, 2010

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The Texas Department of Insurance, Division of Workers' Compensation files this notice of intention to review the rules contained in Chapter 69, concerning Medical Examinations Orders. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB 178, 76th Legislature.

The Division's reason for adopting the rules contained in this chapter continues to exist and it proposes to readopt the following rules:

§69.5. Application of Chapter.

§69.10. Definitions.

§69.15. Carrier May Apply for Order from Board.

§69.20. Application.

§69.25. Bases for Denial.

§69.30. Appeal.

§69.33. Claimant's Medical Records.

§69.35. Claimant's Expenses.

§69.40. Attendance of Claimant's Health Care Provider.

§69.45. Unreasonable Delay.

§69.50. Reports of Examinations.

§69.55. Failure to Attend Examination.

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m on November 15, 2010 and submitted to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, MS-4D, Austin, Texas 78744-1609.

TRD-201005735
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: October 6, 2010

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## Adopted Rule Reviews

Texas Education Agency

**Title 19, Part 2**

The State Board of Education (SBOE) adopts the review of 19 TAC Chapter 61, School Districts, Subchapter A, Board of Trustees Relationship, pursuant to the Texas Government Code, §2001.039. The SBOE proposed the review of 19 TAC Chapter 61, Subchapter A, in the August 6, 2010, issue of the *Texas Register* (35 TexReg 6841).

The SBOE finds that the reasons for adopting 19 TAC Chapter 61, Subchapter A, continue to exist and readopts the rules. The SBOE received no comments related to the review of Subchapter A. The SBOE is proposing amendments to better align the rules with statute and current practice regarding the dissemination of information to boards of trustees and the public and the appointment of trustees to the Boys Ranch Independent School District. The proposed amendments to 19 TAC Chapter 61, Subchapter A, may be found in the Proposed Rules section of this issue of the *Texas Register.*

TRD-201005724
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: October 6, 2010

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# TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 1 TAC §55.120(b)

## Request for Review of National Medical Support Notice (NMSN)

**To:**

Office of the Attorney General
Medical Support Unit
P O BOX 1328
AUSTIN, TX 78767-1328

Telephone Number: (800) 522-2421
Fax Number: (512) 279-1723

**From:**

**Name:**

**Address:**

**Telephone Number:**

**Cause #:**

**OAG #:**

**Custodial Parent:**

**Child(ren):**

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I, _____ (obligor / employee name), contest the National Medical Support Notice (NMSN) sent to my employer,

_____ (name of employer), on or about _____/_____/_____ (date), and request an administrative review based upon the following mistake(s) of fact:

_____

_____

_____.

It has been within 30 calendar days from the date of the notice of issuance of the National Medical Support Notice.

I understand:

- I will receive notice of the date, time and place of the review within 10 days of the Office of the Attorney General (OAG) receiving this request;
- the review may be in person or over the telephone;
- my employer and I must comply with the terms of the NMSN during this review period;
- at the end of the review, which will be completed within 30 days of receipt of this request, the OAG may issue a revised NMSN, terminate the NMSN, or send me notice of a determination that the NMSN is proper and should remain in effect as previously issued; and
- if the OAG does not revise or terminate the NMSN, I may request a hearing with the court of continuing jurisdiction to resolve any issue in dispute.

_____ Obligor / Employee Signature

_____/_____/_____ Date

REQUEST FOR REVIEW OF NATIONAL MEDICAL SUPPORT NOTICE (NMSN) October 2010

Figure: 16 TAC §5.204(b)(1)(A)

NOTICE OF PERMIT APPLICATION
FOR A MAN-MADE CARBON DIOXIDE ($CO_2$) GEOLOGIC STORAGE FACILITY

[Company name and address] is applying to the Railroad Commission of Texas for a permit to create, operate, or maintain an anthropogenic carbon dioxide ($CO_2$) geologic storage facility. The applicant proposes to geologically store man-made carbon dioxide ($CO_2$) in the [formation name]; [lease name]; [well number(s)]. The proposed facility will be located at [address]; approximately [direction and number of miles from nearest town] in the [field name] in [County or Counties]. The legal description of the property is as follows: [legal description, including section/survey/abstract]. The geologic storage reservoir is proposed to be located underground from _____ to _____ feet below the ground surface.

The following map shows the location of the proposed facility. [Include a United States Geological Survey 7.5-minute quadrangle map or maps showing towns; rivers, streams, or other bodies of water; local landmarks; and any other information, including routes, streets, or roads and accurate distance measurements necessary to allow local residents to readily identify the proposed location of the facility; showing the exact location and boundaries of the proposed facility; stating the name of the United States Geological Survey 7.5-minute quadrangle map(s) that contains the area shown or described; and indicating the north direction.]

A copy of the application is available for public inspection in the clerk's office in the [name of each county] County courthouse [address of each courthouse] and online at [website address].

LEGAL AUTHORITY: Texas Natural Resources Code, Title 3, and the Railroad Commission's Oil and Gas Division Rules (Statewide Rules) at 16 Tex. Admin. Code, Chapters 3 and 5.

Persons may request more information about, or make comments on, the application by contacting: Technical Permitting Section, Oil and Gas Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711, (512) 463-6792 or by e-mail at carbondioxide@rrc.state.tx.us. Persons who can show they may be adversely affected by the proposed storage facility may request a public hearing on the application. Such a request must be in writing and received within 30 days of the last date of publication of this notice. Requests for hearing should be sent to the Technical Permitting Section at the address above.

Figure: 16 TAC §5.204(b)(1)(B)

NOTICE OF APPLICATION TO AMEND A PERMIT
FOR A MAN-MADE CARBON DIOXIDE ($CO_2$) GEOLOGIC STORAGE FACILITY

[Company name and address] is applying to the Railroad Commission of Texas for a amendment to an existing man-made carbon dioxide ($CO_2$) geologic storage facility permit. The applicant is storing man-made carbon dioxide ($CO_2$) in the [formation name]; [lease name]; [well number(s)]. The facility is located at [address]; approximately [direction and number of miles from nearest town] in the [field name] in [County or Counties]. The legal description of the property is as follows: [legal description, including section/survey/abstract]. The geologic storage reservoir is located underground from _____ to _____ feet below the ground surface.

The following map shows the location of the proposed facility. [Include a United States Geological Survey (USGS)7.5-minute quadrangle map or maps showing towns; rivers, streams, or other bodies of water; local landmarks; and any other information, including routes, streets, or roads and accurate distance measurements necessary to allow local residents to readily identify the proposed location of the facility; showing the exact location and boundaries of the proposed facility; stating the name of the USGS 7.5-minute quadrangle map(s) that contains the area shown or described; and indicating the north direction.]

The purpose of the requested permit amendment is to [state the purpose of amendment].

A copy of the application is available for public inspection in the clerk's office in the [name of each county] County courthouse [address of each courthouse] and online at [website address].

LEGAL AUTHORITY: Texas Natural Resources Code, Title 3, and the Railroad Commission's Oil and Gas Division Rules (Statewide Rules) at 16 Tex. Admin. Code, Chapters 3 and 5.

Persons may request more information about, or make comments on, the application by contacting: Technical Permitting Section, Oil and Gas Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711, (512) 463-6792 or by e-mail at carbondioxide@rrc.state.tx.us. Persons who can show they may be adversely affected by the proposed storage facility may request a public hearing on the application. Such a request must be in writing and received within 30 days of the last date of publication of this notice. Requests for hearing should be sent to the Technical Permitting Section at the address above.

Figure: 16 TAC §5.204(b)(1)(C)

Affidavit of Publication
STATE OF TEXAS
COUNTY OF _____

Before me, the undersigned authority, on this day personally appeared [name of person], the [title of person] of the [name of newspaper], a newspaper having general circulation in [name(s) of county(ies)] County(ies), Texas, who being by me duly sworn, deposes and says that the foregoing attached notice was published in said newspaper on the following date(s), to wit: [list all dates of publication].

[signature of person]
[typed or printed name of person

Subscribed and sworn to before me this the [day] of [month], [year], to certify which witness my hand and seal of office.

[signature of notary]
[typed or printed name of notary]

Notary Public in and for
[name of county] County, Texas.

# IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

## Texas Department of Agriculture

Request for Applications: Good Agricultural Practices (GAP) Certification Assistance Program

**Statement of Purpose.** Pursuant to the Texas Agriculture Code, §12.002, and §91.009, the Texas Department of Agriculture (TDA) hereby requests applications for the Good Agricultural Practices (GAP) cost-share/reimbursement program designed to assist Texas specialty crop industry producers with the cost of a GAP audit.

**Eligibility.** Applicants must be a Texas-based business that produces specialty crops. TDA will only reimburse for completed and successful audits of approved specialty crops. Specialty crops are defined as fruits and vegetables, dried fruit, tree nuts and nursery crops (including floriculture). Refer to Attachment 1 of this document for a list of common specialty crops.

Reimbursement is limited to the cost of the audit or $750, whichever is less, per eligible applicant for audits passed after successful completion of GAP Food Safety Training. Participating growers will be responsible for paying any balance due above $750.

**Funding Parameters.** Funds are available on a first-come, first-serve basis until funds are depleted. Applications must be complete and have all required documentation to be considered. Applications missing documentation or otherwise deemed incomplete will not be considered for funding until sufficient information has been received by TDA.

**Application Requirements.** Applications will be accepted beginning November 15, 2010, and must be submitted on the form provided by TDA. The application (ER-120) is available on TDA's website at www.TexasAgriculture.gov, or available upon request from TDA by calling (512) 463-6908. Applications must be submitted to TDA headquarters in Austin, Texas. If mailing the application, please make sure it is in a properly addressed envelope, bearing sufficient postage.

To be considered, applications must be certified by the applicant, include required supporting documentation, and bear a notarized signature of the specialty crop producer.

**General Compliance Information.**

1. All grant awards are subject to the availability of appropriations and authorizations by the Agricultural Marketing Service, USDA and TDA.

2. Any information or documentation submitted to TDA is subject to disclosure under the Texas Public Information Act.

**Submission of Responses.**

Responses to this request should be submitted starting Monday, November 15, 2010 to:

**1. Mailing Address:** Ms. Mindy Fryer, Grants Specialist, Texas Department of Agriculture, External Relations Division, Specialty Crop Audit Reimbursement, P.O. Box 12847, Austin, Texas 78711; or

**2. Physical Address for overnight delivery:** Ms. Mindy Fryer, Grants Specialist, Texas Department of Agriculture, External Relations Division, Specialty Crop Audit Reimbursement, 1700 North Congress Avenue, 11th floor, Austin, Texas 78701, e-mail: grants@TexasAgriculture.gov.

TDA will send an acknowledgement receipt by email indicating the response was received.

**Applications will not be accepted prior to November 15, 2010.** Applications submitted without documentation to support third party GAP audit will be returned and no grant will be awarded. If information provided is not adequate, TDA may require additional information or documentation.

**Grant Award.** TDA will distribute funds after applications are complete and reviewed. Reimbursement is limited to the lesser of the cost of the audit, or $750 per audit passed after successful completion of GAP Food Safety Training. Participating growers will be responsible for paying any balance due above $750.

For questions regarding submission of the application and TDA documentation requirements, please contact Ms. Mindy Fryer, Grants Specialist, at (512) 463-6908 or by email at grants@TexasAgriculture.gov.

**Texas Public Information Act.** Once submitted, all proposals shall be deemed to be the property of the TDA and are subject to the Texas Public Information Act, Texas Government Code, Chapter 552.

**ATTACHMENT 1**

**Definition of Specialty Crops.** Specialty crops are defined by law as "fruits and vegetables, tree nuts, dried fruits and horticulture and nursery crops, including floriculture." The tables below list plants commonly considered fruits and tree nuts, vegetables, culinary herbs and spices, medicinal plants, and nursery, floriculture, and horticulture crops. Ineligible commodities are also listed.

This list is not intended to be exhaustive, but rather intended to give examples of the most common specialty crops. It will be updated as USDA provides additional guidance. Please refer to the USDA-AMS website to get the most current list (www.ams.usda.gov).

**List of Plants Commonly Considered Fruits and Tree Nuts.**

Almond, Apple, Apricot, Avocado, Banana, Blackberry, Blueberry, Breadfruit, Cacao, Cashew, Citrus, Cherimoya, Cherry, Chestnut (for nuts), Coconut, Coffee, Cranberry, Currant, Date, Feijou, Fig, Filbert (hazelnut), Gooseberry, Grape (including raisin), Guava, Kiwi, Litchi, Macadamia, Mango, Nectarine, Olive, Papaya, Passion fruit, Peach, Pear, Pecan, Persimmon, Pineapple, Pistachio, Plum (including prune), Pomegranate, Quince, Raspberry, Strawberry, Suriname cherry, Walnut

**List of Plants Commonly Considered Vegetables.**

Artichoke, Asparagus, Bean (snap or green), Lima (dry, edible), Beet table, Broccoli (including broccoli raab), Brussels sprouts, Cabbage (including Chinese), Carrot, Cauliflower, Celeriac, Celery, Chive, Collards (including kale), Cucumber, Edamame, Eggplant, Endive, Garlic, Horseradish, Kohlrabi, Leek, Lettuce, Melon (all types), Mushroom (cultivated), Mustard and other greens, Okra, Pea, (Garden, English or edible pod), Onion, Opuntia, Parsley, Parsnip, Pepper, Potato, Pumpkin, Radish (all types), Rhubarb, Rutabaga, Salsify, Spinach, Squash

(summer and winter), Sweet corn, Sweet potato, Swiss chard, Taro, Tomato (including tomatillo), Turnip, Watermelon

**List of Commonly Considered Nursery, Floriculture, and Horticulture Crops.**

Christmas Trees, Cut Flowers, Honey, Maple Syrup, Hops, Turfgrass Sod and Seed, Tea Leaves

**List of Plants Commonly Considered Culinary Herbs and Spices.**

Ajwain, Allspice, Angelica, Anise, Annatto, Artemisia (all types), Asafetida, Basil (all types), Bay (cultivated), Bladder wrack, Bolivian coriander, Borage, Calendula, Chamomile, Candle nut, Caper, Caraway, Cardamom, Cassia, Catnip, Chervil, Chicory, Cicely, Cilantro, Cinnamon, Clary, Cloves, Comfrey, Common rue, Coriander, Cress, Cumin, Curry, Dill, Fennel, Fenugreek, Filé (gumbo, cultivated), Fingerroot, French sorrel, Galangal, Ginger, Hops, Horehound, Hyssop, Lavender, Lemon balm, Lemon thyme, Lovage, Mace, Mahlab, Malabathrum, Marjoram, Mint (all types), Nutmeg, Oregano, Orris root, Paprika, Parsley, Pepper, Rocket (arugula), Rosemary, Rue, Saffron, Sage (all types), Savory (all types), Tarragon, Thyme, Turmeric, Vanilla, Wasabi, Watercress

**List of Plants Commonly Considered Medicinal Herbs.**

Artemisia, Arum, Astragalus, Boldo, Cananga, Comfrey, Coneflower, Ephedra, Fenugreek, Feverfew, Foxglove, Ginko biloba, Ginseng, Goat's rue, Goldenseal, Gypsywort, Horehound, Horsetail, Lavender, Yerba buena, Liquorice, Marshmallow, Mullein, Passion flower, Patchouli, Pennyroyal, Pokeweed, St. John's wort, Senna, Skullcap, Sonchus, Sorrel, Stevia, Tansy, Urtica, Witch hazel, Wood betony, Wormwood, Yarrow

**List of Ineligible Commodities.**

Alfalfa, Barley, Borage, Canola, Canola oil, Cotton, Cottonseed oil, Dairy products, Eggs, Field corn, Fish (marine or freshwater), Flaxseed, Hay, Livestock products, Millet, Mustard seed oil, Oats, Peanut oil, Peanuts, Primrose, Quinoa, Rapeseed oil, Range grasses, Rice, Rye, Safflower meal, Safflower oil, Shellfish (marine or freshwater), Sorghum, Soybean oil, Soybeans, Sugar beets, Sugarcane, Sunflower oil, Tobacco, Tofu, Wheat, Wild Rice

TRD-201005695
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: October 4, 2010

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## Office of the Attorney General

### Texas Health and Safety and Texas Water Code Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Health and Safety Code, and Texas Water Code. Before the State may settle a judicial enforcement action under the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: *State of Texas v. Airport Sand and Gravel, Inc.; James C. Pritchard, individually and d/b/a Airport Sand and Gravel; Robert H. Carr, Jr.; Robert H. Carr, Sr.; Brian Carr; and G. Brian Holy;* Cause No. D-1-GV-08-000176; in the 250th Judicial District Court, Travis County, Texas.

Nature of Defendants' Operations: Defendants owned and/or operated a sand mining facility and deposited municipal solid waste as part of the fill material without a permit to do so.

Proposed Agreed Judgment: The Agreed Final Judgment orders the Defendants to collectively pay $80,000 in civil penalties: $60,000 by Airport Sand and Gravel; $5,000 by each of the Carr Defendants; and $5,000 by Defendant Holy. The penalty against Defendant Holy is deferred if he complies with the continuing site security and deed recordation requirements.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement, should be directed to Anthony W. Benedict, Assistant Attorney General, Environmental Protection and Administrative Law Division, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

*For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.*

TRD-201005640
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: September 30, 2010

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### Texas Health and Safety Code, Texas Water Code, and Title 30 of the Texas Administrative Code Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Health and Safety Code, Texas Water Code, and Title 30 of the Texas Administrative Code. Before the State may settle a judicial enforcement action under the Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: *Harris County, Texas and State of Texas v. Texas K&N International, Inc.;* Cause No. 2009-37129, in the 165th District Court of Harris County, Texas.

Nature of Defendant's Operations: Defendant owns and operates a restaurant located at 8222 Airline Drive, Houston, Texas. ("Facility"). Defendant's operations discharged raw sewage onto the ground. Defendant also failed to have a maintenance service contractor employed to monitor the on-site sewage facility and to assure that the on-site sewage facility was being properly maintained.

Proposed Agreed Judgment: The Agreed Final Judgment orders the Defendant to pay costs of court, $2,520.00 in civil penalties, to be split equally between Harris County and the State, and to pay $2,000.00 in attorneys fees, to be split equally between Harris County and to the State.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement, should be directed to Laura E. Miles-Valdez, Assistant Attorney

General, Environmental Protection and Administrative Law Division, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0052. Written comments must be received within 30 days of publication of this notice to be considered.

*For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.*

TRD-201005704
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: October 5, 2010

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## Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/11/10 - 10/17/10 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/11/10 - 10/17/10 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005[3] for the period of 10/01/10 - 10/31/10 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The monthly ceiling as prescribed by §303.005 for the period of 10/01/10 - 10/31/10 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-201005703
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 5, 2010

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## Employees Retirement System of Texas

Request for Proposal Texas Employees Group Benefits Program to Conduct Audits of Certain Health and Welfare Programs "Revised Notice"

This Notice takes place of the previous Notice published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8788), TRD-201005333.

In accordance with §1551.055 and §1551.062 of the Texas Insurance Code, the Employees Retirement System of Texas (ERS) is soliciting proposals from qualified auditing firms to perform audits of certain selected Carriers, HMOs and Third Party Administrators of the HealthSelectSM Programs, which may include life, health, and medical programs, provided to participants under the Texas Employees Group Benefits Program (GBP) beginning Fiscal Year 2010 through 2012. A qualified provider of auditing services (Vendor) shall supply the level of services required in the Request for Proposal (RFP) and meet other requirements that are in the best interest of ERS, the GBP health and welfare programs, their participants, or the state of Texas, and shall be required to execute a Contractual Agreement (Contract) provided by, and satisfactory to, ERS.

As provided in Chapter 1551 of the Texas Insurance Code, ERS is the administrator for the GBP which provides health and welfare benefits to over 500,000 state agencies and certain higher education employees, retirees, and their dependents. ERS is responsible for contracting with health, dental, life, and disability carriers, and third party administrators to provide coverage for GBP participants or administer such coverage throughout the state of Texas. The services requested and described in the RFP include auditing a statistically valid sample of claims processed, contract compliance, and administrative costs of the administrators specified in the RFP. A Vendor wishing to respond to this request shall meet the minimum requirements as well as those other evaluation criteria as more fully specified in Article II of the RFP. Each proposal will be evaluated individually and relative to the proposal of other qualified Vendors.

The RFP will be available in early October from ERS' website and will include documents for the Vendor's review and response. To access the secured portion of the RFP website, interested Vendors shall email their request to the attention of IVendor Mailbox at: ivendorquestions@ers.state.tx.us. The email request shall reflect the Vendor's legal name, street address, phone and fax numbers, and email address for the organization's direct point of contact. Upon receipt of this information, a user ID and password will be issued to the requesting organization that will permit access to the secured RFP when the document is published on the Vendor portion of the ERS website.

General questions concerning the RFP and/or ancillary bid materials should be sent to the IVendor Mailbox where responses, if applicable, are updated frequently.

To be eligible for consideration, all Vendors are required to submit a total of six (6) sets of the proposal in a sealed container. One (1) proposal shall be labeled as an "Original" and include fully executed Signature pages, Contractual Agreement and Business Associate Agreement, **signed in blue ink,** and without amendment or revision. Three (3) additional duplicates of the proposal, including all required exhibits, shall be provided in printed format. Finally, two (2) complete copies shall be submitted on CD-ROMs in Excel or Word format. No PDF documents (with the exception of financial materials) may be reflected on the CD-ROMs. All materials shall be executed as noted above and must be received by ERS no later than 12:00 Noon (CT) on November 10, 2010.

ERS reserves the right to reject any and/or all proposals and/or call for new proposals if deemed by ERS to be in the best interests of ERS, the GBP health and welfare programs, their participants or the state of Texas. ERS also reserves the right to reject any proposal submitted that does not fully comply with the RFP's instructions and criteria. ERS is under no legal requirement to execute a Contract on the basis of this notice or upon issuance of the RFP and will not pay any costs incurred by any entity in responding to this notice or the RFP or in connection with the preparation thereof. ERS specifically reserves the right to vary all provisions set forth at any time prior to execution of a contract where ERS deems it to be in the best interest of ERS, the GBP health and welfare programs, their participants or the state of Texas.

TRD-201005721
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: October 6, 2010

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## Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 15, 2010.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 15, 2010.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: A.A.G. TEXAS, INC. dba Chevron 6; DOCKET NUMBER: 2010-0849-PST-E; IDENTIFIER: RN101734986; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 Texas Administrative Code (TAC) §115.245(2) and Texas Health and Safety Code (THSC), §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $4,165; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: Chris L. Mayberry dba All American Irrigation Systems, L.L.C.; DOCKET NUMBER: 2010-1011-LII-E; IDENTIFIER: RN103395455; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: irrigation business; RULE VIOLATED: 30 TAC §344.35(d)(2) and (3), by failing to obtain a permit required to install an irrigation system and by failing to have a final inspection conducted on the irrigation system; PENALTY: $255; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(3) COMPANY: City of Bellville; DOCKET NUMBER: 2010-1260-MWD-E; IDENTIFIER: RN101612356; LOCATION: Bellville, Austin County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010385002, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for ammonia-nitrogen ($NH_3N$); PENALTY: $2,640; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: Biomedical Waste Solutions, LLC; DOCKET NUMBER: 2009-1861-MSW-E; IDENTIFIER: RN105008437; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: medical waste collection and transporter business; RULE VIOLATED: 30 TAC §330.1211(g), by failing to provide the generator with a properly completed document for shipments of waste collected; 30 TAC §330.1211(h)(7), by failing to record the name and signature of the representative receiving the waste on the waste shipping documents; 30 TAC §330.1211(c)(1)(C), by failing to carry spill cleanup equipment in transport vehicles; 30 TAC §330.1211(c)(2), by failing to comply with cargo compartment requirements; 30 TAC §330.9(l)(1)(C)(iii), by failing to complete registration forms provided by the commission and provide a description of each transportation unit, including license plate number, state, and year; 30 TAC §330.9(l)(4), by failing to maintain a copy of the registration form at the designated place of business and with each transportation unit used to transport untreated medical waste; 30 TAC §330.1211(j), by failing to deposit untreated medical waste at an authorized facility; and 30 TAC §330.1211(c)(1)(D), by failing to have transport vehicles with the name of the transporter on the two sides and back of the cargo-carrying compartments in letters at least three inches high; PENALTY: $48,496; ENFORCEMENT COORDINATOR: Tate Barrett, (713) 767-3500; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: City of Blanket; DOCKET NUMBER: 2010-1110-MWD-E; IDENTIFIER: RN104606561; LOCATION: Brown County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014618001, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limitations for chlorine, $NH_3N$, and total suspended solids; and 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0014618001, Monitoring and Reporting Requirements Number 1, by failing to timely submit effluent monitoring results at the intervals specified in the permit; PENALTY: $2,314; ENFORCEMENT COORDINATOR: Martha Hott, (512) 239-2587; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(6) COMPANY: Budget Rent-A-Car of El Paso, Inc.; DOCKET NUMBER: 2010-1223-AIR-E; IDENTIFIER: RN102590932; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: gasoline dispensing site; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by failing to comply with the maximum Reid vapor pressure requirement of seven pounds per square inch absolute; PENALTY: $900; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(7) COMPANY: CITY INTERNATIONAL, LIMITED dba Snappy Mart 3; DOCKET NUMBER: 2010-1044-PST-E; IDENTIFIER: RN101458057; LOCATION: Baytown, Harris County; TYPE OF FACILITY: convenience store with resale sales of gasoline; RULE VIOLATED: 30 TAC §334.49(c)(4)(C) and the Code, §26.3475(d), by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection; 30 TAC §334.50(b)(2)(A)(i) and the Code, §26.3475(a), by failing to equip each separate pressurized line with an automatic line leak detector; 30 TAC §334.72, by failing to report to the TCEQ a suspected release within 24 hours of discovery; 30 TAC §334.74, by failing to investigate a suspected release within 30 days of discovery; and 30 TAC §334.42(i), by failing to inspect all sumps including the dispenser sumps, manways, overspill containers, or catchment basins associated with the underground

storage tank (UST) system; PENALTY: $15,376; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: COMPASS USA ENTERPRISES, INC. dba Sunrise Super Stop; DOCKET NUMBER: 2010-0972-PST-E; IDENTIFIER: RN102468303; LOCATION: Baytown, Harris County; TYPE OF FACILITY: convenience store with resale sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II vapor space manifolding and dynamic back pressure; PENALTY: $2,225; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(9) COMPANY: CVS Pharmacy, Inc.; DOCKET NUMBER: 2010-0869-PWS-E; IDENTIFIER: RN102878139; LOCATION: Spring, Harris County; TYPE OF FACILITY: public water supply (PWS); RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to collect routine distribution water samples for coliform analysis and by failing to provide public notification of the failure to sample; and 30 TAC §290.51(b) and the Code, §5.702, by failing to pay all annual public health service fees; PENALTY: $7,281; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(10) COMPANY: Eagle Rock Field Services, L.P.; DOCKET NUMBER: 2010-0920-AIR-E; IDENTIFIER: RN100227289; LOCATION: near Briscoe, Hemphill County; TYPE OF FACILITY: natural gas processing plant; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to timely submit the final permit compliance certification report; PENALTY: $2,400; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 3916 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(11) COMPANY: Escambia Operating Company, LLC; DOCKET NUMBER: 2010-1037-AIR-E; IDENTIFIER: RN105440218; LOCATION: near Jourdanton, Atascosa County; TYPE OF FACILITY: compressor station; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain authorization prior to operating a compressor station; PENALTY: $900; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(12) COMPANY: FARMERS COOPERATIVE ASSOCIATION OF O'DONNELL, TEXAS; DOCKET NUMBER: 2010-1238-PST-E; IDENTIFIER: RN102025947; LOCATION: O'Donnell, Lynn County; TYPE OF FACILITY: cotton gin and storage; RULE VIOLATED: 30 TAC §334.8(c)(5)(B)(ii), by failing to timely renew a previously issued delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current delivery certificate; and 30 TAC §334.51(a)(6) and the Code, §26.3475(c)(2), by failing to ensure that all spill and overfill prevention devices are maintained in good operating condition; PENALTY: $3,800; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

(13) COMPANY: Flint Hills Resources, LP; DOCKET NUMBER: 2010-0854-AIR-E; IDENTIFIER: RN100217389; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §§101.20(3), 116.715(a), and 122.143(4), Flexible Air Permit Number 16989 and PSD-TX-794, Special Condition (SC) Number 1, Federal Operating Permit (FOP) Number O-01317, SC Number 22, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(a)(1)(B) and §122.143(4), FOP Number O-01317, SC Number 2.F., and THSC, §382.085(b), by failing to report Incident Number 134373 within 24 hours of discovery; PENALTY: $70,382; Supplemental Environmental Project (SEP) offset amount of $35,191 applied to Southeast Texas Regional Planning Commission - West Port Arthur Home Energy Efficiency Program; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3100; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(14) COMPANY: Flying J Inc. dba Flying J Travel Plaza Orange; DOCKET NUMBER: 2010-1071-PST-E; IDENTIFIER: RN102056827; LOCATION: Orange, Orange County; TYPE OF FACILITY: truck stop and convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.246(1), (4), and (5) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for inspection; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $9,278; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(15) COMPANY: Flying J Transportation, LLC dba Flying J Travel Plaza Transportation Shop; DOCKET NUMBER: 2010-1093-PST-E; IDENTIFIER: RN105095640; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: trailer repair shop; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the UST for releases; 30 TAC §334.50(b)(2)(B)(i)(I) and the Code, §26.3475(b), by failing to conduct proper release detection for the piping associated with the UST system; and 30 TAC §334.10(b) and §334.51(c)(3), by failing to maintain UST records and make them immediately available for inspection; PENALTY: $3,282; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5800; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(16) COMPANY: Great Chambers Investment, Inc. dba Cove Country Store; DOCKET NUMBER: 2010-0899-PST-E; IDENTIFIER: RN102029402; LOCATION: Baytown, Chambers County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.226(1) and §115.246(4) and (6) and THSC, §382.085(b), by failing to maintain Stage II records at the station; 30 TAC §334.42(i), by failing to inspect all sumps, manways, overspill containers, or catchment basins associated with a UST system; 30 TAC §334.10(b), by failing to maintain all UST records and make them immediately available for inspection; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current delivery certificate; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; 30 TAC §334.45(c)(3)(A), by failing to ensure that the emergency shutoff valves were securely anchored at the base of the dispensers; and 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs; PENALTY: $14,155; ENFORCEMENT COORDINATOR: Tate Barrett, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(17) COMPANY: Robert William Strona dba Kings X Dairy; DOCKET NUMBER: 2010-0863-AGR-E; IDENTIFIER: RN102287703; LOCATION: Itasca, Hill County; TYPE OF

FACILITY: dairy farm; RULE VIOLATED: 30 TAC §321.40(d), TPDES General Permit Number TXG920164 Part III A.11(b)(1), and the Code, §26.121(a)(1), by failing to prevent the unauthorized discharge of wastewater; and 30 TAC §321.44(a) and TPDES General Permit Number TXG920164 Part IV B.5, by failing to submit written notification to the executive director and the appropriate regional office within 14 days of an unauthorized discharge of wastewater; PENALTY: $8,940; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(18) COMPANY: Majestic Fuel Supplies, LLC dba Vecta Food Store; DOCKET NUMBER: 2010-1169-PST-E; IDENTIFIER: RN101534154; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment, vapor space manifolding, and dynamic back pressure; PENALTY: $2,847; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(19) COMPANY: Montgomery County Water Control and Improvement District Number 1; DOCKET NUMBER: 2010-1198-MWD-E; IDENTIFIER: RN102095205; LOCATION: Montgomery County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010857001, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and the Code, §26.121(a), by failing to comply with permit effluent limits for $NH_3N$ and chlorine; PENALTY: $3,450; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(20) COMPANY: NALLA IDAYAN, INC. dba Yellow Jacket Grocery; DOCKET NUMBER: 2010-1090-PST-E; IDENTIFIER: RN101443950; LOCATION: Alvin, Brazoria County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.51(b)(2)(C) and the Code, §26.3475(c)(2), by failing to equip the tank with a valve or other appropriate device designed to automatically shut off the flow of regulated substances into the tank when the liquid reaches a preset level no higher than 95% capacity level for the tank; 30 TAC §334.42(i), by failing to inspect all sumps, manways, overspill containers, or catchment basins associated with a UST system; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the USTs for releases; and 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied or affixed to either the top of the fill tube or to a non-removable point in the immediate area of the fill tube; PENALTY: $6,756; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(21) COMPANY: Roberto Ortega dba Ortega's Lawn and Trees Service; DOCKET NUMBER: 2010-0754-LII-E; IDENTIFIER: RN105912562; LOCATION: Garland, Dallas County; TYPE OF FACILITY: landscape business; RULE VIOLATED: 30 TAC §30.5(b) and §344.30(a)(2) and the Code, §37.003, by failing to refrain from advertising or representing himself to the public as a person who can perform services for which a license or registration is required; PENALTY: $225; ENFORCEMENT COORDINATOR: Gena Hawkins, (512) 239-2583; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(22) COMPANY: Pencco, Inc.; DOCKET NUMBER: 2010-0989-AIR-E; IDENTIFIER: RN103899191; LOCATION: Sealy, Austin County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(E)(i), New Source Review (NSR) Permit Number 85661, SC Number 17, and THSC, §382.085(b), by failing to maintain information and data required by NSR Permit Number 85661; PENALTY: $1,090; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(23) COMPANY: Prism Gas Systems I, L.P.; DOCKET NUMBER: 2010-0887-AIR-E; IDENTIFIER: RN102558939; LOCATION: Waskom, Harrison County; TYPE OF FACILITY: gas processing plant; RULE VIOLATED: 30 TAC §116.615(2) and §122.143(4), Standard Permit Number 32829, FOP Number O-00815, General Operating Permit Number 514, Site-wide requirements (b)(7)(E)(ii), and THSC, §382.085(b), by failing to adhere to the permitted allowable limits for carbon monoxide and nitrogen oxides; PENALTY: $54,800; SEP offset amount of $21,920 applied to Texas Association of Resource Conservation and Development Areas, Inc. - Clean School Buses; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(24) COMPANY: Rhodia, Inc.; DOCKET NUMBER: 2010-0951-AIR-E; IDENTIFIER: RN100220581; LOCATION: Houston, Harris County; TYPE OF FACILITY: sulfuric acid manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), FOP Number O-01609, Special Terms and Conditions Number 12, NSR Permit Number 56566, SC Number 4, and THSC, §382.085(b), by failing to meet the stack height requirement of 60 feet; PENALTY: $3,360; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(25) COMPANY: Mary Alice Gonzalez dba Skate Plex; DOCKET NUMBER: 2010-0681-PWS-E; IDENTIFIER: RN101218147; LOCATION: Randall County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to collect routine distribution water samples for coliform analysis and by failing to provide public notification of the failure to collect routine samples; PENALTY: $2,394; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(26) COMPANY: Southwest Shipyard, L.P.; DOCKET NUMBER: 2010-1129-PWS-E; IDENTIFIER: RN100248749; LOCATION: Channelview, Harris County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.109(f)(3) and THSC, §341.031(a), by failing to comply with the maximum contaminant level (MCL) for total coliform; 30 TAC §290.109(c)(3)(A)(ii) and §290.122(c)(2)(B), by failing to collect at least four repeat samples for coliform analysis within 24 hours after a routine distribution coliform sample is found to be coliform-positive and by failing to provide notice to persons served by the facility; 30 TAC §290.109(c)(2)(F), by failing to collect at least five routine distribution samples for coliform analysis; and 30 TAC §290.109(f)(1)(B) and THSC, §341.031(a), by failing to comply with the acute MCL for coliform bacteria; PENALTY: $12,388; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(27) COMPANY: SUNRISE MATERIALS, L.P.; DOCKET NUMBER: 2010-0932-WQ-E; IDENTIFIER: RN105930770; LOCATION: Romayor, Liberty County; TYPE OF FACILITY: sand mining operation; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulation §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activities; PENALTY:

$2,000; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(28) COMPANY: Texas Lehigh Cement Company, LP; DOCKET NUMBER: 2010-1057-MWD-E; IDENTIFIER: RN102597846; LOCATION: Hays County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0011976001, Effluent Limitations and Monitoring Requirements Number A, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for biochemical oxygen demand; PENALTY: $2,080; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(29) COMPANY: James H. Wood; DOCKET NUMBER: 2010-0565-LII-E; IDENTIFIER: RN103738399; LOCATION: Colleyville, Tarrant County; TYPE OF FACILITY: landscaping company; RULE VIOLATED: 30 TAC §344.35(d)(2), by failing to obtain all permits required to install an irrigation system; PENALTY: $193; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(30) COMPANY: Zeway Corporation dba Zack Shell & Deli; DOCKET NUMBER: 2010-1089-PST-E; IDENTIFIER: RN102050739; LOCATION: Dallas, Collin County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II vapor space manifolding and dynamic back pressure; PENALTY: $2,161; ENFORCEMENT COORDINATOR: Theresa Hagood, (512) 239-2540; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201005699
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 5, 2010

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## Correction of Error

The Texas Commission on Environmental Quality adopted amendments to 30 TAC §§328.52, 328.55, 328.60, 328.63, 328.66, and 328.69 - 328.71 and the repeal of §328.67 and §328.68 in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8965). Several errors appear in the rule adoption preamble. The corrections are as follows:

On page 8965, second column, third paragraph, under BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES, the second sentence should read: "This rulemaking requires applicants to request input from local authorities, including fire authorities." The remainder of the paragraph should be deleted.

On page 8965, second column, fourth paragraph, under BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES, the third sentence should read: "The executive director is required to consider a local government's timely notice that an application does not comply with local requirements."

On page 8967, second column, third paragraph, under TAKINGS IMPACT ASSESSMENT, the fourth sentence should read: "The executive director is required to consider timely notice from a local government that an application does not comply with local requirements."

On page 8968, first column, second paragraph, under Response, the first two sentences should be deleted.

TRD-201005714

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## Correction on Notice Guidelines for Determining Relationships of Particular Criminal Offenses to Particular Occupational Licenses

In the October 8, 2010, issue of the *Texas Register* (35 TexReg 9140), the Texas Commission on Environmental Quality (commission) published the Notice of Availability of the Guidelines for Determining Relationships of Particular Criminal Offenses to Particular Occupational Licenses. The notice should have also included the actual guidelines, *CRIMINAL CONVICTION GUIDELINES.* The omission of the guidelines was as submitted in error by the commission.

The *CRIMINAL CONVICTION GUIDELINES* are also available for review on the commission's Web site at *http://www.tceq.state.tx.us/nav/main/business_licensing.html.* Copies of the report may be obtained by contacting Mr. Terry Thompson at (512) 239-6095, by email at *tthompso@tceq.state.tx.us,* or in writing to Mr. Terry Thompson, Texas Commission on Environmental Quality, Occupational Licensing Section, MC 178, P.O. Box 13087, Austin, Texas 78711-3087.

Any questions or comments concerning the *CRIMINAL CONVICTION GUIDELINES* may be addressed to Ms. Alicia Lee, Staff Attorney, Environmental Law Division, Texas Commission on Environmental Quality, MC 173, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-0133.

**CRIMINAL CONVICTION GUIDELINES**

These guidelines are issued by the Texas Commission on Environmental Quality (TCEQ) pursuant to the Texas Occupations Code, §53.025(a). These guidelines describe the process by which the executive director determines whether a criminal conviction renders an applicant an unsuitable candidate for the license, or whether a conviction warrants revocation or suspension of a license previously granted. These guidelines present the general factors that are considered in all cases, and also the reasons why particular crimes are considered to relate to each type of license issued by TCEQ.

*I. Agency's process*

A. Upon receiving a request to issue a criminal history evaluation letter regarding an individual's eligibility for a license, the executive director will:

1. Request a criminal background check through the Department of Public Safety (DPS) or other applicable data system for the individual requesting the evaluation letter; and

2. Make a determination whether or not grounds for ineligibility do or do not exist.

B. If the executive director determines that grounds for ineligibility do not exist, the executive director shall notify the requestor in writing of the executive director's determination not later than the 90th day after the date the executive director receives the request.

C. If the executive director determines that the requestor is ineligible for a license, the executive director shall issue a letter not later than the 90th day after the date the executive director receives the request, setting out each basis for potential ineligibility.

D. Upon the executive director's discovery of new facts unknown or undisclosed at the time of the determination of eligibility, the executive director may re-evaluate the eligibility of the requestor.

E. The executive director's determination of eligibility is final.

F. For individuals who are already licensed when the agency discovers a criminal conviction, the executive director may deny that individual's renewal application by:

1. Preparing a letter of proposed license renewal denial and mailing it to the applicant.

2. The letter will clearly identify the convictions that form the basis of the proposed denial, cite the TCEQ rule and statutory authority for the proposed denial, and advise the applicant that a hearing may be requested to challenge the proposed denial.

G. For individuals who are already licensed when the agency discovers a criminal conviction, the executive director may suspend or revoke a license by:

1. Preparing a letter of the proposed license suspension or revocation and mailing it to the licensee.

2. The letter will clearly identify the convictions that form the basis of the proposed suspension or revocation, cite the TCEQ rules and statutory authority for the proposed denial, and advise the applicant that a hearing may be requested to challenge the proposed suspension or revocation.

H. If the applicant or license holder requests a hearing, a hearing is conducted, a Proposal for Decision is issued for consideration by the Commission, and the Commission ultimately decides whether the license application should be denied or an existing license be suspended or revoked.

*II. Responsibilities of the applicant*

A. The applicant has the responsibility, to the extent possible, to obtain and provide to the executive director the recommendations of the prosecution, law enforcement, and correctional authorities as described in section III below.

B. The applicant has the further obligation to furnish proof in the form required by the TCEQ that the applicant has:

1. Maintained a record of steady employment;

2. Supported the applicant's dependents;

3. Maintained a record of good conduct; and

4. Paid all outstanding court costs, supervision fees, fines, and restitution ordered in any criminal case in which the applicant has been convicted.

*III. General factors*

A. In determining whether a criminal conviction should be grounds to deny a license the following factors are considered in all cases:

1. The nature and seriousness of the crime;

2. The relationship of the crime to the purposes for requiring a license to engage in the occupation;

3. The extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the applicant previously had been involved; and

4. The relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation.

B. In determining the fitness to perform the duties and discharge the responsibilities of the licensed occupation of a person who has been convicted of a crime, the agency will also consider the following:

1. The extent and nature of the person's past criminal activity;

2. The age of the person when the crime was committed;

3. The amount of time that has elapsed since the person's last criminal activity;

4. The conduct and work activity of the person before and after the criminal activity;

5. Evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and

6. Other evidence of the person's fitness, including letters of recommendation from:

a. Prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;

b. The sheriff or chief of police in the community where the person resides; and

c. Any other person in contact with the convicted person.

*IV. Relation of crimes to specific licenses issued by TCEQ*

These guidelines reflect the most common or well-known categories of crimes, and their relation to specific license types. Listed below is a list of the occupational licenses issued by TCEQ and how particular categories of crimes may relate to those specific licenses. The vast majority of criminal convictions reviewed by the executive director will fit within the categories of crimes described below. However, these guidelines are not intended to be an exclusive listing, i.e. they do not prohibit the executive director from considering crimes not listed herein. After due consideration of the circumstances of the criminal act and the general factors listed above, the executive director may find that a conviction not described herein renders a person unfit to hold a license.

In addition to the specific crimes listed below, multiple violations of any criminal statute should always be reviewed, for any license type. Multiple violations may reflect a pattern of behavior that renders the applicant unfit for the license.

A. BACKFLOW PREVENTION ASSEMBLY TESTER (BPAT)

1. Crimes involving, misrepresentation, fraud, extortion, bribery, theft or deceptive business practices.

A person with a predisposition for crimes involving misrepresentation, fraud, extortion, bribery, theft or deceptive business practices would have the opportunity to engage in further similar conduct.

a. BPATs have the means and the opportunity to practice deceit, fraud and misrepresentation related to the need for service, parts, and equipment.

b. BPATs are in a position to approve backflow prevention assemblies during inspections that may not be operable or have code or safety violations in exchange for an inducement offered by the individual or entity requesting the test of the equipment.

2. Crimes involving a sexually violent offense, as defined by Code of Criminal Procedure, Article 62.001.

A person with a predisposition for crimes involving sexually violent offenses would have the opportunity to engage in further similar conduct.

a. BPATs have direct access to private residences and deal directly with the general public which could allow the opportunity to engage in further similar conduct.

b. BPATs have direct access to business facilities and deal directly with the owners of the businesses and business personnel which could allow the opportunity to engage in further similar conduct.

3. Crimes against property such as theft or burglary.

A person with the predisposition and experience in committing crimes against property would have the opportunity to engage in further similar conduct.

BPATs have access to private residences and businesses, where they may come into direct contact with unattended property, which could allow the opportunity to engage in further similar conduct.

4. Crimes against the person such as homicide, kidnapping and assault.

A person with a predisposition for a violent response would pose a risk to the public.

BPATs have direct contact with persons at residences and businesses in situations that could have a potential for confrontational behavior.

5. Crimes involving environmental law violations.

A person having the predisposition and experience in committing environmental law violations would have the opportunity to engage in further similar conduct.

B. CUSTOMER SERVICE INSPECTORS (CSI)

1. Crimes involving, misrepresentation, fraud, extortion, bribery, theft or deceptive business practices.

A person with a predisposition for crimes involving misrepresentation, fraud, extortion, bribery, theft or deceptive business practices would have the opportunity to engage in further similar conduct.

a. CSIs have the means and the opportunity to practice deceit, fraud and misrepresentation related to the need for service, parts, and equipment.

b. CSIs are in a position to approve inspections of facilities that may have code or safety violations in exchange for an inducement offered by the individual or entity requesting the inspection.

2. Crimes involving a sexually violent offense, as defined by Code of Criminal Procedure, Article 62.001.

A person with a predisposition for crimes involving sexually violent offenses would have the opportunity to engage in further similar conduct.

a. CSIs have direct access to private residences and deal directly with the general public which could allow the opportunity to engage in further.

b. CSIs have direct access to business facilities and deal directly with the owners of the businesses and business personnel which could allow the opportunity to engage in further.

3. Crimes against property such as theft or burglary.

A person with the predisposition and experience in committing crimes against property would have the opportunity to engage in further similar conduct.

CSIs have access to private residences and businesses, where they may come into direct contact with unattended property which could allow the opportunity to engage in further similar conduct.

4. Crimes against the person such as homicide, kidnapping and assault.

A person with a predisposition for a violent response would pose a risk to the public.

CSIs have direct contact with persons at residences and businesses in situations that could have a potential for confrontational behavior.

5. Crimes involving environmental law violations.

A person having the predisposition and experience in committing environmental law violations would have the opportunity to engage in further similar conduct.

C. LANDSCAPE IRRIGATORS, IRRIGATION TECHNICIANS AND, IRRIGATION INSPECTORS

1. Crimes involving misrepresentation, fraud, extortion, bribery, theft or deceptive business practices.

A person with a predisposition for crimes involving misrepresentation, fraud, extortion, bribery, theft or deceptive business practices would have the opportunity to engage in further similar conduct.

a. Landscape Irrigators and Irrigation Technicians have the means and the opportunity to practice deceit, fraud and misrepresentation related to the need for service, parts, and equipment.

b. Irrigation Inspectors are in a position to pass irrigation systems during inspections that may have code or safety violations in exchange for an inducement offered by the individual or entity requesting the inspection.

2. Crimes involving a sexually violent offense, as defined by Code of Criminal Procedure, Article 62.001.

A person with a predisposition for crimes involving sexually violent offenses would have the opportunity to engage in further similar conduct.

a. The above licensees have direct access to private residences and deal directly with the general public which could allow the opportunity to engage in further similar conduct.

b. The above licensees have direct access to business facilities and deal directly with the owners of the businesses and business personnel which could allow the opportunity to engage in further similar conduct.

3. Crimes against property such as theft or burglary.

A person with the predisposition and experience in committing crimes against property would have the opportunity to engage in further similar conduct.

The above licensees have access to private residences and businesses, where they may come into direct contact with unattended property which could allow the opportunity to engage in further similar conduct.

4. Crimes against the person such as homicide, kidnapping and assault.

A person with a predisposition for a violent response would pose a risk to the public.

The above licensees have direct contact with persons at residences and businesses in situations that could have a potential for confrontational behavior.

6. Crimes involving environmental law violations.

A person having the predisposition and experience in committing environmental law violations would have the opportunity to engage in further similar conduct.

D. LEAKING PETROLEUM STORAGE TANK CORRECTIVE ACTION PROJECT MANAGERS AND SPECIALIST

1. Crimes involving misrepresentation, fraud, extortion, bribery, theft or deceptive business practices.

A person with a predisposition for crimes involving misrepresentation, fraud, extortion, bribery, theft or deceptive business practices would have the opportunity to engage in further similar conduct.

The above licensees have the means and the opportunity to practice deceit, fraud and misrepresentation related to the need for service, parts, and equipment.

2. Crimes involving a sexually violent offense, as defined by Code of Criminal Procedure, Article 62.001.

A person with a predisposition for crimes involving sexually violent offenses would have the opportunity to engage in further similar conduct.

The above licensees have direct access to business facilities and deal directly with the owners of the businesses and business personnel which could allow the opportunity to engage in further similar conduct.

3. Crimes against property such as theft or burglary.

A person with the predisposition and experience in committing crimes against property would have the opportunity to engage in further similar conduct.

The above licensees have access to businesses, where they may come into direct contact with unattended property which could allow the opportunity to engage in further similar conduct.

4. Crimes against the person such as homicide, kidnapping and assault.

A person with a predisposition for a violent response would pose a risk to the public.

The above licensees have direct contact with individuals at businesses in situations that could have a potential for confrontational behavior.

5. Crimes involving environmental law violations.

A person having the predisposition and experience in committing environmental law violations would have the opportunity to engage in further similar conduct.

E. MUNICIPAL SOLID WASTE FACILITY SUPERVISORS

Crimes involving environmental law violations.

A person having the predisposition and experience in committing environmental law violations would have the opportunity to engage in further similar conduct.

F. ON-SITE SEWAGE FACILITY (OSSF) APPRENTICES, DESIGNATED REPRESENTATIVES, INSTALLERS, MAINTENANCE PROVIDERS AND SITE EVALUATORS

1. Crimes involving misrepresentation, fraud, extortion, bribery, theft or deceptive business.

A person with a predisposition for crimes involving misrepresentation, fraud, extortion, bribery, theft or deceptive business practices would have the opportunity to engage in further similar conduct.

a. The OSSF Apprentices, Installers, Maintenance Providers and Site Evaluators have the means and the opportunity to practice deceit, fraud and misrepresentation related to the need for service, parts, and equipment.

b. The OSSF Designated Representatives are in a position to pass OSSF systems during inspections that may have code or safety violations in exchange for an inducement offered by the individual or entity requesting the inspection.

2. Crimes involving a sexually violent offense, as defined by Code of Criminal Procedure, Article 62.001.

A person with a predisposition for crimes involving sexually violent offenses would have the opportunity to engage in further similar conduct.

a. The above licensees have direct access to private residences and deal directly with the general public which could allow the opportunity to engage in further similar conduct.

b. The above licensees have direct access to business facilities and deal directly with the owners of the businesses and business personnel which could allow the opportunity to engage in further similar conduct.

3. Crimes against property such as theft or burglary.

A person with the predisposition and experience in committing crimes against property would have the opportunity to engage in further similar conduct.

The above licensees have access to private residences and businesses, where they may come into direct contact with unattended property which could allow the opportunity to engage in further similar conduct.

4. Crimes against the person such as homicide, kidnapping and assault.

A person with a predisposition for a violent response would pose a risk to the public.

The above licensees have direct contact with individuals at private residences and businesses in situations that could have a potential for confrontational behavior.

5. Crimes involving environmental law violations.

A person having the predisposition and experience in committing environmental law violations would have the opportunity to engage in further similar conduct.

G. PUBLIC WATER SYSTEM OPERATORS

1. Crimes involving a sexually violent offense, as defined by Code of Criminal Procedure, Article 62.001.

A person with a predisposition for crimes involving sexually violent offenses would have the opportunity to engage in further similar conduct.

a. The above licensees may have opportunities to have direct access to private residences and deal directly with the general public which could allow the opportunity to engage in further similar conduct.

b. The above licensees may have opportunities to have direct access to business facilities and deal directly with the owners of the businesses and business personnel which could allow the opportunity to engage in further similar conduct.

2. Crimes against property such as theft or burglary.

A person with the predisposition and experience in committing crimes against property would have the opportunity to engage in further similar conduct.

The above licensees have access to private residences or businesses, where they may come into direct contact with unattended property which could allow the opportunity to engage in further similar conduct.

3. Crimes against the person such as homicide, kidnapping and assault.

A person with a predisposition for a violent response would pose a risk to the public.

The above licensees may have an opportunity to have direct contact with persons at residences and businesses in situations that could have a potential for confrontational behavior.

4. Crimes involving environmental law violations.

A person having the predisposition and experience in committing environmental law violations would have the opportunity to engage in further similar conduct.

H. UNDERGROUND STORAGE TANK ON-SITE SUPERVISORS AND CONTRACTORS

1. Crimes involving misrepresentation, fraud, extortion, bribery, theft or deceptive business practices.

The above licensees have the means and the opportunity to practice deceit, fraud and misrepresentation related to the need for service, parts, and equipment.

2. Crimes involving a sexually violent offense, as defined by Code of Criminal Procedure, Article 62.001.

A person with a predisposition for crimes involving sexually violent offenses would have the opportunity to engage in further similar conduct.

The above licensees have direct access to business facilities and deal directly with the owners of the businesses and business personnel which could allow the opportunity to engage in further similar conduct.

3. Crimes against property such as theft or burglary.

A person with the predisposition and experience in committing crimes against property would have the opportunity to engage in further similar conduct.

The above licensees have access to businesses, where they may come into direct contact with unattended property which could allow the opportunity to engage in further similar conduct.

4. Crimes against the person such as homicide, kidnapping and assault.

A person with a predisposition for a violent response would pose a risk to the public.

The above licensees have direct contact with individuals at businesses in situations that could have a potential for confrontational behavior.

5. Crimes involving environmental law violations.

A person having the predisposition and experience in committing environmental law violations would have the opportunity to engage in further similar conduct.

I. WASTEWATER OPERATORS

1. Crimes involving a sexually violent offense, as defined by Code of Criminal Procedure, Article 62.001.

A person with a predisposition for crimes involving sexually violent offenses would have the opportunity to engage in further similar conduct.

a. The above licensees may have opportunities to have direct access to private residences and deal directly with the general public which could allow the opportunity to engage in further similar conduct.

b. The above licensees may have opportunities to have direct access to business facilities and deal directly with the owners of the businesses and business personnel which could allow the opportunity to engage in further similar conduct.

2. Crimes against property such as theft or burglary.

A person with the predisposition and experience in committing crimes against property would have the opportunity to engage in further similar conduct.

The above licensees have access to private residences or businesses, where they may come into direct contact with unattended property which could allow the opportunity to engage in further similar conduct.

3. Crimes against the person such as homicide, kidnapping and assault.

A person with a predisposition for a violent response would pose a risk to the public.

The above licensees may have an opportunity to have direct contact with persons at residences and businesses in situations that could have a potential for confrontational behavior.

4. Crimes involving environmental law violations.

A person having the predisposition and experience in committing environmental law violations would have the opportunity to engage in further similar conduct.

J. WATER TREATMENT SPECIALIST (WTS)

1. Crimes involving, misrepresentation, fraud, extortion, bribery, theft or deceptive business practices.

A person with a predisposition for crimes involving misrepresentation, fraud, extortion, bribery, theft or deceptive business practices would have the opportunity to engage in further similar conduct.

WTSs have the means and the opportunity to practice deceit, fraud and misrepresentation related to the need for service, parts, and equipment.

2. Crimes involving a sexually violent offense, as defined by Code of Criminal Procedure, Article 62.001.

A person with a predisposition for crimes involving sexually violent offenses would have the opportunity to engage in further similar conduct.

a. WTSs have direct access to private residences and deal directly with the general public which could allow the opportunity to engage in further similar conduct.

b. WTSs have direct access to business facilities and deal directly with the owners of the businesses and business personnel which could allow the opportunity to engage in further similar conduct.

3. Crimes against property such as theft or burglary.

A person with the predisposition and experience in committing crimes against property would have the opportunity to engage in further similar conduct.

WTSs have access to private residences and businesses, where they may come into direct contact with unattended property which could allow the opportunity to engage in further similar conduct.

4. Crimes against the person such as homicide, kidnapping and assault.

A person with a predisposition for a violent response would pose a risk to the public.

WTSs have licensees may have an opportunity to have direct contact with persons at residences and businesses in situations that could have a potential for confrontational behavior.

5. Crimes involving environmental law violations.

A person having the predisposition and experience in committing environmental law violations would have the opportunity to engage in further similar conduct.

TRD-201005698
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: October 5, 2010

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## Notice of Public Hearing on Proposed Revision to 30 TAC Chapter 116

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revision to 30 Texas Administrative Chapter (TAC) Chapter 116, Control of Air Pollution by Permits for New Construction or Modification under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency (EPA) regulations.

The proposed rulemaking would repeal §116.118. Section 116.118 applied to facilities exempted from air permitting under the Texas Clean Air Act. This exemption has expired, and the section no longer has an application under the air permitting rules of the commission.

The commission will hold a public hearing on this proposal in Austin on November 8, 2010 at 10:00 a.m. in Building B, Room 201A at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2010-052-116-PR. The comment period closes November 15, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Beecher Cameron, Air Permits Division, (512) 239-1495.

TRD-201005671
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: October 1, 2010

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## Notice of Request for Public Comment and Notice of a Public Meeting for Two Total Maximum Daily Loads

The Texas Commission on Environmental Quality (TCEQ or commission) has made available for public comment two draft total maximum daily loads (TMDLs) for indicator bacteria in two assessment units of the Upper Trinity River watershed located in Dallas County, Segment 0805.

The TCEQ will conduct a public meeting in Dallas to receive comments on the draft TMDLs. This announcement also constitutes notice that the TMDLs will become part of the State Water Quality Management Plan upon approval by the United States Environmental Protection Agency (EPA).

Texas is required to develop TMDLs for impaired water bodies included in the State of Texas Clean Water Act, §303(d) list of impaired water bodies. A TMDL is a detailed water quality assessment that provides the scientific foundation to allocate pollutant loads in a certain body of water in order to restore and maintain designated uses.

The TCEQ will conduct a public meeting for the Upper Trinity River watershed draft TMDLs for indicator bacteria on Tuesday, October 19, 2010 at 6:30 p.m. at the Dallas City Hall, 1500 Marilla Street, Room L1FN (Auditorium), Dallas, Texas 75201. The purpose of the public meeting is to provide the public an opportunity to comment on the two draft TMDLs.

The commission requests comment on each of the major components of the TMDL: problem definition, endpoint identification, source analysis, seasonal variation, linkage between sources and receiving waters, margin of safety, pollutant loading allocation, public participation, and implementation and reasonable assurances. After the public comment period, TCEQ may revise the TMDLs, if appropriate. A request will then be made that the final TMDLs be considered by the commission for adoption. Upon adoption of the TMDLs by the commission, the final TMDLs and a response to all comments received will be made available on the TCEQ Web site located at *http://www.tceq.state.tx.us/implementation/water/tmdl/66-trinitybacteria.html.* The TMDLs will then be submitted to the EPA Region 6 for final action. Upon approval by EPA, the TMDLs will be certified as an update to the State of Texas Water Quality Management Plan.

At this meeting individuals have the opportunity to present oral statements when called upon in order of registration. An agency staff member will give a brief presentation at the start of the meeting and will be available to answer questions before and after public comments have been received.

Written comments should be submitted to Dania Grundmann, Water Quality Planning Division, Texas Commission on Environmental Quality, MC 203, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1414. All comments must be received by **5:00 p.m., Monday, November 8, 2010,** and should reference **Two Total Maximum Daily Loads for Upper Trinity River for Bacteria.** For further information regarding the draft TMDLs, please contact Dania Grundmann, Water Quality Planning Division, at (512) 239-3449 or *dgrundma@tceq.state.tx.us.* Copies of the draft TMDL document will be available and can be obtained via the commission's Web site at: *http://www.tceq.state.tx.us/implementation/water/tmdl/tmdlcalendar.html* or by calling Earlene Lambeth at (512) 239-3129.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meetings should contact Earlene Lambeth at (512) 239-3129. Requests should be made as far in advance as possible.

TRD-201005700
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: October 5, 2010

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## Notice of Water Quality Applications

The following notice was issued on September 24, 2010 through October 1, 2010.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

J AND B SAUSAGE COMPANY INC which operates J Bar B Foods Plant, a meat processor and distributor of sausage and other related meat products, has applied for a major amendment to TCEQ Permit No.WQ0002868000 to authorize an increase in the permitted flow limit from 35,000 gallons per day to 69,500 gallons per day and an increase in the irrigation area from 18.17 acres to 39.21 acres. The current permit authorizes the disposal of process wastewater generated from meat processing equipment and product wash down that is commingled with domestic wastewater at a daily average flow not to exceed 35,000 gallons per day via irrigation of 18.17 acres of Bermuda grass. This permit will not authorize a discharge of pollutants into water in the State.

GREENSMITHS INC which operates a former graphite mine and processing plant, has applied for a renewal of TCEQ Permit No. WQ0000350000 which authorizes the discharge of storm water runoff, noncontact cooling water, and leachate from the tailings pile at a daily average flow not to exceed 300,000 gallons per day via Outfall 001; and the disposal of storm water runoff, noncontact cooling water, and leachate from the tailings pile by irrigation of a 23.8 acres irrigation tract of the tailings pile at an application rate not to exceed 50 inches per calendar year. The application also included a request for a minor amendment to remove the authorization to discharge via Outfall 001, reduce the irrigation tract from 23.8 acres to 16.5 acres, modify the application rate from 50 inches per calendar year to 25,000 gallons per day (equates to 20.4 inches/year), and update the authorized wastestream description to treated acid mine drainage and storm water. The proposed permit authorizes the disposal of treated acid mine drainage and storm water by irrigation of the 16.5 acre phytoplot/phytocap irrigation tract at a daily average flow of effluent not to exceed 25,000 gallons per day. This permit will not authorize a discharge of pollutants into water in the State. The facility and land application site are located at 2046 CR 115, approximately 2.1 miles north of the State Highway 29 crossing over Clear Creek which is approximately 10 miles west of the City of Burnet, Burnet County, Texas 75006.

DOS REPUBLICAS COAL PARTNERSHIP which will operate the Eagle Pass Mine, a sub-bituminous coal mine, has applied for a renewal of TPDES Permit No. WQ0003511000, which authorizes the discharge of storm water and mine seepage from active mining areas on an intermittent and flow variable basis via Outfalls 001 through 013. The site is located on the northeast side of State Highway 1588, three miles northeast of U.S. Highway 277, and approximately five miles northeast of the City of Eagle Pass, Maverick County, Texas 78852.

THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) has initiated a minor amendment of the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014916001 issued to J. West Development, Inc., 3502 Westelm Court, Richmond, Texas 77469, to authorize an update to Other Requirement No. 4 to refer to the buffer zone requirements being met by ownership. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 75,000 gallons per day. The facility will be located approximately 4,000 feet northeast of the intersection of State Highway 60 and Farm-to-Market Road 2031 in the community of Matagorda in Matagorda County, Texas 77457.

CITY OF DALLAS has applied for a renewal of TPDES Permit No. WQ0010060006, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 110,000,000 gallons per day. The facility is located on the east bank of the Trinity River at 10011 Log Cabin Road in the City of Dallas in Dallas County, Texas 75253.

CITY OF COTULLA has applied for a renewal of TPDES Permit No. WQ0010153001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 990,000 gallons per day. The facility is located approximately 1.1 miles south of the intersection of State Highway 97 and State Highway 624 and 1.1 miles southeast of the intersection of U.S. Highway-Business 81 and State Highway 97 in La Salle County, Texas 78014.

CITY OF PITTSBURG has applied for a renewal of TPDES Permit No. WQ0010250002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located approximately 1.3 miles southeast of the intersection of Arch Davis Road and Lafayette Street in the southeast section of the City of Pittsburg in Camp County, Texas 75686.

WADSWORTH WATER SUPPLY CORPORATION has applied for a major amendment to TPDES Permit No. WQ0012618001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 27,000 gallons per day to a daily average flow not to exceed 75,000 gallons per day. The facility is located approximately 400 feet east of State Highway 60 and approximately 1,100 feet south of Laird Road in Matagorda County, Texas 77483. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

U S DEPARTMENT OF THE INTERIOR has applied for a renewal of TCEQ Permit No. WQ0012865002, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 23,000 gallons per day via evaporation. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 2,000 feet northeast of the Ranger Station at Boquillas (Rio Grande Village) in Big Bend National Park in Brewster County, Texas 79834.

DONNA INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. WQ0013680001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 17,000 gallons per day. The facility is located approximately 1,000 feet west of the intersection of State Highway 493 and U.S. Highway 281, 3.6 miles south of the City of Donna in Hidalgo County, Texas 78537.

CITY OF PRESIDIO has applied for a renewal of TPDES Permit No. WQ0014679001 which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,250,000 gallons per day. The facility will be located approximately 1.5 miles southeast of the City of Presidio on the north side of Farm-to-Market Road 170 in Presidio County, Texas 79845.

AQUA WATER SUPPLY CORPORATION has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014982001, to authorize the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 12,000 gallons per day. The facility is located approximately 2.1 miles west-northwest of the intersection of Farm-to-Market

Road 1624 and County Road 322, and approximately 2.4 miles southeast of the intersection of Farm-to-Market Road 696 and County Road 309 in Lee County, Texas 78947.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201005731
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 6, 2010

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## Texas Facilities Commission

Request for Proposals #303-1-20254

The Texas Facilities Commission (TFC), on behalf of the Department of Public Safety (DPS), announces the issuance of Request for Proposals (RFP) #303-1-20254. TFC seeks a five (5) or ten (10) year lease of approximately 5,408 square feet of office space in Northwest Tarrant County, Texas.

The deadline for questions is October 25, 2010, and the deadline for proposals is November 1, 2010, at 3:00 p.m. The target award date is December 17, 2010. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Contract Specialist Sandy Williams at (512) 475-0453 or sandy.williams@tfc.state.tx.us. Any addendum to the original RFP will be posted to the Electronic State Business Daily (ESBD). A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=91359.*

TRD-201005728
Kay Molina
General Counsel
Texas Facilities Commission
Filed: October 6, 2010

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## General Land Office

Notice of Violation - Derelict Vessel

Official Notice to Vessel Owner/Operator (Pursuant to §40.254, Texas Natural Resources Code)

This preliminary report and notice of violation was issued by Greg Pollock, Deputy Commissioner, Oil Spill Prevention and Response Division (OSPR), Texas General Land Office, on 14 September 2010.

**PRELIMINARY REPORT**

Based upon an inspection conducted by OSPR Region 3 staff, the Commissioner of the General Land Office (GLO) has determined that this steel-hulled barge (GLO Vessel #943), USCG Vessel Documentation No. Unknown, is in an abandoned, wrecked, and derelict condition without the consent of the commissioner. This vessel is located in Nueces Bay at latitude 27 degrees 50 minutes 36 seconds N, longitude 97 degrees 23 minutes 10 seconds W in the City of Corpus Christi, Nueces County, Texas. The GLO is unable to determine the owner or responsible person(s) for this vessel. The Commissioner has further determined that, because of the vessel's condition and location, the vessel poses a navigational hazard, an unreasonable threat to public health, safety, and welfare, and is a hazard to the environment.

**Violation**

You are hereby given notice, pursuant to the provisions of §40.254 of the Texas Natural Resources Code (OSPRA) that you are in violation of OSPRA §40.108(a) that prohibits a person from leaving, abandoning, or maintaining any structure or vessel in or on coastal waters, on public or private lands, or at a public or private port or dock if the structure or vessel is in a wrecked, derelict, or substantially dismantled condition, and the Commissioner determines the vessel is involved in an actual or unauthorized discharge of oil, a threat to the public health, safety, and welfare, or a hazard to the environment or navigation. The Commissioner is authorized by OSPRA §40.108(b) to dispose of or contract for the disposal of any vessel described in §40.108(a).

**Recommendation**

The Commissioner recommends that the vessel be removed from Texas coastal waters and disposed of in accordance with OSPRA §40.108.

The owner or operator of this vessel can request a hearing to contest the violation and the removal and disposal of the vessel. If the owner or operator wants to request a hearing, a request in writing must be made within twenty (20) days of this notice being posted on the vessel. The request for a hearing must be sent to: Texas General Land Office, Oil Spill Prevention and Response Division, P.O. Box 12873, Austin, TX 78711. Failure to request a hearing may result in the removal and disposal of the vessel by the TGLO. If the TGLO removes and disposes of the vessel, the TGLO has authority under TNRC §40.108(b) to recover the costs of removal and disposal from the vessel's owner or operator.

For additional information contact Wm. D. "Bill" Grimes at (512) 475-1464.

TRD-201005730
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: October 6, 2010

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Notice of Violation - Derelict Vessel

Official Notice to Vessel Owner/Operator (Pursuant to §40.254, Texas Natural Resources Code)

This preliminary report and notice of violation was issued by Greg Pollock, Deputy Commissioner, Oil Spill Prevention and Response Division (OSPR), Texas General Land Office, on 14 September 2010.

**PRELIMINARY REPORT**

Based upon an inspection conducted by OSPR Region 3 staff, the Commissioner of the General Land Office (GLO), has determined that this steel-hulled barge (GLO Vessel #944), USCG Vessel Documentation No. Unknown, is in an abandoned, wrecked, and derelict condition without the consent of the commissioner. The steel-hulled barge is approximately 100 feet in length and is located at latitude 27 degrees 50 minutes 36 seconds N, longitude 97 degrees 23 minutes 10 seconds W, in Nueces Bay, in the City of Corpus Christi, in Nueces County, Texas. The GLO is unable to determine the owner or responsible person(s) for this vessel. The Commissioner has further determined that, because of the vessel's condition and location, the vessel poses a navigational haz-

ard, an unreasonable threat to public health, safety, and welfare, and is a hazard to the environment.

**Violation**

You are hereby given notice, pursuant to the provisions of §40.254 of the Texas Natural Resources Code (OSPRA) that you are in violation of OSPRA §40.108(a) that prohibits a person from leaving, abandoning, or maintaining any structure or vessel in or on coastal waters, on public or private lands, or at a public or private port or dock if the structure or vessel is in a wrecked, derelict, or substantially dismantled condition, and the Commissioner determines the vessel is involved in an actual or unauthorized discharge of oil, a threat to the public health, safety, and welfare, or a hazard to the environment or navigation. The Commissioner is authorized by OSPRA §40.108(b) to dispose of or contract for the disposal of any vessel described in §40.108(a).

**Recommendation**

The Commissioner recommends that the vessel be removed from Texas coastal waters and disposed of in accordance with OSPRA §40.108.

The owner or operator of this vessel can request a hearing to contest the violation and the removal and disposal of the vessel. If the owner or operator wants to request a hearing, a request in writing must be made within twenty (20) days of this notice being posted on the vessel. The request for a hearing must be sent to: Texas General Land Office, Oil Spill Prevention and Response Division, P.O. Box 12873, Austin, TX 78711. Failure to request a hearing may result in the removal and disposal of the vessel by the TGLO. If the TGLO removes and disposes of the vessel, the TGLO has authority under TNRC §40.108(b) to recover the costs of removal and disposal from the vessel's owner or operator.

For additional information contact Wm. D. "Bill" Grimes at (512) 475-1464.

TRD-201005720
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: October 6, 2010

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## Notice of Violation - Derelict Vessel

Official Notice to Vessel Owner/Operator (Pursuant to §40.254, Texas Natural Resources Code)

This preliminary report and notice of violation was issued by Greg Pollock, Deputy Commissioner, Oil Spill Prevention and Response Division (OSPR), Texas General Land Office, on 14 September 2010.

**PRELIMINARY REPORT**

Based upon an inspection conducted by OSPR Region 3 staff, the Commissioner of the General Land Office (GLO), has determined that this steel-hulled barge (GLO Vessel #945), USCG Vessel Documentation No. Unknown, is in an abandoned, wrecked, and derelict condition without the consent of the commissioner. The steel-hulled barge is approximately 120 feet in length and is located at latitude 27 degrees 50 minutes 36 seconds N, longitude 97 degrees 23 minutes 10 seconds W, in Nueces Bay, in the City of Corpus Christi, in Nueces County, Texas. The GLO is unable to determine the owner or responsible person(s) for this vessel. The Commissioner has further determined that, because of the vessel's condition and location, the vessel poses a navigational hazard, an unreasonable threat to public health, safety, and welfare, and is a hazard to the environment.

**Violation**

YOU ARE HEREBY GIVEN NOTICE, pursuant to the provisions of §40.254 of the Texas Natural Resources Code (OSPRA) that you are in violation of OSPRA §40.108(a) that prohibits a person from leaving, abandoning, or maintaining any structure or vessel in or on coastal waters, on public or private lands, or at a public or private port or dock if the structure or vessel is in a wrecked, derelict, or substantially dismantled condition, and the Commissioner determines the vessel is involved in an actual or unauthorized discharge of oil, a threat to the public health, safety, and welfare, or a hazard to the environment or navigation. The Commissioner is authorized by OSPRA §40.108(b) to dispose of or contract for the disposal of any vessel described in §40.108(a).

**Recommendation**

The Commissioner recommends that the vessel be removed from Texas coastal waters and disposed of in accordance with OSPRA §40.108.

The owner or operator of this vessel can request a hearing to contest the violation and the removal and disposal of the vessel. If the owner or operator wants to request a hearing, a request in writing must be made within twenty (20) days of this notice being posted on the vessel. The request for a hearing must be sent to: Texas General Land Office, Oil Spill Prevention and Response Division, P.O. Box 12873, Austin, TX 78711. Failure to request a hearing may result in the removal and disposal of the vessel by the TGLO. If the TGLO removes and disposes of the vessel, the TGLO has authority under TNRC §40.108(b) to recover the costs of removal and disposal from the vessel's owner or operator.

For additional information contact Wm. D. "Bill" Grimes at (512) 475-1464.

TRD-201005718
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: October 6, 2010

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## Notice of Violation - Derelict Vessel

Official Notice to Vessel Owner/Operator (Pursuant to §40.254, Texas Natural Resources Code)

This preliminary report and notice of violation was issued by Greg Pollock, Deputy Commissioner, Oil Spill Prevention and Response Division (OSPR), Texas General Land Office, on 8 September 2010.

**PRELIMINARY REPORT**

Based upon an inspection conducted by OSPR Region 2 staff, the Deputy Commissioner of the General Land Office (GLO), Oil Spill Prevention and Response Division, has determined that a 27 foot Irwin fiberglass-hulled sailboat TX 5652 XA (GLO Vessel Tracking Number 962), named "Just Enough", is in an abandoned, wrecked, and derelict condition without the consent of the commissioner. The sailboat is completely submerged and is located landward and adjacent to the flood protection gates in Seabrook, west of State Highway 146, at Latitude 29 degrees 33 minutes 16.22 seconds N, Longitude 95 degrees 01 minute 34.55 seconds W, in Harris County, Texas. The GLO determined that Mr. Lawrence W. Allen of Seabrook, Texas, is the owner of record for this vessel, but certified mail was returned as "unclaimed" and "unable to forward" when sent this Preliminary Report and Notice of Violation on July 29, 2010. Therefore, the GLO cannot determine the owner or responsible person(s) for this vessel. In addition, the Deputy Commissioner has determined, pursuant to OSPR §40.254(b)(2)(B), that the vessel has no intrinsic value. The Commissioner has further determined that, because of the vessel's

condition and location, the vessel poses a navigational hazard, an unreasonable threat to public health, safety, and welfare, and is a hazard to the environment.

**Violation**

You are hereby given notice, pursuant to the provisions of OSPRA §40.254 that you are in violation of OSPRA §40.108(a) that prohibits a person from leaving, abandoning, or maintaining any structure or vessel in or on coastal waters, on public or private lands, or at a public or private port or dock if the structure or vessel is in a wrecked, derelict, or substantially dismantled condition, and the Commissioner determines the vessel is involved in an actual or threatened unauthorized discharge of oil, a threat to public health, safety, and welfare, or a hazard to the environment or navigation. The Commissioner is authorized by OSPRA §40.108(b) to dispose of or contract for the disposal of any vessel described in §40.108(a).

**Recommendation**

The Deputy Commissioner recommends that the vessel be removed from Texas coastal waters and disposed of in accordance with OSPRA §40.108.

The owner or operator of this vessel can request a hearing to contest the violation and the removal and disposal of the vessel. If the owner or operator wants to request a hearing, a request in writing must be made within twenty (20) days of this notice being posted on the vessel. The request for a hearing must be sent to: Texas General Land Office, Oil Spill Prevention and Response Division, P.O. Box 12873, Austin, TX 78711. Failure to request a hearing may result in the removal and disposal of the vessel by the TGLO. If the TGLO removes and disposes of the vessel, the TGLO has authority under TNRC §40.108(b) to recover the costs of removal and disposal from the vessel's owner or operator.

For additional information contact Wm. D. "Bill" Grimes at (512) 475-1464.

TRD-201005719
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: October 6, 2010

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Notice of Violation - Derelict Vessel

Official Notice to Vessel Owner/Operator (Pursuant to §40.254, Texas Natural Resources Code)

This preliminary report and notice of violation was issued by Greg Pollock, Deputy Commissioner, Oil Spill Prevention and Response Division (OSPR), Texas General Land Office, on 4 October 2010.

**PRELIMINARY REPORT**

Based upon an inspection conducted by OSPR Region 3 staff, the Deputy Commissioner of the General Land Office (GLO), Oil Spill Prevention and Response Division, has determined that a 24 foot fiberglass-hulled recreational vessel TX 4544 YH (GLO Vessel Tracking Number 995) is in an abandoned, wrecked, and derelict condition without the consent of the commissioner. The vessel is located in the south end of Cove Harbor in Aransas Bay, in Aransas County, Texas. It is located at Latitude 27 degrees 59 minutes 23 seconds N, Longitude 97 degrees 4 minutes 42 seconds W. The GLO is unable to determine the owner or responsible person(s) for this vessel. In addition, the Deputy Commissioner has determined, pursuant to OSPRA §40.254(b)(2)(B) that the vessel has no intrinsic value. The Deputy Commissioner has further determined that, because of the vessel's condition and location, the vessel poses a navigational hazard, an unreasonable threat to public health, safety, and welfare, and is a hazard to the environment.

**Violation**

You are hereby given notice, pursuant to the provisions of OSPRA §40.254 that you are in violation of OSPRA §40.108(a) that prohibits a person from leaving, abandoning, or maintaining any structure or vessel in or on coastal waters, on public or private lands, or at a public or private port or dock if the structure or vessel is in a wrecked, derelict, or substantially dismantled condition, and the Commissioner determines the vessel is involved in an actual or threatened unauthorized discharge of oil, a threat to public health, safety, and welfare, or a hazard to the environment or navigation. The Commissioner is authorized by OSPRA §40.108(b) to dispose of or contract for the disposal of any vessel described in §40.108(a).

**Recommendation**

The Deputy Commissioner recommends that the vessel be removed from Texas coastal waters and disposed of in accordance with OSPRA §40.108.

The owner or operator of this vessel can request a hearing to contest the violation and the removal and disposal of the vessel. If the owner or operator wants to request a hearing, a request in writing must be made within twenty (20) days of this notice being posted on the vessel. The request for a hearing must be sent to: Texas General Land Office, Oil Spill Prevention and Response Division, P.O. Box 12873, Austin, TX 78711. Failure to request a hearing may result in the removal and disposal of the vessel by the TGLO. If the TGLO removes and disposes of the vessel, the TGLO has authority under TNRC §40.108(b) to recover the costs of removal and disposal from the vessel's owner or operator.

For additional information contact Wm. D. "Bill" Grimes at (512) 475-1464.

TRD-201005716
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: October 6, 2010

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Notice of Violation - Derelict Vessels

Official Notice to Vessel Owner/Operator (Pursuant to §40.254, Texas Natural Resources Code)

This preliminary report and notice of violation was issued by Greg Pollock, Deputy Commissioner, Oil Spill Prevention and Response Division (OSPR), Texas General Land Office, on 17 September 2010.

**PRELIMINARY REPORT**

Based upon an inspection conducted by Region 3 staff, the Commissioner of the General Land Office (GLO), has determined that the steel-hulled vessel and barges listed below, Vessel Documentation Nos. Unknown, are in an abandoned, wrecked, and derelict condition in the Laguna Salada, in western Baffin Bay, in Kleberg County and are a threat to public health, safety, and welfare.

Because there are no current registration or identification numbers, the GLO is unable to determine the owners of or responsible person(s) for these abandoned vessels.

VESSELS:

3-252 - Description: Barge; Location: Lat: 27.277694 Long: -97.709; Near Williamson Boat Works

3-489 - Description: Barge; Location: Lat: 27.276361 Long: -97.709417; Near Williamson Boat Works

3-499 - Description: Barge; Location: Lat: 27.27575 Long: -97.709833; Near Williamson Boat Works

3-893 - Description: M/V Sabine; Location: Lat: 27.276667 Long: -97.709167 Near Williamson Boat works

3-939 - Description: Barge; Location: Lat: 27.276944 Long: -97.709444; Near Williamson Boat Works

3-940 - Description: Barge; Location: Lat: 27.276667 Long: -97.709444; Near Williamson Boat Works

**Violation**

You are hereby given notice, pursuant to the provisions of §40.254 of the Texas Natural Resources Code (OSPRA) that you are in violation of OSPRA §40.108(a) that prohibits a person from leaving, abandoning, or maintaining any structure or vessel in or on coastal waters, on public or private lands, or at a public or private port or dock if the structure or vessel is in a wrecked, derelict, or substantially dismantled condition, and the Commissioner determines the vessel is a threat to the public health, safety, and welfare. The commissioner is authorized by OSPRA §40.108(b) to dispose of or contract for the disposal of any vessel described in §40.108(a).

**Recommendation**

The Commissioner recommends that the vessels be removed from Texas coastal waters and disposed of in accordance with OSPRA §40.108.

The owner or operator of these vessels can request a hearing to contest the violation and the removal and disposal of the vessel. If the owner or operator wants to request a hearing, a request in writing must be made within twenty (20) days of this notice being posted on the vessel. The request for a hearing must be sent to: Texas General Land Office, Oil Spill Prevention and Response Division, P.O. Box 12873, Austin, TX 78711. Failure to request a hearing may result in the removal and disposal of the vessel by the TGLO. If the TGLO removes and disposes of the vessel, the TGLO has authority under TNRC §40.108(b) to recover the costs of removal and disposal from the vessel's owner or operator.

For additional information contact Wm. D. "Bill" Grimes at (512) 475-1464.

TRD-201005715
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: October 6, 2010

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## Texas Health and Human Services Commission

### Notice of Adopted Medicaid Provider Payment Rates

Adopted Rates. As the single state agency for the state Medicaid program, the Texas Health and Human Services Commission (HHSC) adopts a new per diem payment rate for the Truman Smith Children's Care Center in the amount of $219.69. The payment rate is adopted to be effective September 1, 2010. The Notice of Public Hearing on the adjusted rate appeared in the August 6, 2010, issue of the *Texas Register* (35 TexReg 6860) and the Notice of Proposed Reimbursement Rate appeared in the August 20, 2010, issue of the *Texas Register* (35 TexReg 7592).

Methodology and Justification. The adopted rate was determined in accordance with the rate setting methodologies for the nursing facility/pediatric care facility special rate class at 1 Texas Administrative Code (TAC) §355.307(c) (relating to Reimbursement Setting Methodology); §355.101 (relating to Introduction); and §355.109 (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs).

TRD-201005681
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 1, 2010

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### Notice of Adopted Reimbursement Rates for Large, State-Operated Intermediate Care Facilities for Persons with Mental Retardation (ICFs/MR) and for Small, State-Operated ICFs/MR

Adopted Rates. As the single state agency for the state Medicaid program, the Texas Health and Human Services Commission (HHSC) has adopted the following per diem reimbursement rates to be effective September 1, 2010.

*Per Diem Rates for Large, State-Operated ICF/MR Services*

Large State-Operated ICF/MR Facilities - Medicaid Only clients:

Adopted interim daily rate: $537.41

Large State-Operated ICF/MR Facilities - Dual-eligible Medicaid/Medicare clients:

Adopted interim daily rate: $516.23

*Per Diem Rate for Small, State-Operated ICF/MR Services*

Adopted interim daily rate: $603.64

Hearing. HHSC conducted a public hearing on August 20, 2010, to receive public comment on the proposed rates. The hearing was held in accordance with Title 1 of the Texas Administrative Code (TAC) §355.105(g), which requires that public hearings be held on proposed reimbursement rates before such rates are approved by HHSC. The public hearing notice was published in the August 6, 2010, issue of the *Texas Register* (35 TexReg 6861). The notice of proposed reimbursement rates was published in the August 20, 2010, issue of the *Texas Register* (35 TexReg 7593).

Methodology and Justification. The adopted rates were determined in accordance with the rate setting methodologies codified at Texas Administrative Code (TAC) Title 1 Chapter 355, Subchapter D, §355.456(e), relating to Reimbursement Determination for State-Operated Facilities. The rate changes are being made based on actual and projected increases in costs to operate these facilities.

TRD-201005682
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 1, 2010

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## Texas Department of Housing and Community Affairs

### 2010-2011 HTF Rural Housing Expansion Program: USDA §502 Direct Loan Application Assistance Notice of Funding Availability

**I. Source of Housing Trust Funds.**

The Housing Trust Fund was established by the 72nd Legislature, Senate Bill 546, (§2306.201, Texas Government Code), to create affordable housing for low- and very low-income individuals and families. Funding sources consist of appropriations or transfers made to the fund, unencumbered fund balances, and public or private gifts, grants, or donations.

**II. Notice of Funding Availability (NOFA).**

The Texas Department of Housing and Community Affairs (the "Department") announces the availability of up to $363,000 in funding from the 2010-2011 Housing Trust Fund (HTF) appropriation for the HTF Rural Housing Expansion Program (the "Program") - The U.S. Department of Agriculture ("USDA") §502 Direct Loan Application Assistance. The purpose of USDA §502 Direct Loan Application Assistance is to support rural housing entities that package and submit §502 Direct Loan Applications to the USDA on behalf of low-income households.

Of the $500,000 in funds available, a minimum of $313,000 is set aside as grant assistance related to packaging and submitting USDA §502 Direct Loan Applications. Applicants requesting such assistance may receive $1,500 for every Direct Loan closed. Funds will be reserved through a reservation process on a first-come, first-served basis until all funds have been reserved or are otherwise no longer available.

Of the $363,000 in funds available, up to $50,000 is set aside for capacity building related to submitting USDA §502 Direct Loan Applications. Applicants requesting such capacity building may receive up to an additional $5,000 grant. Upon award, Administrators will execute a contract to participate in the Organizational Capacity Assessment, Training and Technical Assistance Program Capacity building requirements are further outlined in §2 of the NOFA.

**III. Applicant Eligibility.**

Applicants must meet the qualifications of the NOFA and must be rural municipalities and rural counties, Nonprofit Organizations that serve rural communities, or consortia of several such municipalities, counties and/or Nonprofit Organizations.

**IV. Application Deadline and Availability.**

The HTF Rural Housing Expansion Program NOFA is posted on the Department's website: http://www.tdhca.state.tx.us/htf/index.htm and organizations on the Department's listserv will receive an email notification that the NOFA is available on the Department's website.

**V. Deadline for Receipt.**

Funds for the USDA §502 Direct Loan Application Assistance component under this NOFA will be awarded through an Open Application Cycle. Applications will be accepted by the Department on regular business days until 5:00 p.m. Central Standard Time (CST) on **Friday, July 29, 2011,** regardless of method of delivery.

**Mailing Address:**

Ms. Glynis Laing, Housing Trust Fund Administrator

Housing Trust Fund Division

Texas Department of Housing and Community Affairs

P.O. Box 13941

Austin, Texas 78711-3941

(All U.S. Postal Service including Express)

**Courier Delivery:** 221 East 11th Street, 1st Floor

Austin, Texas 78701

(FedEx, UPS, Overnight, etc.)

**Hand Delivery:** If you are hand delivering the application, contact Glynis Laing at (512) 936-7800 or Dee Copeland Patience at (512) 475-2567 when you arrive at the lobby of our building.

**Questions.** Questions pertaining to the 2010-2011 HTF Rural Housing Expansion Program: USDA §502 Direct Loan Application Assistance NOFA may be directed to Glynis Laing at (512) 936-7800 (glynis.laing@tdhca.state.tx.us) or Dee Copeland Patience at (512) 475-2567 (Dee.Copeland@tdhca.state.tx.us).

TRD-201005637
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: September 30, 2010

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## Texas Department of Insurance

### Company Licensing

Application for admission to the State of Texas by FIRST DAKOTA INDEMNITY COMPANY, a foreign fire and/or casualty company. The home office is in Sioux Falls, South Dakota.

Application to change the name of KEMPER CASUALTY INSURANCE COMPANY to LUMBERMENS CASUALTY INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Lake Zurich, Illinois.

Application to change the name of MERRILL LYNCH LIFE INSURANCE COMPANY to TRANSAMERICA ADVISORS LIFE INSURANCE COMPANY, a foreign life, accident and/or health company. The home office is in Little Rock, Arkansas.

Application to do business in the State of Texas by RGV PREFERRED HEALTH CARE, INC., a domestic Health Maintenance Organization. The home office is in McAllen, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-201005727
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 6, 2010

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## Texas Lottery Commission

### Instant Game Number 1282 "Ruby Red 5's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1282 is "RUBY RED 5'S". The play style is "key number with $100 auto win and doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1282 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1282.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 5 SYMBOL, 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, $5.00, $10.00, $20.00, $50.00, $100, $500, $1,000, $5,000 and $50,000. The possible red play symbols are: 5 SYMBOL, RUBY SYMBOL, 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29 and 30.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1282 - 1.2D

| PLAY SYMBOL | CAPTION |
|---|---|
| 5 SYMBOL (black) | WIN |
| 1 (black) | ONE |
| 2 (black) | TWO |
| 3 (black) | THR |
| 4 (black) | FOR |
| 6 (black) | SIX |
| 7 (black) | SVN |
| 8 (black) | EGT |
| 9 (black) | NIN |
| 10 (black) | TEN |
| 11 (black) | ELV |
| 12 (black) | TLV |
| 13 (black) | TRN |
| 14 (black) | FTN |
| 16 (black) | SXN |
| 17 (black) | SVT |
| 18 (black) | ETN |
| 19 (black) | NTN |
| 20 (black) | TWY |
| 21 (black) | TWON |
| 22 (black) | TWTO |
| 23 (black) | TWTH |
| 24 (black) | TWFR |
| 26 (black) | TWSX |
| 27 (black) | TWSV |
| 28 (black) | TWET |
| 29 (black) | TWNI |
| 30 (black) | TRTY |
| $5.00 (black) | FIVE$ |
| $10.00 (black) | TEN$ |
| $20.00 (black) | TWENTY |
| $50.00 (black) | FIFTY |
| $100 (black) | ONE HUND |
| $500 (black) | FIV HUND |
| $1,000 (black) | ONE THOU |
| $5,000 (black) | FIV THOU |
| $50,000 (black) | 50 THOU |
| 5 SYMBOL (red) | DBL |
| RUBY SYMBOL (red) | WIN$100 |
| 1 (red) | ONE |
| 2 (red) | TWO |
| 3 (red) | THR |
| 4 (red) | FOR |
| 6 (red) | SIX |
| 7 (red) | SVN |
| 8 (red) | EGT |

| | |
|---|---|
| 9 (red) | NIN |
| 10 (red) | TEN |
| 11 (red) | ELV |
| 12 (red) | TLV |
| 13 (red) | TRN |
| 14 (red) | FTN |
| 16 (red) | SXN |
| 17 (red) | SVT |
| 18 (red) | ETN |
| 19 (red) | NTN |
| 20 (red) | TWY |
| 21 (red) | TWON |
| 22 (red) | TWTO |
| 23 (red) | TWTH |
| 24 (red) | TWFR |
| 26 (red) | TWSX |
| 27 (red) | TWSV |
| 28 (red) | TWET |
| 29 (red) | TWNI |
| 30 (red) | TRTY |

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100, $200 or $500.

H. High-Tier Prize - A prize of $1,000, $5,000 or $50,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1282), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1282-0000001-001.

K. Pack - A pack of "RUBY RED 5'S" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "RUBY RED 5'S" Instant Game No. 1282 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "RUBY RED 5'S" Instant Game is determined once the latex on the ticket is scratched off to expose 40 (forty) Play Symbols. If a player reveals a "BLACK 5" play symbol, the player wins the PRIZE shown for that symbol. If a player reveals a "RED 5" play symbol, the player wins DOUBLE the prize shown. If a player reveals a "RUBY" play symbol, the player instantly wins $100. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 40 (forty) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 40 (forty) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 40 (forty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 40 (forty) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The "RED 5" (doubler) play symbol will only appear as dictated by the prize structure.

C. The "RUBY" (win $100) play symbol will only appear as dictated by the prize structure.

D. The "BLACK 5" (auto win) play symbol will only appear as dictated by the prize structure.

E. There will be a minimum of 4 and a maximum of 12 red play symbols on every ticket unless otherwise restricted by the prize structure.

F. No more than four (4) duplicate non-winning prize symbols will appear on a ticket.

G. No duplicate non-winning play symbols on a ticket regardless of color.

H. Non-winning prize symbols will never be the same as the winning prize symbol(s).

I. No prize amount in a non-winning spot will correspond with the play symbol (i.e. 20 and $20).

J. The "RUBY" (win $100) play symbol will always appear with the $100 prize symbol

K. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "RUBY RED 5'S" Instant Game prize of $5.00, $10.00, $20.00, $50.00, $100, $200 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100, $200 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "RUBY RED 5'S" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "RUBY RED 5'S" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "RUBY RED 5'S" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "RUBY RED 5'S" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1282. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1282 - 4.0

| Prize Amount | Approximate Number of Winners* | Approximate Odds are 1 in** |
|---|---|---|
| $5 | 520,000 | 11.54 |
| $10 | 640,000 | 9.38 |
| $20 | 280,000 | 21.43 |
| $50 | 40,500 | 148.15 |
| $100 | 13,750 | 436.36 |
| $200 | 3,250 | 1,846.15 |
| $500 | 2,100 | 2,857.14 |
| $1,000 | 300 | 20,000.00 |
| $5,000 | 20 | 300,000.00 |
| $50,000 | 6 | 1,000,000.00 |

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.00. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1282 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1282, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201005711
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 5, 2010

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Instant Game Number 1293 "Double Blackjack"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1293 is "DOUBLE BLACKJACK". The play style is "beat score with doubler and win all".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1293 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1293.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 4 CARD SYMBOL, 5 CARD SYMBOL, 6 CARD SYMBOL, 7 CARD SYMBOL, 8 CARD SYMBOL, 9 CARD SYMBOL, 10 CARD SYMBOL, J CARD SYMBOL, Q CARD SYMBOL, K CARD SYMBOL, A CARD SYMBOL, 16, 17, 18, 19, 20, BUSTS SYMBOL, $2.00, $4.00, $5.00, $10.00, $20.00, $25.00, $50.00, $100, $500, $2,100 and $21,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1293 - 1.2D

| PLAY SYMBOL | CAPTION |
|---|---|
| 4 CARD SYMBOL | FOR |
| 5 CARD SYMBOL | FIV |
| 6 CARD SYMBOL | SIX |
| 7 CARD SYMBOL | SVN |
| 8 CARD SYMBOL | EGT |
| 9 CARD SYMBOL | NIN |
| 10 CARD SYMBOL | TEN |
| J CARD SYMBOL | JCK |
| Q CARD SYMBOL | QUN |
| K CARD SYMBOL | KNG |
| A CARD SYMBOL | ACE |
| 16 | SXTN |
| 17 | SVTN |
| 18 | EGTN |
| 19 | NTN |
| 20 | TWTY |
| BUSTS SYMBOL | WINALL5 |
| $2.00 | TWO$ |
| $4.00 | FOUR$ |
| $5.00 | FIVE$ |
| $10.00 | TEN$ |
| $20.00 | TWENTY |
| $25.00 | TWY FIV |
| $50.00 | FIFTY |
| $100 | ONE HUND |
| $500 | FIV HUND |
| $2,100 | 21 HUND |
| $21,000 | 21 THOU |

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $500.

H. High-Tier Prize - A prize of $2,100 or $21,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1293), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1293-0000001-001.

K. Pack - A pack of "DOUBLE BLACKJACK" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One ticket will be folded over to expose a front and back of one ticket on each pack. Please note the books will be in an A, B, C and D configuration.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "DOUBLE BLACKJACK" Instant Game No. 1293 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Proce-

dures, and the requirements set out on the back of each instant ticket. A prize winner in the "DOUBLE BLACKJACK" Instant Game is determined once the latex on the ticket is scratched off to expose 32 (thirty-two) Play Symbols. FOR EACH TABLE: If the total of a PLAYER'S cards play symbols is higher than the DEALER'S HAND play symbol, the player wins the PRIZE shown for that PLAYER. If a player reveals a BLACKJACK (21), the player wins DOUBLE the PRIZE shown for that PLAYER. If the Dealer's Hand "BUSTS", the player wins all 5 PRIZES for that TABLE. A=11. K, Q, J = 10. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 32 (thirty-two) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 32 (thirty-two) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 32 (thirty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 32 (thirty-two) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No three or more matching non-winning prize symbols will appear on a ticket.

C. No duplicate non-winning prize symbols within a TABLE.

D. Non-winning prize symbols will never be the same as the winning prize symbol(s) within a TABLE.

E. No duplicate TABLES on a ticket.

F. The doubler feature "BlackJack" (21) will never appear more than twice within a TABLE.

G. The doubler feature "BlackJack" (21) will never appear in a TABLE when the DEALER'S HAND busts.

H. No duplicate non-winning HANDS in any order within a TABLE.

I. No HAND will contain two aces.

J. No HAND will total less than 14.

K. No ties between a PLAYER'S total and the DEALER'S HAND within a TABLE.

L. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "DOUBLE BLACKJACK" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant

shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "DOUBLE BLACKJACK" Instant Game prize of $2,100 or $21,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "DOUBLE BLACKJACK" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "DOUBLE BLACKJACK" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "DOUBLE BLACKJACK" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 8,040,000 tickets in the Instant Game No. 1293. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1293 - 4.0

| Prize Amount | Approximate Number of Winners* | Approximate Odds are 1 in** |
|---|---|---|
| $2 | 578,880 | 13.89 |
| $4 | 771,840 | 10.42 |
| $5 | 96,480 | 83.33 |
| $10 | 112,560 | 71.43 |
| $20 | 48,240 | 166.67 |
| $50 | 34,840 | 230.77 |
| $100 | 12,730 | 631.58 |
| $500 | 804 | 10,000.00 |
| $2,100 | 23 | 349,565.22 |
| $21,000 | 8 | 1,005,000.00 |

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.85. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1293 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1293, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201005638
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: September 30, 2010

♦ ♦ ♦

Instant Game Number 1294 "Triple Win"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1294 is "TRIPLE WIN". The play style is "key number match with doubler and tripler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1294 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1294.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, $$, $$$, $1.00, $2.00, $3.00, $4.00, $5.00, $6.00, $10.00, $20.00, $30.00, $60.00, $100, $300, $1,000 or $3,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1294 - 1.2D

| PLAY SYMBOL | CAPTION |
|---|---|
| 1 | ONE |
| 2 | TWO |
| 3 | THR |
| 4 | FOR |
| 5 | FIV |
| 6 | SIX |
| 7 | SVN |
| 8 | EGT |
| 9 | NIN |
| 10 | TEN |
| 11 | ELV |
| 12 | TLV |
| 13 | TRN |
| 14 | FTN |
| 15 | FFN |
| 16 | SXN |
| 17 | SVT |
| 18 | ETN |
| 19 | NTN |
| 20 | TWY |
| $$ | DBL |
| $$$ | TPL |
| $1.00 | ONE$ |
| $2.00 | TWO$ |
| $3.00 | THREE$ |
| $4.00 | FOUR$ |
| $5.00 | FIVE$ |
| $6.00 | SIX$ |
| $10.00 | TEN$ |
| $20.00 | TWENTY |
| $30.00 | THIRTY |
| $60.00 | SIXTY |
| $100 | ONE HUND |
| $300 | THR HUND |
| $1,000 | ONE THOU |
| $3,000 | THR THOU |

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $3.00, $4.00, $6.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $30.00, $60.00, $100 or $300.

H. High-Tier Prize - A prize of $1,000 or $3,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven

(7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1294), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1294-0000001-001.

K. Pack - A pack of "TRIPLE WIN" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "TRIPLE WIN" Instant Game No. 1294 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "TRIPLE WIN" Instant Game is determined once the latex on the ticket is scratched off to expose 11 (eleven) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to the WINNING NUMBER play symbol, the player wins PRIZE shown for that number. If a player reveals a "$$" play symbol, the player wins DOUBLE the PRIZE shown for that symbol. If the player reveals a "$$$" play symbol, the player wins TRIPLE the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 11 (eleven) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 11 (eleven) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 11 (eleven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 11 (eleven) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning prize symbols on a ticket.

C. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

D. Non-winning prize symbols will never be the same as the winning prize symbol(s).

E. The "$$" (doubler) and "$$$" (tripler) play symbols will only appear on winning tickets as dictated by the prize structure.

F. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

G. The top prize will appear on every ticket unless otherwise restricted by the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "TRIPLE WIN" Instant Game prize of $1.00, $2.00, $3.00, $4.00, $6.00, $10.00, $20.00, $30.00, $60.00, $100 or $300 claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $30.00, $60.00, $100 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "TRIPLE WIN" Instant Game prize of $1,000 or $3,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "TRIPLE WIN" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "TRIPLE WIN" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "TRIPLE WIN" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,080,000 tickets in the Instant Game No. 1294. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1294 - 4.0

| Prize Amount | Approximate Number of Winners* | Approximate Odds are 1 in** |
|---|---|---|
| $1 | 672,000 | 15.00 |
| $2 | 739,200 | 13.64 |
| $3 | 369,600 | 27.27 |
| $4 | 117,600 | 85.71 |
| $6 | 67,200 | 150.00 |
| $10 | 84,000 | 120.00 |
| $20 | 16,590 | 607.59 |
| $30 | 7,350 | 1,371.43 |
| $60 | 3,360 | 3,000.00 |
| $100 | 966 | 10,434.78 |
| $300 | 336 | 30,000.00 |
| $1,000 | 42 | 240,000.00 |
| $3,000 | 27 | 373,333.33 |

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.85. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1294 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1294, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201005678
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 1, 2010

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Instant Game Number 1297 "Red Hot Cherries"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1297 is "RED HOT CHERRIES". The play style is "row, column or diagonal".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1297 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1297.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, CHERRIES SYMBOL, GRAPES SYMBOL, BELL SYMBOL, MELON SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00, $50.00, $100, $500 or $1,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1297 - 1.2D

| PLAY SYMBOL | CAPTION |
|---|---|
| 1 | |
| 2 | |
| 3 | |
| 4 | |
| 5 | |
| 6 | |
| 7 | |
| 8 | |
| 9 | |
| CHERRIES SYMBOL | C |
| GRAPES SYMBOL | G |
| BELL SYMBOL | B |
| MELON SYMBOL | M |
| $1.00 | ONE$ |
| $2.00 | TWO$ |
| $4.00 | FOUR$ |
| $5.00 | FIVE$ |
| $10.00 | TEN$ |
| $20.00 | TWENTY |
| $40.00 | FORTY |
| $50.00 | FIFTY |
| $100 | ONE HUND |
| $500 | FIV HUND |
| $1,000 | ONE THOU |

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $40.00, $50.00, $100 or $500.

H. High-Tier Prize - A prize of $1,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1297), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1297-0000001-001.

K. Pack - A pack of "RED HOT CHERRIES" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "RED HOT CHERRIES" Instant Game No. 1297 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "RED HOT CHERRIES" Instant Game is determined once the latex on the ticket is scratched off to expose 10 (ten) Play Symbols. If a player reveals three "CHERRIES" play symbols in any of one row, column or diagonal, the player wins the PRIZE shown. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 10 (ten) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 10 (ten) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 10 (ten) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 10 (ten) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No ticket will contain three or more of a kind other than the cherry symbol.

C. A ticket can only win once.

2.3 Procedure for Claiming Prizes.

A. To claim a "RED HOT CHERRIES" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $40.00, $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "RED HOT CHERRIES" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "RED HOT CHERRIES" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp pro-

gram or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "RED HOT CHERRIES" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "RED HOT CHERRIES" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 11,040,000 tickets in the Instant Game No. 1297. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1297 - 4.0

| Prize Amount | Approximate Number of Winners* | Approximate Odds are 1 in** |
|---|---|---|
| $1 | 956,800 | 11.54 |
| $2 | 1,104,000 | 10.00 |
| $4 | 220,800 | 50.00 |
| $5 | 73,600 | 150.00 |
| $10 | 73,600 | 150.00 |
| $20 | 36,800 | 300.00 |
| $40 | 4,600 | 2,400.00 |
| $50 | 2,300 | 4,800.00 |
| $100 | 1,840 | 6,000.00 |
| $500 | 230 | 48,000.00 |
| $1,000 | 138 | 80,000.00 |

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.46. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1297 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1297, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201005717
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 6, 2010

♦ ♦ ♦

## Instant Game Number 1298 "Neon 9's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1298 is "NEON 9'S". The play style is "key number with doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1298 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1298.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible red play symbols are: 9, SYMBOL, 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 20. The possible black play symbols are: 9, SYMBOL, 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, $2.00, $4.00, $5.00, $10.00, $20.00, $25.00, $50.00, $100, $500, $2,000 and $20,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1298 - 1.2D

| PLAY SYMBOL | CAPTION |
|---|---|
| 9 SYMBOL (red) | DBL |
| 1 (red) | ONE |
| 2 (red) | TWO |
| 3 (red) | THR |
| 4 (red) | FOR |
| 5 (red) | FIV |
| 6 (red) | SIX |
| 7 (red) | SVN |
| 8 (red) | EGT |
| 10 (red) | TEN |
| 11 (red) | ELV |
| 12 (red) | TLV |
| 13 (red) | TRN |
| 14 (red) | FTN |
| 15 (red) | FFN |
| 16 (red) | SXN |
| 17 (red) | SVT |
| 18 (red) | ETN |
| 20 (red) | TWY |
| 9 SYMBOL (black) | WIN |
| 1 (black) | ONE |
| 2 (black) | TWO |
| 3 (black) | THR |
| 4 (black) | FOR |
| 5 (black) | FIV |
| 6 (black) | SIX |
| 7 (black) | SVN |
| 8 (black) | EGT |
| 10 (black) | TEN |
| 11 (black) | ELV |
| 12 (black) | TLV |
| 13 (black) | TRN |
| 14 (black) | FTN |
| 15 (black) | FFN |
| 16 (black) | SXN |
| 17 (black) | SVT |
| 18 (black) | ETN |
| 20 (black) | TWY |
| $2.00 (black) | TWO$ |
| $4.00 (black) | FOUR$ |
| $5.00 (black) | FIVE$ |
| $10.00 (black) | TEN$ |
| $20.00 (black) | TWENTY |
| $25.00 (black) | TWY FIV |
| $50.00 (black) | FIFTY |
| $100 (black) | ONE HUND |

| | |
|---|---|
| $500 (black) | FIV HUND |
| $2,000 (black) | TWO THOU |
| $20,000 (black) | 20 THOU |

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $500.

H. High-Tier Prize - A prize of $2,000 or $20,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1298), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1298-0000001-001.

K. Pack - A pack of "NEON 9'S" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One ticket will be folded over to expose a front and back of one ticket on each pack. Please note the books will be in an A, B, C and D configuration.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "NEON 9'S" Instant Game No. 1298 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "NEON 9'S" Instant Game is determined once the latex on the ticket is scratched off to expose 20 (twenty) Play Symbols. If a player reveals a "BLACK 9" play symbol, the player wins the PRIZE shown for that symbol. If a player reveals a "RED 9" play symbol, the player wins DOUBLE the prize shown instantly! No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 20 (twenty) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 20 (twenty) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 20 (twenty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 20 (twenty) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. How-

ever, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. No three or more duplicate non-winning prize symbol(s) on a ticket.

C. No prize amount in a non-winning spot will correspond with the play symbol (i.e. 5 and $5).

D. A non-winning prize symbol will never be the same as a winning prize symbol.

E. No duplicate non-winning play symbols on a ticket regardless of color.

F. The "BLACK 9" (auto win) play symbol will only appear as dictated by the prize structure.

G. The "RED 9" (doubler) play symbol will only appear as dictated by the prize structure.

H. Every ticket will contain a minimum of four (4) and a maximum of seven (7) red play symbols unless otherwise restricted by the prize structure.

I. Non-winning play symbols and captions will appear in both black and red imaging.

J. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "NEON 9'S" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "NEON 9'S" Instant Game prize of $2,000 or $20,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "NEON 9'S" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "NEON 9'S" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "NEON 9'S" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 8,040,000 tickets in the Instant Game No. 1298. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1298 - 4.0

| Prize Amount | Approximate Number of Winners* | Approximate Odds are 1 in** |
|---|---|---|
| $2 | 578,880 | 13.89 |
| $4 | 771,840 | 10.42 |
| $5 | 96,480 | 83.33 |
| $10 | 112,560 | 71.43 |
| $20 | 48,240 | 166.67 |
| $50 | 33,500 | 240.00 |
| $100 | 12,730 | 631.58 |
| $500 | 950 | 8,463.16 |
| $2,000 | 15 | 536,000.00 |
| $20,000 | 9 | 893,333.33 |

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.86. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1298 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1298, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201005639
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: September 30, 2010

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Instant Game Number 1301 "Red Hot Hearts"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1301 is "RED HOT HEARTS". The play style is "key symbol match with doubler and win all".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1301 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1301.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: KISS SYMBOL, BEAR SYMBOL, CANDY SYMBOL, DIAMOND SYMBOL, GIFT SYMBOL, NECKLACE SYMBOL, BALLOON SYMBOL, RING SYMBOL, BOW SYMBOL, CAKE SYMBOL, COUPLE SYMBOL, NOTE SYMBOL, PERFUME SYMBOL, MINK COAT SYMBOL, CANDLE SYMBOL, CROWN SYMBOL, CUPID SYMBOL, ROSE SYMBOL, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $1,000 or $20,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1301 - 1.2D

| PLAY SYMBOL | CAPTION |
|---|---|
| KISS SYMBOL | KISS |
| BEAR SYMBOL | BEAR |
| CANDY SYMBOL | CANDY |
| DIAMOND SYMBOL | DIMND |
| GIFT SYMBOL | GIFT |
| NECKLACE SYMBOL | NKLACE |
| BALLOON SYMBOL | BALLN |
| RING SYMBOL | RING |
| BOW SYMBOL | BOW |
| CAKE SYMBOL | CAKE |
| COUPLE SYMBOL | COUPLE |
| NOTE SYMBOL | NOTE |
| PERFUME SYMBOL | PERFUME |
| MINK COAT SYMBOL | MINK |
| CANDLE SYMBOL | CANDLE |
| CROWN SYMBOL | CROWN |
| CUPID SYMBOL | WINALL |
| ROSE SYMBOL | DOUBLE |
| $2.00 | TWO$ |
| $4.00 | FOUR$ |
| $5.00 | FIVE$ |
| $10.00 | TEN$ |
| $20.00 | TWENTY |
| $50.00 | FIFTY |
| $100 | ONE HUND |
| $1,000 | ONE THOU |
| $20,000 | 20THOU |

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $100.

H. High-Tier Prize - A prize of $1,000 or $20,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1301), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1301-0000001-001.

K. Pack - A pack of "RED HOT HEARTS" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be 2 fanfold configurations for this game. Configuration A will show the front of ticket 001 and the back of ticket 125. Configuration B will show the back of ticket 001 and the front of ticket 125.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "RED HOT HEARTS" Instant Game No. 1301 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "RED HOT HEARTS" Instant Game is determined once the latex on the ticket is scratched off to expose 22 (twenty-two) Play Symbols. If a player matches any of YOUR SYMBOLS to either of the RED HOT SYMBOLS, the player wins the PRIZE shown for that symbol. If a player reveals a "ROSE" play symbol, the player wins the DOUBLE the prize shown for that symbol. If a player reveals a "CUPID" play symbol, the player wins WIN ALL 10 PRIZES instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 22 (twenty-two) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 22 (twenty-two) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 22 (twenty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 22 (twenty-two) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. No more than two (2) duplicate non-winning prize symbol(s) on a ticket.

C. A non-winning prize symbol will never be the same as a winning prize symbol.

D. No duplicate RED HOT SYMBOLS play symbols on a ticket.

E. No duplicate non-winning YOUR SYMBOLS play symbols on a ticket.

F. The "ROSE" (doubler) play symbol will only appear on winning tickets as dictated by the prize structure.

G. The "CUPID" (win all) play symbol will only appear on winning tickets as dictated by the prize structure.

H. When the "CUPID" (win all) play symbol appears, there will be no occurrence of any of YOUR SYMBOLS matching to either RED HOT SYMBOL.

I. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "RED HOT HEARTS" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the

claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "RED HOT HEARTS" Instant Game prize of $1,000 or $20,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "RED HOT HEARTS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "RED HOT HEARTS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "RED HOT HEARTS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 1301. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1301 - 4.0

| Prize Amount | Approximate Number of Winners* | Approximate Odds are 1 in** |
|---|---|---|
| $2 | 604,800 | 8.33 |
| $4 | 362,880 | 13.89 |
| $5 | 60,480 | 83.33 |
| $10 | 70,560 | 71.43 |
| $20 | 30,240 | 166.67 |
| $50 | 37,464 | 134.53 |
| $100 | 2,604 | 1,935.48 |
| $1,000 | 46 | 109,565.22 |
| $20,000 | 5 | 1,008,000.00 |

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.31. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1301 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1301, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201005712
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 5, 2010

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## North Central Texas Council of Governments

Request for Proposals for the 2011 Cooperative Vehicle Procurement

**Vendor Proposal Request**

The North Central Texas Council of Governments (NCTCOG) is requesting sealed written proposals from qualified VENDOR(s) to design, manufacture, deliver, and warranty quality transit vehicles to support Federal Transit Administration (FTA) programs including: the American Recovery and Reinvestment Act of 2009, Transit Capital Assistance Program, the Urbanized Area Formula Program, the Job Access/Reverse Commute Program, and the New Freedom Program. NCTCOG is requesting sealed written proposals from VENDOR(s) for seventeen (17) to twenty (20), Light-duty Transit Buses, seventeen (17) to twenty (20) Small Transit Vehicles, and an option to purchase up to three (3) additional Light-duty Transit Buses at a later date. Copies of the Request for Proposals (RFP) will be available at http://www.nctcog.org/trans/admin/rfp by the close of business on Friday, October 15, 2010.

Vehicles must meet all requirements related to NCTCOG, FTA, and the U.S. Department of Transportation (US DOT).

**Due Date**

Proposals must be received no later than 5:00 p.m., Central Daylight Time, on Friday, December 3, 2010, to Juanita Bridges, Transportation Planner, NCTCOG. The physical address is 616 Six Flags Drive, Arlington, Texas 76011. The mailing address is P.O. Box 5888, Arlington, Texas 76005-5888. NCTCOG encourages participation by disadvantaged business enterprises and does not discriminate on the basis of age, race, color, religion, sex, national origin, or disability.

**Contract Award Procedures**

The VENDOR(s) selected to design, manufacture, deliver, and warranty the vehicles will be recommended by a Vendor Selection Committee (VSC). The VSC will use evaluation criteria and methodology consistent with the scope of work contained in the RFP. The NCTCOG Executive Board will review the VSC's recommendations and, if found acceptable, will issue a contract(s) for award.

**Regulations**

NCTCOG, in accordance with Title VI of the Civil Rights Act of 1964, 78 Statute 252, 41 United States Code 2000d to 2000d-4; and Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 1, Nondiscrimination in Federally Assisted Programs of the Department of Transportation issued pursuant to such act, hereby notifies all proposers that it will affirmatively assure that in regard to any contract entered into pursuant to this advertisement, disadvantaged business enterprises will be afforded full opportunity to submit proposals in response to this invitation and will not be discriminated against on the grounds of race, color, sex, age, national origin, or disability in consideration of an award.

TRD-201005702
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: October 5, 2010

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## Panhandle Regional Planning Commission

Legal Notice

The Panhandle Regional Planning Commission (PRPC) is seeking quotes for 25-30 Infant and Toddler classroom packages. Each classroom will consist of appropriate furnishings, equipment and developmental learning materials that would allow recipient child care providers to be licensed by the Texas Department of Family and Protective Services (TDFPS) for one or more Infant-Toddler age groups, meet Texas Rising Star (TRS) Provider Certification guidelines and comply with additional provider award requirements as specified.

This project is funded by an American Recovery and Reinvestment Act (ARRA) grant and intended to assist area child care providers in increasing the numbers of Infants and Toddlers that can be served in a quality setting. To that end, selected providers in the area will be awarded classroom packages as described above.

A copy of the Request for Quotes (RFQ) can be obtained Monday through Friday, 8:00 a.m. to 5:00 p.m., at 415 West Eighth Avenue, Amarillo, Texas 79101 or by contacting Leslie Hardin, PRPC's Workforce Development Facilities Coordinator, at (806) 372-3381 or lhardin@theprpc.org. Proposals must be received at PRPC by 3:00 p.m. on Monday, November 1, 2010.

TRD-201005705
Leslie Hardin
Facilities, Training and Support Coordinator
Panhandle Regional Planning Commission
Filed: October 5, 2010

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## Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on September 20, 2010, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 38748 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include the city of Mathis, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 38748.

TRD-201005692
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2010

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on October 1, 2010, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Windjammer Communications LLC for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 38763 before the Public Utility Commission of Texas.

The requested amendment is to change its address and delete the following service areas: the city limits of the cities of Blanco and Granger; and the county limits of the counties of Atascosa, Bandera, Bell, Delta, Duval, and Jim Hogg.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 38763.

TRD-201005708
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 5, 2010

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on October 4, 2010, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 38768 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include the City of Cockrell Hill, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 38768.

TRD-201005710
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 5, 2010

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## Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On September 29, 2010, BullsEye Telecom, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60517. Applicant seeks approval to expand its service area to include those areas currently served by CenturyTel of Lake Dallas, Inc. d/b/a CenturyLink, CenturyTel of Port Aransas, Inc. d/b/a CenturyLink, CenturyTel of San Marcos, Inc. d/b/a CenturyLink, CenturyTel of Northwest Louisiana, Inc. d/b/a CenturyLink (collectively, CenturyLink) and Windstream Sugar Land, Inc., Texas Windstream, Inc., Windstream Communications Southwest and Windstream Communications Kerrville, L.P.

The Application: Application of BullsEye Telecom, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 38749.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than October 22, 2010. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38749.

TRD-201005693
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2010

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## Notice of Application for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider

Notice is given to the public of an application filed with the Public Utility Commission of Texas on September 30, 2010, for designation as an eligible telecommunications provider (ETP) and eligible telecommunications carrier (ETC) pursuant to P.U.C. Substantive Rule §26.417 and §26.418, respectively.

Docket Title and Number: Application of Telix, LLC for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider. Docket Number 38752.

The Application: The company requests ETC/ETP designation to be eligible for federal and state universal service funds to assist it in providing universal service in Texas. Pursuant to P.U.C. Substantive Rule §26.418 and P.U.C. Substantive Rule §26.417, the commission, designates qualifying common carriers as ETCs and ETPs for service areas designated by the commission. Telix, LLC seeks ETC/ETP designation in all AT&T Texas wire centers as shown in Attachment C. The company holds Service Provider Certificate of Operating Authority Number 60849.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. The deadline for intervention in this proceeding is November 4, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All comments should reference Docket Number 38752.

TRD-201005709
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 5, 2010

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## Notice of Application for Good Cause Exception to P.U.C. Substantive Rule §25.101(b) for a Proposed Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on September 28, 2010, to waive for good cause P.U.C. Substantive Rule §25.101(b).

Docket Style and Number: Application of Electric Transmission Texas, LLC for a Good Cause Exception to P.U.C. Substantive Rule §25.101(b), Docket Number 38742.

The Application: Electric Transmission Texas, LLC (ETT) is requesting permission from the commission to construct a new 345 kV transmission line approximately 3.2 miles in length to connect the new Riley substation to the Oklaunion Substation in Wilbarger County. ETT is seeking a waiver of P.U.C. Substantive Rule §25.101(b) so it can construct the line without amending its certificate of convenience and necessity. The project does not qualify for an exception under P.U.C. Substantive Rule §25.101(c)(5)(A)(i), because the line's length exceeds one mile.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is October 22, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 38742.

TRD-201005690
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2010

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## Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of an application for approval of the sale, transfer, merger, or affiliation of electric generation facilities filed with the Public Utility Commission of Texas on September 20, 2010, pursuant to the Public Utility Regulatory Act, Tex. Util. Code Ann. §§14.101, 39.154, and 39.158 (Vernon 2007 and Supp. 2010) (PURA).

Docket Style and Number: Application of GDF SUEZ S.A. and International Power plc Pursuant to §39.158 of the Public Utility Regulatory Act, Docket Number 38699.

The Application: GDF SUEZ S.A. and its subsidiary power generation companies in Texas (GDF SUEZ S.A., alone or collectively with the said subsidiaries hereafter SUEZ, depending of the context) and International Power plc and its subsidiary power generation companies in Texas (collectively, IP) filed an application for approval of the proposed acquisition by SUEZ of approximately 70% of the share capital of IP (the Transaction). SUEZ will bring most of its international energy assets, located mainly outside Europe, under the control of its wholly-owned subsidiary, Electrabel S.A. (Electrabel) (if the corresponding subsidiaries are not already under the control of Electrabel). Electrabel will contribute its shares in these assets to IP in return for the

issuance of new IP shares representing approximately 70% of the share capital of IP. As a result of the Transaction, Electrabel's international energy assets will be combined with IP's energy assets, and SUEZ will control IP. Applicants propose to close the Transaction on January 18, 2011, or as soon as possible following the acquisition of all required regulatory approvals.

Through several wholly-owned subsidiaries, SUEZ owns 1,904 megawatts (MW) of generation facilities located in or capable of delivering electricity to the Electric Reliability Council of Texas (ERCOT) and IP owns 2,987.8 MW of generation facilities located in or capable of delivering electricity to ERCOT. Neither SUEZ nor IP controls any additional generation capacity located in Texas or capable of delivering electricity into Texas. Following the Transaction, the combined company will own and control 4,891.8 MW of installed generation capacity in ERCOT, which represents 5.69% of the total installed generation capacity located in, or capable of delivering electricity to, ERCOT.

The Applicants are required to obtain commission approval before closing the Transaction if the electricity to be offered for sale in the relevant power region will exceed one percent of the total electricity for sale in the relevant power region. ERCOT is the relevant power region. The commission shall approve the Transaction unless the commission finds that the Transaction results in a violation of §39.154 of PURA. Under §39.154, a power generation company may not own and control more than 20% of the installed generation capacity located in, or capable of delivering electricity to a power region. The Applicants have stated that, since the newly affiliated entities will own and control 4,891.8 MW of installed generation capacity within ERCOT, this will not exceed the 20% limitation.

Persons who wish to intervene in or comment upon this application should notify the Public Utility Commission of Texas as soon as possible, as an intervention deadline will be imposed. A request to intervene or for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. Further information may also be obtained by calling the Public Utility Commission at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. The deadline for intervention in the proceeding is October 22, 2010. All correspondence should refer to Docket Number 38699.

TRD-201005694
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2010

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## Notice 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 September 29, 2010, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of iNetworks Group, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 38744.

Applicant intends to provide facilities-based and resold telecommunications services.

Applicant's requested SPCOA geographic area includes the exchanges served by AT&T Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than October 22, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38744.

TRD-201005691
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2010

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## Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed CREZ Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on September 29, 2010, to amend a certificate of convenience and necessity (CCN) for a proposed Competitive Renewable Energy Zone (CREZ) transmission line in Pecos, Crockett, and Schleicher Counties.

Docket Style and Number: Application of South Texas Electric Cooperative, Inc. to Amend its Certificate of Convenience and Necessity for the Bakersfield to Big Hill 345-kV CREZ Transmission Line in Pecos, Crockett, and Schleicher Counties. SOAH Docket Number 473-11-0544; PUC Docket Number 38648.

The Application: South Texas Electric Cooperative, Inc. (STEC) requests to amend its CCN for a proposed CREZ transmission line designated the Bakersfield to Big Hill Double-Circuit 345-kV transmission line project (formerly known as McCamey C to McCamey D) (project). The proposed project consists of constructing a new double-circuit capable 345-kV transmission line, which will extend from the proposed Bakersfield Station to the proposed Big Hill Station. The proposed project is described in the ERCOT CREZ Transmission Optimization Study as the "McCamey C to McCamey D single-circuit, double-circuit capable 345-kV." The McCamey C station, which has been renamed Bakersfield, is a proposed 345-kV switching station to be installed by the Lower Colorado River Authority (LCRA) located in eastern Pecos County. The McCamey D station, which has been renamed Big Hill, is a proposed 345-kV switching station, also to be installed by LCRA, located in northern Schleicher County.

The application includes a total of 24 alternative routes. STEC identified Route 9 as its preferred route. Any route presented in the application could, however, be approved by the Commission. The preferred route for the new 345-kV double-circuit line is approximately 107 miles in length and is proposed to be constructed on steel single-pole structures. The estimated date to energize facilities is August 2013. The estimated cost of the Project is $130,411,000. Pursuant to the Public Utility Regulatory Act §39.203(e), the commission must issue a final order in this docket before the 181st day after the date the application is filed with the commission.

In Docket Number 33672, the commission determined that the transmission facilities identified in the final order were necessary to deliver to customers renewable energy generated in the CREZ. The Bakersfield to Big Hill Double-Circuit 345-kV transmission line project (formerly known as McCamey C to McCamey D), the subject of this application, was specifically identified in that order as a necessary facility. In Docket Number 36802, STEC was ordered to complete the project identified as the Bakersfield to Big Hill (formerly known as McCamey C to McCamey D) double-circuit 345-kV CREZ transmission line project.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is October 29, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference SOAH Docket Number 473-11-0544 and PUC Docket Number 38648.

TRD-201005685
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2010

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## Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed CREZ Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on September 29, 2010, to amend a certificate of convenience and necessity (CCN) for a proposed Competitive Renewable Energy Zone (CREZ) transmission line in Carson and Gray Counties, Texas.

Docket Style and Number: Application of Cross Texas Transmission, LLC to Amend a Certificate of Convenience and Necessity (CCN) for the Gray to White Deer 345-kV CREZ Transmission Line in Carson and Gray Counties. SOAH Docket Number 473-11-0538; PUC Docket Number 38650.

The Application: Cross Texas Transmission, LLC (Cross Texas) requests to amend its CCN for a proposed CREZ transmission line designated as the Gray to White Deer 345-kV transmission line project (project). The proposed project consists of constructing a new double-circuit 345-kV transmission line which will connect the new Cross Texas Gray Substation to the new Sharyland Utilities, L.P. (Sharyland) White Deer Substation. The proposed project is described in the ERCOT CREZ transmission optimization study as the Panhandle BB to Panhandle BA double-circuit 345-kV line. Cross Texas has changed the name of the Panhandle BB Substation to the Gray Substation and Sharyland has changed the name of the Panhandle BA Substation to the White Deer Substation. The new Gray Substation will be located in Gray County, while the new White Deer Substation will be located in Carson County.

The application includes a total of 75 alternative routes presented for consideration. Cross Texas identified Route 98 as its preferred route. Any route presented in the application could, however, be approved by the commission. The preferred route for the new 345-kV double-circuit line is approximately 41.3 miles in length and is proposed to be constructed on double-circuit steel monopole and/or lattice towers. The estimated date to energize facilities is March 2013. The estimated cost of the project is $61,518,000. Pursuant to the Public Utility Regulatory Act §39.203(e), the commission must issue a final order in this docket before the 181st day after the date the application is filed with the commission.

In Docket Number 33672, the commission determined that the transmission facilities identified in the final order were necessary to deliver to customers renewable energy generated in the CREZ. The Gray to White Deer (formerly known as Panhandle BB to Panhandle BA) double-circuit 345-kV CREZ transmission line project, the subject of this application, was specifically identified in that order as a necessary facility. In Docket Number 36802, Cross Texas was ordered to complete the project identified as the Gray to White Deer (formerly known as Panhandle BB to Panhandle BA) double-circuit CREZ project.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is October 29, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference SOAH Docket Number 473-11-0538 and PUC Docket Number 38650.

TRD-201005686
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2010

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## Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed CREZ Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on September 29, 2010, to amend a certificate of convenience and necessity (CCN) for a proposed Competitive Renewable Energy Zone (CREZ) transmission line in Ector County, Texas.

Docket Style and Number: Application of Oncor Electric Delivery Company, LLC to Amend its Certificate of Convenience and Necessity for the Ector County North - Moss 138-kV CREZ Transmission Line in Ector County. SOAH Docket Number 473-11-0539; PUC Docket Number 38677.

The Application: Oncor Electric Delivery Company, LLC (Oncor) requests to amend its CCN for a proposed CREZ transmission line designated the as the Ector County North to Moss 138-kV transmission line project (project). The proposed project consists of constructing a new 138-kV transmission line which will extend from the new Oncor Ector County North Switching Station to the existing Oncor Moss Switching Station in Ector County. The proposed project is described in the ERCOT CREZ transmission optimization study as the West B to Moss single-circuit 138-kV line.

The application includes a total of 36 alternative routes presented for consideration. Oncor identified Route 15 as its preferred route. Any route presented in the application could, however, be approved by the commission. The preferred route for the new 138-kV line is approximately 17.5 miles in length and is proposed to be constructed on double-circuit monopole structures with a single circuit in place. The estimated date to energize facilities is June 2012. The estimated cost of the project is $21,009,000. Pursuant to the Public Utility Regulatory Act §39.203(e), the commission must issue a final order in this docket before the 181st day after the date the application is filed with the commission.

In Docket Number 33672, the commission determined that the transmission facilities identified in the final order were necessary to deliver to customers renewable energy generated in the CREZ. The Ector County North to Moss 138-kV (formerly known as West B to Moss single-circuit 138-kV) CREZ transmission line project, the subject of this application, was specifically identified in that order as a necessary facility. In Docket Number 36802, Oncor was ordered to complete the project identified as the Ector County North - Moss 138-kV transmission line project (formerly known as the West B to Moss single-circuit 138-kV).

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is October 29, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference SOAH Docket Number 473-11-0539 and PUC Docket Number 38677.

TRD-201005687
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2010

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## Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Generating Unit

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on September 30, 2010, to amend a certificate of convenience and necessity for an 87 Megawatt (MW) natural gas-fueled power generating unit.

Docket Style and Number: Application of El Paso Electric Company for an Amendment to its Certificate of Convenience and Necessity for a Peaking Generating Unit at the Rio Grande Site in New Mexico. Docket Number 38717.

The Application: El Paso Electric Company (EPE) requests to amend its certificate of convenience and necessity (CCN) for an 87 Megawatt (MW) natural gas-fueled power generating unit to be constructed at EPE's existing Rio Grande Generating Station in the City of Sunland Park, in southeast New Mexico. The new facility is needed to accommodate growth in demand, and is scheduled to be in service for the peak season of 2013 and will serve as a peaking facility. EPE requests that its CCN be amended to include the proposed new generating facility known as the Rio Grande Unit 9.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is November 15, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 38717.

TRD-201005707
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 5, 2010

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## Notice of Application Under Public Utility Regulatory Act §39.158

Notice is given to the public of an application for approval of the sale, transfer, merger, or affiliation of electric generation facilities filed with the Public Utility Commission of Texas (commission) on September 17, 2010, pursuant to the Public Utility Regulatory Act, Tex. Util. Code Ann. §§14.101, 39.154, and 39.158 (Vernon 2007 and Supp. 2010) (PURA).

Docket Style and Number: Application of Exelon Corporation and Exelon Generation Company, LLC Pursuant to §39.158 of the Public Utility Regulatory Act, Docket Number 38693.

The Application: Exelon Corporation and its subsidiary, Exelon Generation Company, LLC (Exelon Generation) (collectively, Exelon) filed an application for approval of Exelon's acquisition of John Deere Renewables, LLC (JDR) from Deere & Company (John Deere) (the Transaction). After the Transaction, the JDR generating assets will be part of the Exelon Power division of Exelon Generation, which already includes more than 1,000 megawatts (MW) of owned and contracted renewable power, including hydroelectric, wind, landfill gas and solar power. Exelon desires to obtain all regulatory approval by December 2, 2010, in order to permit the proposed Transaction to prepare for closing prior to year-end, 2010.

Through several wholly-owned subsidiaries, Exelon owns 2,225 MW (net summer dependable capacity) of generation facilities located in the Electric Reliability Council of Texas (ERCOT). Through wholly-owned subsidiaries JDR owns 190 MW (nameplate capacity) of wind generation facilities in the Texas within the Southwest Power Pool (SPP). Exelon does not own any generation facilities in SPP, and JDR does not own any generation facilities in ERCOT. When potential import capabilities are taken into account together with the ownership of generation by Exelon and JDR outside of Texas: (i) the installed generation capacity attributable to the combined company in ERCOT following close of the Transaction will be 3,035 MW, or 3.58% of the total installed generation capacity located in, or capable of delivering electricity to, ERCOT; and (ii) the installed generation capacity attributable to the combined company in SPP following close of the Transaction will be 2,589 MW, or 4.85% of the total installed generation capacity located in, or capable of delivering electricity to, SPP.

The Applicants are required to obtain commission approval before closing the Transaction if the electricity to be offered for sale in the relevant power region will exceed one percent of the total electricity for sale in the relevant power region. The commission shall approve the Transaction unless the commission finds that the Transaction results in a violation of PURA §39.154. Under §39.154, a power generation company may not own and control more than 20% of the installed generation capacity located in, or capable of delivering electricity to a power region. The Applicants have stated that, since the newly affiliated entities will own and control 3.58% of installed generation capacity within ERCOT and 4.85 % of installed generation capacity in SPP, this will not exceed the 20% limitation in either power region.

Persons who wish to intervene in or comment upon this application should notify the Public Utility Commission of Texas as soon as possible, as an intervention deadline will be imposed. A request to intervene or for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. Further information may also be obtained by calling the Public Utility Commission at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. The deadline for intervention in the proceeding is October 22, 2010. All correspondence should refer to Docket Number 38693.

TRD-201005688
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2010

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### Request for Comments on Form for Application for Critical Care or Chronic Condition Customer Status, Pursuant to New §25.497

The Public Utility Commission of Texas (commission) requests comments regarding the form for Application for Critical Care or Chronic Condition Status, pursuant to new §25.497, regarding Critical Care Customers. Project Number 38676, has been established for this proceeding. The draft form can be found on the commission's Interchange, Project Number 38676: (http://www.puc.state.tx.us/interchange/index.cfm). The commission is also proposing amendments to the Tariff for Retail Delivery Service relating to critical care and chronic care residential customers. Persons who provide comments on both the proposed Tariff and proposed form are encouraged to submit the comments in a single document.

The commission requests that persons comment on whether revisions to the form should be made to allow customers to select whether or not their information can be provided to First Responders for use in emergency situations.

Comments may be filed by submitting 16 copies to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, Austin, Texas 78711-3326. Initial comments will be received until 21 days after publication (November 5, 2010). Reply comments will be received until 31 days after publication (November 15, 2010). All comments should reference Project Number 38676.

Questions concerning Project Number 38676 should be referred to Ms. Christine Wright, Competitive Markets Division, at (512) 936-7376 or Ms. Scottie Aplin, Legal Division, at (512) 936-7275.

Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-201005689
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2010

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## Texas Department of Transportation

### Aviation Division - Request for Proposal for Professional Engineering Services

The City of Edinburg, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the South Texas International Airport at Edinburg during the course of the next five years through multiple grants.

Current Project: City of Edinburg. TxDOT CSJ No.: 1121EDNBG. Engineering and design services to construct taxiway Q; reconstruct taxiway P; construct parallel taxiway B; and install signage Taxiway Q.

The DBE goal for the current project is 6%. TxDOT Project Manager is Clayton Bridwell.

Future scope work items for engineering/design services within the next five years may include, but are not necessarily limited to, the following:

1. Rehab Apron
2. Rehab concrete cargo apron
3. Replace perimeter fence
4. Construct auto parking
5. Update ALP
6. Rehab and Mark Runway 14-32
7. Rehab parallel Taxiway B
8. Rehab and Mark Taxiway R
9. Rehab and Mark Taxiway A
10. Rehab and Mark Taxiway N
11. Rehab Taxiway P & Q
12. Rehab run-up area Taxiway A
13. Rehab hangar access Taxiway

The City of Edinburg reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting "South Texas International Airport at Edinburg." The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal." The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at http://www.txdot.gov/business/projects/aviation.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT web site as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

**Please note:**

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later November 9, 2010, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Becky Vick.

The consultant selection committee will be composed of Aviation Division staff members and one local government member. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals

can be found at http://www.txdot.gov/business/projects/aviation.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Becky Vick, Grant Manager. For technical questions, please contact Clayton Bridwell, Project Manager.

TRD-201005641
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 30, 2010

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### Request for Comments - Traffic Safety Program

The Texas Department of Transportation (department) is requesting comments for potential revisions to the program area goals and strategies of the Traffic Safety Program.

The overall goal of the program is to reduce the number of motor vehicle related crashes, injuries, and fatalities in Texas. The program is divided into fourteen (14) areas aimed at addressing human factors that contribute to crashes, e.g. alcohol, speed, driver training, etc. The department is seeking both general ideas and specific language suggestions to improve and clarify the program area goals and strategies of the Traffic Safety Program. Comments on specific text changes should include appropriate citations to page number, program area, and column heading for proper reference. The latest version of the Traffic Safety Program goals and strategies is available online at:

https://www.txdot.gov/apps/eGrants/eGrantsHelp/StrategicPlanning.pdf

The department will consider comments and suggestions and create revised goals and strategies that will form the basis for future Requests for Proposal and the annual Highway Safety Performance Plan.

The authority and responsibility of the traffic safety grant program derives from the National Highway Safety Act of 1966 (23 U.S.C. §401, et seq.), and the Texas Traffic Safety Act of 1967 (Transportation Code, Chapter 723). Traffic Safety is an integral part of the Texas Department of Transportation and works through the department's 25 districts for local projects. The program is administered at the state level by the department's Traffic Operations Division. The executive director of the department is the designated Governor's Highway Safety Representative.

The department will accept written comments submitted by e-mail at eGrants@txdot.gov, or by mail at: Texas Department of Transportation, Attn: TRF-TS, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 15, 2010.

TRD-201005642
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 30, 2010

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## The University of Texas System

### Invitation for Consultants to Provide Offers of Consulting Services

The University of Texas Southwestern Medical Center at Dallas

In accordance with the provisions of *Texas Government Code*, Chapter 2254, The University of Texas Southwestern Medical Center at Dallas ("University") is currently working to build and enhance its fundraising program.

University is seeking to contract with a consultant to provide services University requires to examine and evaluate its current institutional advancement information management practices, with a primary focus on data management practices (gift processing and records management), report delivery solutions, tools used to monitor data integrity, and customer satisfaction ratings. ("Consulting Services").

The Institution President, Daniel K. Podolsky, M.D., made a finding of fact that the Consulting Services are necessary. While University has a substantial need for the Consulting Services, University does not currently have staff with expertise or experience with the Consulting Services and University cannot obtain such Consulting Services through a contract with another state governmental entity.

University will:

(a) select the consultant based on demonstrated competence, knowledge, and qualifications and on the reasonableness of the proposed fee for the Consulting Services; and

(b) if other considerations are equal, give preference to a consultant whose principal place of business is in the state or who will manage the consulting contract wholly from an office in the state.

To obtain a copy of the Invitation for Offers for the Consulting Services identified in this Notice contact:

Paul D. Belew

Assistant Vice President for Materials Management

4600 Harry Hines Boulevard

Services Building, X3.300

Dallas, Texas 75390-9056

(214) 648-6062 - Phone

(214) 648-6048 - Fax

paul.belew@utsouthwestern.edu

Offers must be received by University no later than 3:00 p.m., October 29, 2010.

TRD-201005680
Francie A. Frederick
General Counsel to the Board of Regents
The University of Texas System
Filed: October 1, 2010

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### Request for Applications Concerning the Mathematics Regional Collaboratives Program

**The University of Texas at Austin, Texas Regional Collaboratives (TRC) for Excellence in Science and Mathematics Teaching**

**Filing Authority.** The availability of grant funds is authorized by the No Child Left Behind Act of 2001, Title II, Part B, Mathematics and Science Partnerships and the General Appropriations Act, Article III, Rider 38, 81st Texas Legislature, 2009.

**Eligible Applicants.** The TRC is requesting applications from partnerships that must include an engineering, mathematics, or science department of an institution of higher education (IHE) and a high-need local educational agency (LEA). They may also include another engineering, mathematics, science, or education department or college of an IHE; additional LEAs, public charter schools, public or private elementary schools or secondary schools, or a consortium of such schools; a business; or a nonprofit or for-profit organization of demonstrated effectiveness in improving the quality of mathematics and science teachers.

**Description.** The purpose of this notice is to solicit applications from eligible applicants to improve the academic achievement of students in mathematics through forming partnerships among institutions of higher education, local education agencies, elementary schools, and secondary schools. These partnerships will provide high quality, sustained, and high intensity professional development focused on the education of mathematics teachers as a career-long process. Such process should continuously stimulate intellectual growth of teachers and upgrade knowledge and skills of teachers through activities that are founded on scientifically based research and aligned with the Texas Essential Knowledge and Skills for Mathematics.

**Dates of Project.** Applicants should plan for a starting date of no earlier than May 1, 2011, and an ending date of no later than July 31, 2012.

**Project Amount.** An estimated $600,000 in funding is available for the Mathematics Regional Collaboratives Program for the 2011 - 2012 grant period. Funding will be provided for approximately 4 projects.

**Selection Criteria.** Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. The TRC reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

The TRC is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TRC to pay any costs before an application is approved. The issuance of this RFA does not obligate TRC to award a grant or pay any costs incurred in preparing a response.

**Further Information.** For clarifying information about the RFA, please visit the TRC website at http://thetrc.org/web/mathdirectorcorner.html or contact Karl Hereim at (512) 471-7408.

**Deadline for Receipt of Applications.** Applications must be received in the TRC by 4:00 p.m. (Central Time), Friday, December 3, 2010 to be eligible to be considered for funding.

TRD-201005684
James P. Barufaldi
Director, Center for Science and Mathematics Education
The University of Texas System
Filed: October 4, 2010

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## Request for Applications Concerning the Science Regional Collaboratives Program

**The University of Texas at Austin, Texas Regional Collaboratives (TRC) for Excellence in Science and Mathematics Teaching**

**Filing Authority.** The availability of grant funds is authorized by the No Child Left Behind Act of 2001, Title II, Part B, Mathematics and Science Partnerships and the General Appropriations Act, Article III, Rider 38, 81st Texas Legislature, 2009.

**Eligible Applicants.** The TRC is requesting applications from partnerships that must include an engineering, mathematics, or science department of an institution of higher education (IHE) and a high-need local educational agency (LEA). The partnerships may also include another engineering, mathematics, science, or education department or college of an IHE; additional LEAs, public charter schools, public or private elementary schools or secondary schools, or a consortium of such schools; a business; or a nonprofit or for-profit organization of demonstrated effectiveness in improving the quality of mathematics and science teachers.

**Description.** The purpose of this notice is to solicit applications from eligible applicants to improve the academic achievement of students in science through forming partnerships among institutions of higher education, local education agencies, elementary schools, and secondary schools. These partnerships will provide high quality, sustained, and high intensity professional development focused on the education of science teachers as a career-long process. Such process should continuously stimulate intellectual growth of teachers and upgrade knowledge and skills of teachers through activities that are founded on scientifically based research and aligned with the Texas Essential Knowledge and Skills for Science.

**Dates of Project.** Applicants should plan for a starting date of no earlier than May 1, 2011, and an ending date of no later than July 31, 2012.

**Project Amount.** An estimated $600,000 in funding is available for the Science Regional Collaboratives Program for the 2011 - 2012 grant period. Funding will be provided for approximately 4 projects.

**Selection Criteria.** Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. The TRC reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

The TRC is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TRC to pay any costs before an application is approved. The issuance of this RFA does not obligate TRC to award a grant or pay any costs incurred in preparing a response.

**Further Information.** For clarifying information about the RFA, please visit the TRC website at http://thetrc.org/web/sciencedirectorcorner.html or contact Karl Hereim at (512) 471-7408.

**Deadline for Receipt of Applications.** Applications must be received in the TRC by 4:00 p.m. (Central Time), Friday, December 3, 2010 to be eligible to be considered for funding.

TRD-201005683
James P. Barufaldi
Director, Center for Science and Mathematics Education
The University of Texas System
Filed: October 4, 2010

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## How to Use the Texas Register

**Information Availabl**e: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

**Governor** - Appointments, executive orders, and proclamations.

**Attorney General** - summaries of requests for opinions, opinions, and open records decisions.

**Secretary of State** - opinions based on the election laws.

**Texas Ethics Commission** - summaries of requests for opinions and opinions.

**Emergency Rule**s- sections adopted by state agencies on an emergency basis.

**Proposed Rules** - sections proposed for adoption.

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

**Adopted Rules** - sections adopted following public comment period.

**Texas Department of Insurance Exempt Filings** - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

**Texas Department of Banking** - opinions and exempt rules filed by the Texas Department of Banking.

**Tables and Graphics** - graphic material from the proposed, emergency and adopted sections.

**Transferred Rules**- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

**In Addition** - miscellaneous information required to be published by statute or provided as a public service.

**Review of Agency Rules** - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

**How to Cit**e: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 35 (2010) is cited as follows: 35 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "35 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 35 TexReg 3."

**How to Researc**h: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online at: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

## Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

**How to Cit**e: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

**How to updat**e: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

**TITLE 1. ADMINISTRATION**
***Part 4. Office of the Secretary of State***
**Chapter 91. Texas Register**
40 TAC §3.704.....950 *(P)*