

# 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 13. CULTURAL RESOURCES

### PART 7. STATE PRESERVATION BOARD

#### CHAPTER 111. RULES AND REGULATIONS OF THE BOARD

##### 13 TAC §111.13

The State Preservation Board (SPB) adopts the repeal of 13 TAC §111.13, concerning Exhibitions in the Capitol and Capitol Extension without changes as proposed in the text published in the December 31, 2021, issue of the *Texas Register* (46 TexReg 9146). The rule will not be republished.

No comments were received during the comment period of 12-31-21 to 1-31-22.

The SPB proposed the repeal of 13 TAC §111.13 because the agency does not need the rule in order to serve its intended purpose of providing for the display of government speech in the Capitol that educates, informs, and unites.

This action is requested under Texas Government Code §443.007(b), which authorizes the SPB to adopt rules concerning certain buildings, their contents, and their grounds.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 31, 2022.

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Leslie Pawelka

Attorney

State Preservation Board

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For further information, please call: (512) 463-4180



##### 13 TAC §111.45

The State Preservation Board (SPB) adopts amendments to §111.45, relating to Sick Leave Pool, retitling the rule "Employee Leave Pools" and adding new subsection (b). Existing §111.45 will now be §111.45(a), Employee Sick Leave Pool, and new §111.45(b) will be Employee Family Leave Pool. The amendments are adopted without changes to the text as published in the December 31, 2021, issue of the *Texas Register* (46 TexReg 9147). The rule will not be republished.

The new subsection is necessary to implement House Bill (HB) 2063, 87th Leg., R.S. (2021), which created a state employee family leave pool by the addition of new Subchapter A-1 to Chapter 661. The additional proposed amendments are necessary to update the existing rule relating to the sick leave pool for consistency with the proposed new subsection.

No comments were received during the comment period, which lasted from from December 31, 2021 to January 31, 2022.

The amendments are adopted under Government Code §661.022(c), which requires state agencies to adopt rules relating to the operation of the agency family leave pool, and Government Code §661.002(c), which requires state agencies to adopt rules relating to the operation of the agency sick leave pool.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Leslie Pawelka

Attorney

State Preservation Board

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For further information, please call: (512) 463-4180



## TITLE 16. ECONOMIC REGULATION

### PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

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

##### SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION

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

##### 16 TAC §25.218

The Public Utility Commission of Texas (commission) adopts new 16 Texas Administrative Code (TAC) §25.218 relating to

Middle Mile Broadband. The commission adopts this rule with changes to the proposed rule as published in the December 31, 2021, issue of the *Texas Register* (46 TexReg 9150). The rule will be republished. This rule will facilitate implementation of middle mile broadband service in unserved and underserved areas of Texas by allowing amenable electric utilities to lease excess fiber capacity to internet service providers (ISPs). These electric utilities are required to submit written middle mile broadband service plans for review by the commission as required by Chapter 43 of the Public Utility Regulatory Act (PURA) as amended by House Bill (HB) 3853 by the 87th Texas Legislature, Regular Session.

The commission received comments on the proposed rule from AEP Texas Inc., Southwestern Electric Power Company, CenterPoint Energy Houston Electric, LLC, Oncor Electric Delivery Company LLC, Texas-New Mexico Power Company, and Southwestern Public Service Company (collectively Joint Utilities); City of Houston; Connected Nation Texas (CN Texas); Southwestern Bell Telephone Company d/b/a AT&T Texas (AT&T); Steering Committee of Cities Served by Oncor and the Texas Coalition of Cities for Utility Issues (collectively, Cities); Texas 2036; Entergy Texas, Inc. (ETI); Texas Broadband Development Office (BDO); Texas Cable Association (TCA); Office of Public Utility Counsel (OPUC); and United Telephone Company of Texas, Inc. d/b/a CenturyLink, Central Telephone Company of Texas, Inc. d/b/a CenturyLink, CenturyTel of Lake Dallas, Inc. d/b/a CenturyLink, CenturyTel of San Marcos, Inc. d/b/a CenturyLink, and CenturyTel of Port Aransas, Inc. d/b/a CenturyLink (collectively, CenturyLink).

#### Question 1

Under PURA §43.051(a), an electric utility may own, construct, maintain, and operate fiber optic cables and other facilities for providing middle mile broadband service in unserved and underserved areas. Chapter 43 of PURA (relating to Provision of Middle Mile Broadband Service by Electric Utilities) does not define or provide guidance on what constitutes an unserved or underserved area. The commission posed a question for comment, regarding whether the terms "unserved area" and "underserved area" should be defined in the rule, and if so, how.

Should "unserved areas" and "underserved areas" be defined?

BDO, Cities, TCA, OPUC, Joint Utilities, Texas 2036, ETI, CN Texas, City of Houston, CenturyLink, and AT&T supported including definitions for "unserved" and "underserved" in the proposed rule. Cities noted that HB 3853, the Texas Utilities Code, Texas Water Code (TWC) and the commission's substantive rules either did not define "unserved area" and "underserved area" or defined the terms inconsistently.

Cities commented that defining "unserved area" and "underserved area" will assist efforts to target communities in need of broadband service and more efficiently implement the middle mile broadband application process. Therefore, Cities argued the commission should provide an objective standard of "unserved area" and "underserved area" to effectuate the intent of Chapter 43 of PURA. CenturyLink refrained from taking a position on the specific definitions of "unserved area" and "underserved area" and deferred to the proposed definitions of other commenters.

Commission Response

The commission agrees that the terms "unserved area" and "underserved area" should be defined. The commission adopts the following definitions, as discussed in greater detail below.

Underserved area -- means one or more census blocks that are not an unserved area and in which 80 percent or more of end-user addresses in each census block either lack access to broadband service with a download speed not less than 100 megabits per second and an upload speed not less than 20 megabits per second, or lack access to reliable broadband service with those speeds as determined using Federal Communications Commission mapping criteria, if available.

Unserved area -- means one or more census blocks, in which 80 percent or more of the end-user addresses in each census block either have no access to broadband service, or lack access to reliable broadband service as determined using Federal Communications Commission mapping criteria, if available.

Should the commission take state and federal broadband availability maps into consideration in developing definitions of "unserved area" and "underserved area"?

PURA §43.102(c) requires the commission to approve, modify, or reject an application to provide middle mile broadband service not later than the 181st day after the application is submitted. Accordingly, a threshold consideration for the definitions of unserved and underserved areas is whether the definitions will allow the commission to efficiently verify whether an area is unserved or underserved.

BDO argued that the definitions of "unserved area" and "underserved area" should be based on established standards and that the adopted rule should incorporate a validation method, such as referencing the federal and state maps. BDO, City of Houston, and TCA each referred to the Infrastructure Investment and Jobs Act (IIJA) passed in 2021. The IIJA defines "unserved location" and "underserved location" as areas that are determined in accordance with the Federal Communication Commission's (FCC's) broadband maps. These federal maps exist today but will be updated with additional criteria to enhance accuracy in late 2022 or early 2023. BDO will also establish a statewide broadband availability map by January 1, 2023, which will assess broadband availability based upon address-level data.

Commission Response

The commission agrees with BDO that the designation of areas as unserved or underserved should be based on established standards, particularly because middle mile broadband plans need to be processed quickly. Because the federal and state maps will provide objective criteria for middle mile broadband plan validation and are relevant for access to broadband funding programs, the commission takes these maps into account in developing the adopted definitions of unserved and underserved areas.

What is the relevant standard for "broadband service" when defining "unserved" or "underserved" areas?

Under PURA §43.003(1), "broadband service" is defined as "retail Internet service provided by a commercial Internet service provider with the capability of providing a download speed of at least 25 megabits per second and an upload speed of at least 3 megabits per second." This standard is commonly referred to as the "25/3 benchmark" for broadband service.

BDO, Cities, TCA, OPUC, Joint Utilities, Texas 2036, ETI, CN Texas, and City of Houston agreed that the 25/3 benchmark is

the objective standard of broadband service. Each of these parties, except for OPUC, advocated that the definitions of both unserved and underserved areas should incorporate the 25/3 benchmark. OPUC incorporated the 25/3 benchmark into its recommended definition of "underserved area" but defined "unserved area" as "a geographic area that currently lacks any internet service options." Joint Utilities opposed OPUC's proposed definitions as inconsistent with legislative intent as OPUC does not utilize the 25/3 benchmark or otherwise reference broadband service in its proposed definition of "unserved area."

#### Commission Response

The commission agrees with commenters that the 25/3 bandwidth benchmark is the appropriate standard for broadband service. The 25/3 bandwidth benchmark is included in the definition of broadband service in PURA §43.003(1) and is incorporated into both federal and state mapping efforts. Accordingly, the commission incorporates the 25/3 bandwidth benchmark into the adopted definitions of "unserved area" and "underserved area."

BDO further recommended that the commission consider the effect on the definitions in question of potential future changes by the FCC to the 25/3 benchmark for broadband service. Joint Utilities and City of Houston agreed with BDO that the definitions of "unserved area" and "underserved area" should be updated on an ongoing basis if the BDO and FCC update the 25/3 speed benchmark but recommended this be accomplished by modifying the definition of "broadband service" under proposed subparagraph (b)(2), rather than directly modifying the definitions of "unserved area" and "underserved area."

#### Commission Response

The commission declines to add language to the definitions of "broadband service" or "unserved area" and "underserved area" that would actively cross-reference to any current FCC broadband speed benchmark. In addition, the definitions as adopted provide a greater degree of certainty for utilities submitting plans under this rule.

Should the terms latency and reliable broadband service be included in the definitions of underserved areas and unserved areas?

The IJA specifically refers to "reliable broadband service" and "latency," which are not terms or criteria utilized in Chapters 490H and 490I of the Texas Government Code or in PURA Chapter 43. Texas 2036 provided draft language for the definition of underserved area that includes "resilient and reliable broadband connections." TCA opposed Texas 2036's proposal as beyond the scope of PURA Chapter 43 and this rulemaking.

#### Commission Response

The commission includes the statement "or lack access to reliable broadband service with those speeds, as determined using Federal Communications Commission mapping criteria, if available" to the definitions of "underserved area" and "unserved area."

Under IJA §60102(a)(1)(L), "reliable broadband service" is defined as "broadband service that meets performance criteria for service availability, adaptability to changing end-user requirements, length of serviceable life, or other criteria, other than upload and download speeds, as determined by the Assistant Secretary in coordination with the (FCC)," and latency is referenced as "latency sufficient to support real-time, interactive ap-

plications." Accordingly, the commission interprets reliability to be inclusive of latency.

Because reliability may be a mapping criterion for the FCC and the adopted rule requires validation of whether an area is unserved or underserved, the adopted rule must contemplate reliability, or the commission will not be able to rely upon the federal maps in determining if an area is unserved or underserved. If, for example, the commission does not consider the reliability of broadband service and the FCC designates an area as unserved or underserved on its map but does not indicate which criterion, the speed benchmark or reliability, was used to make that designation, the commission would not be able to rely upon the map's designation. Alternatively, if an FCC map does make clear whether the speed benchmark or reliability is used to designate an area as unserved or underserved, and the commission does not include reliability in its definitions, under the rule a utility's ability to offer middle mile broadband service could be called into question, despite the area being designated as unserved or underserved by a credible federal agency. Both outcomes are undesirable.

However, it is not yet clear whether and to what extent the FCC will incorporate the concept of reliability into its map, or if it will determine if an area is unserved based on reliability, the bandwidth benchmark standard, or both. Accordingly, the commission includes "if available" to account for the possibility that the FCC maps may not include such reliability criteria. Additionally, the reference to "mapping criteria" instead of a direct reference to the map itself is included in the adopted definitions to provide discretion for the commission to properly consider relevant and verifiable data errors in the federal maps. Should such errors be discovered, the commission can assess the reliability of service in an area by considering the mapping criteria rather than the map itself. In the absence of relevant and verifiable data errors, the maps are presumed to be accurate applications of the relevant mapping criteria.

What constitutes an "area"?

BDO, Cities, TCA, OPUC, Joint Utilities, Texas 2036, ETI, CN Texas, and City of Houston argued that the term "area" is ambiguous and should be clarified. Joint Utilities and ETI recommended the commission utilize the term "census block" as it appears in Texas Government Code §490H.001(3).

#### Commission Response

The commission determines that an "area" be defined in terms of "one or more census blocks.", Census block is the standard measurement used by the BDO and the FCC in compiling each agency's map for middle mile broadband implementation. The adopted rule specifies "one or more census blocks" because plans submitted under the rule will foreseeably encompass multiple census blocks.

The commission declines to use the term "location" in lieu of the term "area" in the definitions of "unserved area" and "underserved area," because the adopted definitions maximize the commonalities between state and federal statutes.

Should the definitions include a percentage threshold for the number of end-user addresses that receive broadband service?

Texas 2036, TCA, and Joint Utilities expressed concern that an area that is eligible for middle mile broadband service could lose its designation as unserved or underserved if even a few addresses have access to broadband service. These commenters recommended including a qualification in one or both definitions

that only a certain percentage of addresses must lack access to broadband service to qualify.

With regard to unserved areas, Texas 2036 and Joint Utilities proposed implementing an 80 percent threshold. Specifically, if fewer than 80 percent of the addresses in an area have access to broadband service, then the area should qualify as unserved. Texas 2036 concluded that its proposed definition of "unserved" helps ensure continuity across the Texas state government.

With regard to underserved areas, Joint Utilities supported an 80 percent threshold in reply comments, after initially opposing a percentage threshold. Specifically, Joint Utilities recommended that "underserved areas" be defined as locations that are not unserved, but in which fewer than 80 percent of the addresses have access to broadband service at an enhanced benchmark standard, which is more fully discussed below. Joint Utilities compared the 80 percent threshold with the federal Farm Bill Broadband Loans and Loan Guarantees which, among other things, includes a 15 percent threshold for unserved addresses. TCA opposed Joint Utilities' initial position, which would require a utility to demonstrate as part of its application, "the expected improvement in service in an area," as too vague. In TCA's view, under Joint Utilities proposed definition, an entire area would be considered "underserved" for purposes of the rule if a single customer in the area did not have access to broadband.

AT&T proposed as an alternative that a "significant number" of end-users need to lack access to broadband services at an enhanced download speed for area to qualify as underserved.

#### Commission Response

The commission includes an 80 percent threshold in the definitions of both unserved area and underserved area, consistent with similar provisions in both state and federal law. This inclusion harmonizes the relevant definitions in the rule with the BDO and FCC mapping initiatives and provides clarity to utilities submitting middle mile broadband service plans under this rule. Specifically, Texas Government Code §4901.0105(1) and (2) utilize the 80 percent threshold as a criterion for eligibility for inclusion in the BDO's planned map. The 80 percent threshold under Texas Government Code §4901.0105(1) and (2) applies only to what would be considered "unserved" locations under the adopted rule. Similarly, the IJA utilizes the 80 percent threshold in the definitions of "unserved service project" and "underserved service project" which are criteria for the planned FCC map. Given that the 80 percent threshold is fundamental to the state and federal mapping criteria, the commission accordingly adopts the 80 percent threshold in the definitions.

The commission further refines the definitions of "unserved area" and "underserved area" by specifying the 80 percent threshold applies to end-user addresses as both state and federal law incorporate such a standard.

Should areas receiving federal funding be exempt from the definitions of unserved and underserved?

TCA recommended excluding from the definitions of "unserved" and "underserved" areas that are provided federal funding, such as under RDOF, to prevent conflicts with FCC regulation of interstate telecommunications. CenturyLink and City of Houston supported TCA's proposed exception to the definitions of "unserved area" and "underserved area."

Joint Utilities and AT&T opposed TCA's recommendation. Joint Utilities argued that federal funding provisions in Texas Government Code §4901.0105(a)(1)(B) and (2)(B) are irrelevant to the

proposed rule's implicit questions of eligibility to provide middle mile broadband service and whether such service is being provided in unserved or underserved areas. Joint Utilities further opposed the limitations recommended by TCA as placing an artificial barrier to entry for potential competitors. Joint Utilities maintained that the receipt of federal funds has no bearing on whether an area is unserved or underserved. Additionally, Joint Utilities asserted there is no basis in statute for imposing such a limitation and that the proposed rule properly accounts for applicants that may have received federal or state funding, which must be included in a utility's middle mile broadband plan. AT&T opposed TCA's recommendation and stated that TCA's proposed exception for the term "underserved" is overly stringent.

#### Commission Response

The commission declines to adopt TCA's recommendation to except areas already receiving federal funding from the definitions of "unserved area" and "underserved area." This exception is not contemplated by PURA Chapter 43 and the inclusion of such areas within the definitions does not conflict with FCC regulation of interstate telecommunications. On the contrary, the categorical exclusion included by TCA would inhibit the goal of PURA Chapter 43 to encourage the provision of middle mile broadband service by electric utilities as Phase I RDOF grants cover a considerable portion of rural areas in Texas. Consequently, an applicant utility and the leasing ISP would be barred from all RDOF-covered locations without regard to whether the area is "unserved" or "underserved."

Should an "underserved area" be subject to an enhanced bandwidth benchmark?

Cities indicated that other jurisdictions have defined "underserved area" as an area that has internet access below the 25/3 benchmark but does not meet the definition of "unserved area." Cities recommended the term "underserved area" incorporate a range of download and upload speeds because a specific threshold such as the 25/3 benchmark "could limit service to certain areas of Texas that might still experience issues with connectivity" and unnecessarily restrict the applicability of middle mile broadband implementation. Joint Utilities agreed with Cities that the definition of underserved should not be a specific threshold, but instead be a range. Joint Utilities further commented that including an enhanced benchmark for broadband service at a download speed of at least 100 megabits per second (Mbps) and an upload speed of at least 20 Mbps (100/20 benchmark) to the definition of "underserved area" is viable, but, if adopted, should be based on the percentage of customers in the area receiving broadband service meeting the 25/3 benchmark. Accordingly, Joint Utilities proposed that the terms "unserved area" and "underserved area" be interpreted to expand the availability of broadband service to customers who do not currently have access to such service and recommended that "underserved area" be defined as "an area in which broadband service is not available to all of the potential customers in the area."

BDO, TCA, and City of Houston noted that "unserved" is defined in Texas Government Code 403.503(a)(4) as "a location that lacks access to a retail fixed, terrestrial, wireline, or wireless internet service capable of providing (download and upload speeds)" at the 25/3 benchmark or faster. BDO noted that this definition of unserved area does not include "satellite internet access or latency benchmarks."

BDO commented that the term "underserved" remains undefined in Texas statutes. However, BDO elaborated, the term is generally associated with areas receiving broadband service that meet the 25/3 benchmark but "lack sufficient access to meet the needs of residents." The 25/3 benchmark is considered a minimum standard and is frequently criticized as "too slow to meet the contemporary needs of families and small businesses" and that the coronavirus pandemic has highlighted the need for dependable broadband service. BDO further referenced the IJA for the definition of "underserved area" which incorporates a 100 Mbps download and 20 Mbps.

City of Houston, CN Texas, TCA, and AT&T specifically recommended the commission's definition of "underserved area" use the 100/20 benchmark.

#### Commission Response

The commission agrees with BDO, TCA, City of Houston and CN Texas and adopts the 25/3 and 100/20 benchmarks used in the federal IJA, and in Texas Government Code Chapters 490H and 490I for defining "unserved area" and "underserved area," respectively.

The commission declines to adopt a range of download or upload speeds as a standard for either definition as this approach would conflict with state and federal mapping criteria. The federal IJA and Texas Government Code Chapters 490H and 490I govern implementation of the FCC and BDO maps, respectively. The 25/3 benchmark is the basis for the definition of "unserved area" in both the IJA and Texas Government Code. The IJA utilizes the 100/20 benchmark in the definition of "underserved area." The adopted definitions of "unserved area" and "underserved area" substantially address commenters' concerns and harmonize the provisions of PURA relating to middle mile broadband service with other state and federal statutes that are intended to promote the deployment of broadband service in areas with limited broadband service.

Texas 2036 recommended that the definition of "underserved area" include an increased bandwidth benchmark of at least 100 upload and 100 Mbps. Texas 2036 noted that its proposed definition of "underserved area" is a more general version of the "eligible area" designation that BDO requires for state funding under Texas Government Code §490I.

TCA strongly opposed Texas 2036's proposed definition of "underserved area" as it "would potentially envelop a majority of the state"; as "underserved" by using a 100 Mbps upload and 100 Mbps download benchmark, and therefore divert investment and broadband service away from "unserved" areas altogether. TCA opposed a higher threshold for the definition of underserved as proposed by some commenters as it would not effectuate the intent of the Legislature to provide middle mile broadband service where it is most needed. Accordingly, TCA recommended the definition of "underserved area" be based on "objective and quantifiable facts, such as state and federal statutes."

Texas 2036 provided draft language for "underserved area" with reference to a 100 upload and 100 download Mbps benchmark, affordable broadband service, and "resilient and reliable broadband connections."

#### Commission Response

The commission declines to implement Texas 2036's proposed definition of "underserved area" that utilizes a 100 Mbps upload and 100 Mbps download speed. The 100/100 benchmark is not

cited in either state or federal law implementing broadband or middle mile broadband service programs. Therefore, adopting such a standard would be inconsistent with such initiatives. The commission declines to implement Texas 2036's proposed additional criteria for the definition of "underserved area" regarding a "lack of middle mile infrastructure with the ability to support resilient and reliable broadband connections in the form of a backup due to unforeseen disconnections" for the same reasons.

Should the definition of "underserved" refer to last mile networks?

Texas 2036 recommended the definition of "underserved area" include additional language to ensure the bandwidth benchmark applies to the service received by the last mile network to which the middle mile broadband service would connect.

TCA opposed Texas 2036's proposals as beyond the scope of PURA Chapter 43 and this rulemaking.

#### Commission Response

The commission declines to adopt Texas 2036's recommendation to modify the definition of underserved area to clarify that the bandwidth benchmark applies to last mile broadband service. The adopted definition of "underserved area" applies the bandwidth benchmark to service received by the "end-user," which substantively addresses Texas 2036's concern.

Should the definition of "underserved" require a demonstration of identified need?

Texas 2036 recommended that the definition of "underserved area" include a requirement that the area has an "identified need" for additional middle mile broadband infrastructure. Texas 2036 also recommended the addition of a new provision of the rule directing the commission to coordinate with the BDO in making a determination of identified need and included a nonexclusive list of factors the commission must consider in doing so. This list included factors such as existing broadband service performance, federal and state data, and reports from community organizations. Texas 2036 noted that its list of factors is "identical to the list adopted by the U.S. Department of Treasury in the issued Final Rule for the Coronavirus State and Local Fiscal Recovery Funds."

TCA opposed Texas 2036's proposals as beyond the scope of PURA Chapter 43 and this rulemaking.

#### Commission Response

The commission declines to adopt Texas 2036's recommendation to add a new section relating to "identified need" in the proposed rule. Texas 2036's proposed factors relating to broadband service performance, existing infrastructure, and federal and state broadband data will be detailed in the BDO and FCC's planned maps. Other proposed factors such as those regarding community interviews and reports, may also be incorporated into the methodology for the BDO and FCC, such as the "community surveys" described under Texas Government Code §490I.0105(I). As discussed above, the commission relies upon the subject matter expertise of the BDO and FCC, via each agency's respective map, in determining whether an area is unserved or underserved, by utilizing components of existing federal and state definitions in the adopted rule.

Proposed §25.218(b); definitions; "affiliated internet service provider"

The proposed rule prohibits a utility from providing middle mile broadband service to an affiliated internet service provider. OPUC recommended the proposed rule include a new definition for "affiliated internet service provider" for clarity and provided recommended language.

TCA and Joint Utilities opposed OPUC's proposed new definition for "affiliated internet service provider" as unnecessary as the term "affiliate" is already defined in commission rules and in PURA. TCA further argued that OPUC's proposed definition "may also unintentionally allow an electric utility to create an intermediary affiliate to avoid the prohibitions under the rule." Alternatively, if the commission decides to add the new definition of "affiliated internet service provider," TCA recommended deleting the phrase "that is also defined as an internet service provider under this section" from OPUC's proposed definition.

#### *Commission Response*

The commission agrees to define the term "affiliated internet service provider" to provide clarity, as recommended by OPUC. However, to address the concerns of TCA that OPUC's definition would create a loophole allowing utilities to provide middle mile broadband service to affiliates through intermediaries, the adopted rule defines affiliated internet service provider as "an internet service provider that is an affiliate of the electric utility that provides or intends to provide a plan for middle mile broadband service under this section." As TCA and Joint Utilities noted, "affiliate" is already comprehensively defined under 16 TAC §25.5 (related to Definitions) in a manner that addresses the issue of intermediate entities. By directly incorporating the defined term of "affiliate" into the definition of affiliated internet service provider, the commission substantively addresses TCA's concerns.

Proposed §25.218(b); definitions; "electric utility"

Joint Utilities and ETI recommended the proposed rule include a new definition under proposed subsection (b) for "electric utility" to clarify the applicability of the proposed rule. Specifically, Joint Utilities stated that most of the proposed rule language refers to transmission and distribution utilities (TDUs) and therefore the rule should define "electric utility" as including an electric utility and a TDU, as defined in PURA.

TCA opposed Joint Utilities' proposed new definition for "electric utility" as unnecessary as the term "electric utility" is already defined in commission rules and in PURA. OPUC supported Joint Utilities' proposal to define "electric utility" as it is an "essential term to define and set the parameters on what entities are permitted to provide middle mile broadband services."

#### *Commission Response*

The commission declines to adopt Joint Utilities and ETI's recommendation to define the term "electric utility" in the proposed rule, because it is unnecessary. The terms "electric utility" and "transmission and distribution utility" are already defined under §25.5(41) and (137). Moreover, PURA §43.002(a), which is incorporated as subsection (a) of the adopted rule, states "(t)his section applies to an electric utility and a transmission and distribution utility regardless of whether the utility is offering customer choice under PURA Chapter 39." To further emphasize that the term electric utility includes TDUs, adopted subsection (a) rephrases this language to read that this "section applies to an electric utility, including a transmission and distribution utility";.

Proposed §25.218(b)(1) - "Affected property owner"

Proposed paragraph (b)(1) defines the term "affected property owner" as "an owner of real property that is burdened by an easement or other property right owned or leased by an electric utility whose property is listed on the most recent tax roll of each county";and will be affected by the installation or operation of middle mile broadband service";.

Joint Utilities and ETI recommended that the definition of "affected property owner" under proposed paragraph (b)(1) be revised to "expressly exclude local and state government bodies that own public rights-of-way" as the statutory right for affected property owners to protest middle mile broadband implementation defined under Chapter 43 does not apply to state and local governments. Joint Utilities argued that "this is apparent from PURA §43.053(c)(1), which requires notice to property owners listed on the county tax roll, which does not include government bodies or public rights-of-way." Joint Utilities further argued that that such institutions have "rules, ordinances, and franchises governing the use of their public rights-of-way." Finally, Joint Utilities commented that PURA separately accounts for notice to property owners under §43.053 and for public rights-of-way under §43.101(e) and (f).

Cities strongly opposed Joint Utilities proposed changes to the definition of "affected property owner" under proposed paragraph (b)(1) excluding state and local governments that own public rights-of-way from the definition of "affected property owner" and recommended changes to the proposed definition as it "impliedly excludes cities and municipalities."

Cities noted that "affected property owner" is not consistently defined in PURA, the Texas Water Code (TWC), or the Texas Local Government Code and asserted that the statutory citations of Chapter 43 by Joint Utilities are "not relevant to the question of whether a city should receive notice when its rights-of-way may be impacted by installation of middle mile broadband services." Cities continued, stating that, "as stewards of the safety and accessibility within their areas, cities and municipalities should undoubtedly receive notice when any installation or project will impact public rights-of-way" for implementation of middle mile broadband service.

Cities maintained that excluding cities and municipalities from the definition of "affected property owner" deprives such institutions "of the opportunity to submit a written protest under PURA" and a city, municipality, or local government that owns public rights-of-way should be entitled to the same notice and hearing rights as any other affected property owner.

As an alternative, Cities proposed either omitting the use of "affected property owner" in proposed paragraph (f)(2) prescribing the notice and intervention deadlines, or changing the definition of "affected property owner" under proposed paragraph (b)(2) to expressly include local and state governments that own public rights-of-way.

TCA noted that Joint Utilities' proposed definition of "affected property owner" appears to be consistent with Chapter 43 of PURA and did not object to its inclusion.

#### *Commission Response*

The commission agrees with Cities that local governments should receive notice when an electric utility submits a written middle mile broadband plan for consideration by the commission. Under adopted subparagraph (f)(2)(B), notice must be sent by first class mail to municipalities crossed by or within five miles of the planned project and counties that are crossed

by the planned project. Furthermore, to the extent that a local government believes it has a justiciable interest in a middle mile broadband proceeding, it may file a motion to intervene in the proceeding.

The commission agrees with Joint Utilities that, although the statute does not expressly define affected property owner, it is clear that a local government such as a municipality is not an affected property owner insofar as it does not have the right to file a protest under PURA §43.053(d). The language of subsection (d) specifically grants the right to file protests to "a property owner *entitled to the notice* (emphasis added)" under subsection (c). Further, paragraph (c)(1) clarifies that this notice must "be sent by first class mail to the last known address of each person in whose name the affected property is listed on the most recent tax roll of each county authorized to levy property taxes against the property." Because the statute explicitly links the right of affected property owners to file a protest to persons entitled to receive notice under subsection (c) - which a local or state government is not, because its property is not listed on county tax rolls - the commission excludes state and local governments from the definition of affected property owner.

The commission also moves the language "(whose property) is listed on the most recent tax roll of each county authorized to levy property taxes against the property" from the definition of affected property owner to the notice provision under adopted clause (f)(2)(A)(i) to more accurately reflect PURA Chapter 43.

Proposed §25.218(b)(6) - "Middle mile broadband service"

Proposed paragraph (b)(6) defines the term "middle mile broadband service" for use within §25.218 as "the provision of excess fiber capacity on an electric utility's electric delivery system or other facilities to an internet service provider to provide broadband service. The term does not include provision of internet service to end-use customers on a retail basis."

CN Texas recommended the commission clarify the definition of "middle mile broadband service" under proposed paragraph (b)(6) to indicate that the term can include both "finished" (i.e., "lit") middle mile service or open access/"dark" fiber (indefeasible rights of use) for fiber pairs that are lit by the customer ISP." CN Texas noted "it is possible this definition may prohibit other middle mile network operators from leasing capacity to turn around and lease it to last-mile ISPs."

#### *Commission Response*

The commission declines to adopt CN Texas' recommendation to clarify that the definition of "middle mile broadband service" to include both lit and dark fiber. As noted by CN Texas, the statute does not make such a delineation.

Proposed §25.218(c) and (c)(1) - Authorization for middle mile broadband service

Proposed subsection (c) and paragraph (c)(1) authorize electric utilities to own, construct, maintain, and operate fiber optic cables and other facilities for providing middle mile broadband service *primarily* for unserved and underserved areas, grants sole discretion to an electric utility to implement middle mile broadband service, and prohibits an electric utility from being penalized for deciding to implement or not implement that service.

TCA, Cities, OPUC, ETI, City of Houston, CenturyLink, and AT&T opposed the inclusion of the term "primarily" in proposed paragraph (c)(1) as "it expressly contemplates the existence of unspecified customers other than unserved and underserved

customers" and therefore creates a loophole for implementation that would be contrary to statutory intent and authority. Specifically, it would permit an electric utility to implement middle mile broadband service without limitation and undermine the objective of the rule and statute to provide broadband service to "unserved and underserved" customers. Similarly, OPUC stated that inclusion of the word "primarily" in proposed paragraph (c)(1) "would allow electric utilities to provide service to areas other than unserved and underserved areas." OPUC commented that PURA §43.051 authorizes electric utilities to provide middle mile broadband service only "in" unserved and underserved areas. OPUC reiterated that HB 3853, the legislation that underlies this rulemaking, was not intended to be a statewide authorization for middle mile broadband service and is specifically intended to provide service to "unserved" and "underserved" areas.

ETI also noted that the proposed rule language inappropriately "indicates that utilities can provide middle mile broadband service for areas that are not unserved or underserved, as long as the service is being provided primarily for those areas" and that inclusion of the term "primarily" would require a finding of fact determination for every commission review of a utility's middle mile broadband plan. AT&T commented that inclusion of "primarily" in proposed paragraph (c)(1) is an "unintended loophole" and contrary to statutory language and therefore should not be inserted in the rule.

Joint Utilities opposed other commenters' recommendations to delete the term "primarily" from proposed paragraph (c)(1) as provision of broadband service may involve "anchor institutions" such as libraries, schools, or hospitals. Joint Utilities also referenced CN Texas's comments, emphasizing that fiber utilized for middle mile broadband "will often traverse served areas to reach ISPs intending to serve unserved or underserved areas" which supports inclusion of the word "primarily" in proposed paragraph (c)(1). TCA noted that the "anchor institutions" listed by Joint Utilities are "identical to entities eligible for federal support under the Federal Communication Commission's E-Rate Program" which is designed to support local institutions such as schools and libraries but not determine whether an area is "unserved" or "underserved" and that the program is incapable of providing such guidance.

#### *Commission Response*

The commission agrees with TCA, Cities, OPUC, ETI, City of Houston, CenturyLink, and AT&T and replaces the term "primarily for" with the statutory language "in" as utilized in PURA §43.001 and §43.051. The commission also acknowledges that routes for middle mile broadband service may traverse served areas to ultimately allow an ISP to provide broadband service to end-users in unserved and underserved areas. The commission modifies paragraph (c)(1) to reflect that it is the broadband service provided by the ISP, not the entirety of the fiber used to provide middle mile broadband service, that must be located in an unserved or underserved area.

The commission does not agree with Joint Utilities' comments regarding the provision of middle mile broadband service to anchor institutions. Anchor institutions are not referenced in PURA Chapter 43, which directs the commission to adopt rules facilitating middle mile broadband service to unserved and underserved areas. Anchor institutions are a separate category from unserved and underserved areas under the federal Broadband Equity Access Deployment program, which supports the conclusion that the provision of middle mile broadband service to an-

chor institutions is distinguishable from the provision of such service to unserved and underserved areas.

Texas 2036 recommended proposed paragraph (c)(1) be revised to include the phrase "connecting last mile networks" and replaced "and" with "or" between the terms "unserved" and "underserved." Texas 2036 stated this proposed change would clarify that the proposed rule specifically applies to last mile networks in unserved or underserved areas and does not unnecessarily limit where middle mile broadband infrastructure can pass through as it is foreseeable that electric utility lines could cross through areas considered served, underserved, or unserved.

TCA opposed Texas 2036's recommendation as beyond the scope of PURA Chapter 43 and this rulemaking.

#### *Commission Response*

The commission declines to include language in (c)(1) as recommended by Texas 2036. As noted above, the commission modifies paragraph (c)(1) to reflect that it is the broadband service provided by the ISP, not the entirety of the fiber used to provide middle mile broadband service, that must be located in an unserved or underserved area. This modification substantively addresses Texas 2036's concerns.

#### Proposed §25.218(c)(2) - Nondiscriminatory access to fiber

Proposed paragraph (c)(2) requires an electric utility to not discriminate in selecting ISPs that may access excess fiber capacity and prohibits a utility from leasing to an affiliated internet service provider.

Joint Utilities and ETI recommended that proposed paragraph (c)(2) include a provision clarifying that an electric utility has the sole discretion to determine excess fiber capacity available to provide middle mile broadband service over its electric delivery system. Joint Utilities argued this provision is necessary due to the planning involved in reserving fiber capacity for future use by an electric utility or for when fiber lines are damaged. OPUC supported Joint Utilities' proposal to define "excess fiber capacity" to "clearly delineate for the utilities when they have excess fiber for planning purposes."

City of Houston and TCA opposed Joint Utilities' proposal to include a definition of "excess fiber capacity" in proposed paragraph (c)(2) as providing too much discretion to utilities in implementation of middle mile broadband. TCA asserted that only the commission has the sole discretion to determine the meaning of "excess fiber capacity" and that if the commission chooses to define it, the definition should at least include language indicating that it is "the amount of fiber capacity that is not being used for electric utility or its affiliate's electric utility purposes." Similarly, City of Houston recommended defining excess fiber capacity as "fiber capacity not needed for planned electric utility operations" under subsection (b).

#### *Commission Response*

The commission declines to grant utilities sole discretion over what constitutes excess fiber capacity, as recommended by Joint Utilities. What may be considered excess fiber capacity is not a uniform standard but is based on the needs of the utility and the electrical grid, and therefore may vary depending on circumstance and with the limitations described under subsection (h). However, the commission agrees with TCA that the commission has the authority to determine whether a utility's plan properly characterizes fiber capacity as available fiber capacity.

The commission agrees that the term excess fiber capacity is frequently used in the rule and a definition is necessary for clarity. Accordingly, the commission defines excess fiber capacity as "fiber capacity neither utilized nor reserved for current or planned electric utility operations" under adopted paragraph (b)(5).

#### Proposed §25.218(c)(3) - Reasonable and nondiscriminatory terms and conditions

Proposed paragraph (c)(3) requires an electric utility to provide access to excess fiber capacity only on reasonable and nondiscriminatory terms and conditions that assure the electric utility the unimpaired ability to comply with and enforce all applicable federal and state requirements regarding the safety, reliability, and security of the electric delivery system.

TCA recommended that proposed paragraph (c)(3) "include a clarification that the electric utility may not hide discriminatory behavior from the commission." TCA expressed concern that an electric utility could indirectly discriminate against potential lessees of excess fiber capacity "by delaying timely make-ready on a pole attachment or exacting excessive concessions on other pole attachment negotiations in order to affect excess fiber lease negotiations." TCA highlighted that "pole attachments are a frequent point of contact between an internet service provider and an electric utility," and therefore such discrimination is not improbable. Accordingly, TCA provided draft language for paragraph (c)(3) which would prohibit a utility from discriminating against a lessee in business transactions unrelated to middle mile broadband service such as make-ready or pole attachment issues.

Joint Utilities generally opposed TCA's proposed recommendation to include in proposed paragraph (c)(3) additional language prohibiting indirect discrimination terms and conditions in a middle mile broadband lease as beyond the scope of the rulemaking and involving issues such as "pole attachments and make-ready" that are governed by the federal Pole Attachment Act (PAA). Joint Utilities further argued that TCA's proposed language would "potentially broaden the scope of an electric utility's non-discriminatory access obligation regarding pole attachments beyond what is statutorily mandated under Section 224(f) of the PAA" which "creates a non-discriminatory access obligation with respect to cable television systems and non-incumbent local exchange companies (non-ILECs)." Joint Utilities indicated that the federal non-discrimination requirement does not extend to broadband-only providers, including ISPs. Joint Utilities concluded that there is also "no statutory basis upon which to create such a requirement" in Chapter 43 or the Utilities Code as the "commission does not regulate pole attachments or make-ready obligations."

#### *Commission Response*

The commission agrees with Joint Utilities and declines to adopt TCA's proposed revision to paragraph (c)(3) regarding discrimination in other business transactions such as those involving pole attachment and "make-ready" issues, because the proposed revision is overly broad. This rulemaking is intended to address the provision of middle mile broadband service, and under the rule the utility must provide access to excess fiber capacity only on reasonable and nondiscriminatory terms and conditions, which prohibits the direct or indirect imposition of unreasonable or discriminatory terms and conditions for middle mile broadband service.

#### Proposed §25.218(d) - Charges

Proposed subsection (d) requires an electric utility that leases excess fiber capacity on its electric delivery system or other facilities to an internet service provider on a wholesale basis to charge the internet service provider for the use of the electric utility's system for all costs associated with that use. Proposed subsection (d) further requires that the rates and the terms and conditions of the lease be nondiscriminatory and prohibits an electric utility from leasing excess fiber capacity to provide middle mile broadband service to an affiliated internet service provider.

Joint Utilities and ETI recommended that proposed subsection (d) clarify that the costs associated with usage of an electric utility's systems for providing middle mile broadband service are those costs that are directly attributable to providing middle mile broadband service.

City of Houston opposed the change recommended by the Joint Utilities. City of Houston stated that the usage of the phrase "directly attributable to providing middle mile broadband service" is unclear and could be interpreted to exclude some costs such as administrative and general expenses and taxes.

#### *Commission Response*

The commission agrees with Joint Utilities and amends the rule accordingly. "Directly attributable costs" are substantively discussed under heading (f)(1)(M).

#### Proposed §25.218(e)(1) & (2) - Participation by electric utility

Proposed paragraph (e)(1) establishes that an electric utility may install and operate facilities to provide middle mile broadband service on any part of its electric delivery system or other facilities but may not construct new electric delivery facilities for the purpose of expanding middle mile broadband service. Proposed paragraph (e)(2) establishes that an electric utility may lease excess fiber capacity to internet service providers on a wholesale basis and may not provide internet service to customers on a retail basis.

Joint Utilities and ETI recommended that this paragraph clarify that any provision in the proposed rule is not intended to restrict an electric utility from owning, constructing, maintaining, or operating fiber optic cables or a broadband system for the electric utility's own use to support its delivery system operations or for other lawful purposes. It also does not affect an electric utility's ability to construct communications facilities at a requesting customer's cost or adding or expanding electric delivery facilities, including communication facilities, for electric delivery service purposes. Joint Utilities recommended adding new subparagraph (e)(1)(A) that states that "an electric utility may construct new electric delivery facilities, including communication facilities, to provide electric delivery service to customers and may use excess fiber capacity on new facilities to provide middle mile broadband service." TCA opposed Joint Utilities' proposed addition of new subparagraph (e)(1)(A) as that would enable electric utilities to construct communications facilities that are unrelated to delivery of electric service.

#### *Commission Response*

The commission agrees with TCA and declines to adopt Joint Utilities' recommendation for paragraph (e)(1) as the protections contemplated are already included in the rule under paragraph (c)(4) which states: "(n)othing in this section is intended to restrict an electric utility from owning, constructing, maintaining, or operating fiber optic cables or a broadband system for the electric utility's own use to support the operation of the electric utility's electric delivery system or for other lawful purposes." Similarly,

subsection (h) emphasizes the primacy of the provision of electric service over middle mile broadband service.

PURA §43.101(a) states "(a)n electric utility may install and operate facilities to provide middle mile broadband service on any part of its electric delivery system or other facilities for internet service providers *but may not construct new electric delivery facilities for the purpose of expanding the electric utility's middle mile broadband service.* (emphasis added)" Paragraph (e)(1) directly incorporates this statutory language. An electric utility is not prohibited from constructing new facilities for the purpose of providing *electric service* or from providing middle mile broadband service using those facilities, once constructed.

#### Proposed §25.218(f) - Commission review of middle mile broadband plan

Proposed subsection (f) imposes filing requirements for a utility's plan for middle mile broadband service.

Joint Utilities and ETI recommended adding a confidentiality provision to subsection (f) based on previous language in §25.130(d)(6) (relating to Advanced Metering) and 22.142(c) (relating to Limitations on Discovery and Protective Orders) to read: "Competitively sensitive information contained in a utility's middle mile broadband plan may be filed confidentially in accordance with §22.142(c)."

#### *Commission Response*

The commission declines to adopt Joint Utilities' recommendation to add a confidentiality provision to the adopted rule as such provision is unnecessary. The confidentiality provisions of §22.142(c) and §22.71(d)(1) (relating to Filing of Pleadings, Documents, and Other Materials) allow for parties to file information confidentially. The presiding officer can make any additional determinations necessary regarding the confidentiality of competitively sensitive information.

#### Proposed §25.218(f)(1) - Filing requirements

Proposed paragraph (f)(1) includes the filing requirements for a written plan submitted by a utility for middle mile broadband service.

Cities opined that the proposed rule will effectively make participating electric utilities landlords to the ISP's leasing space on their infrastructure and expressed concern that there are no required protections for utility ratepayers if an ISP breaches the lease or otherwise defaults. Cities stated that in a scenario where funds are not delivered and/or the lease is breached, the electric utility could potentially continue to collect money from ratepayers without receiving revenues to credit ratepayers for the associated costs as required by statute. Therefore, Cities proposed, as part of the filing requirements under proposed paragraph (f)(1), the rule include a demonstration that the electric utility has (1) a guarantee of funds to be received from the lessor for the entire lease term or some defined part of the lease term and (2) the financial capability to offset all construction, maintenance, operations and other costs, and all return associated with the service in the event of a breach, default, or other failure by the lessor to pay the contracted revenues through the end of the lease term. Cities stated that these additional requirements will protect ratepayers from subsidizing the provision of middle mile broadband service as specifically required in the statute.

OPUC supported Cities' proposals to add additional subparagraphs to proposed paragraph (f)(1) providing additional cus-

customer protections for electric utility ratepayers in case an ISP breaches the lease or defaults. OPUC noted that the cost recovery mechanism under proposed subsection (d) and the customer credit provision under proposed paragraph (g)(2) do not sufficiently mitigate the risk for ratepayers in case of an ISP breach or default on a middle mile broadband lease. OPUC commented that subsection (d) implies consumers will be made whole through charges to the internet service provider. In this context, OPUC supported Cities' position under heading (f)(1) that the electric utility demonstrate that it has a guarantee of funds from the ISP for the entire lease term or some defined part of the lease term; and also demonstrate that it has the financial capability to offset all construction, maintenance, operations, and other costs and all return associated with the middle mile broadband service if all costs associated with the service are not recovered from the ISP.

City of Houston agreed with Cities' recommendation for rule language protecting ratepayers in case an ISP defaults on a lease with the electric utility as new facilities installed to connect an ISP to the utility's fiber system could be at risk in such a scenario. Specifically, City of Houston recommended the proposed rule require an ISP to pay a Contribution In Aid of Construction (CIAC) for any interconnection costs. Alternatively, City of Houston recommended the rule include language prohibiting a utility from recovering from ratepayers any unrecovered costs due to an ISP default.

CenturyLink supported Cities' proposals to add additional subparagraphs to proposed paragraph (f)(1) providing additional customer protections for electric utility ratepayers in case an ISP breaches the lease or defaults. CenturyLink asserted ratepayers, as "captive" customers of a utility, should not be required to fund costs associated with middle mile broadband service as they may not be the same customers benefiting from the provision of such service. CenturyLink also stated that diversion of any money from the regulated service of electricity to the non-regulated service of middle mile broadband may diminish the quality of electricity provided to ratepayers. Specifically, CenturyLink maintained "it is counter to fair market practices to have captive ratepayers of a regulated service supporting the cost of an unregulated service, especially where potential competitive free market participants exist and offer the same product without a regulated customer base." CenturyLink urged the commission to ensure that electric utilities are not permitted a competitive advantage through utilizing their regulated customer base for provision of middle mile broadband service as it is foreseeable a competitor may not have a ratepayer customer base to insure its investment in provisioning middle mile broadband.

Joint Utilities stated that the proposals of Cities are onerous and unnecessary. Joint Utilities noted that middle mile broadband service will be based on unused strands in fiber bundles installed to support electric delivery service, so capital and operations costs for those fiber facilities are a part of the utility's cost of service, and only incremental costs of the middle mile broadband program will be directly attributable to that program. Joint Utilities pointed out that obtaining an up-front guarantee of lease payments from the ISP, as Cities suggest, would be onerous and potentially hinder provision of service in unserved and underserved areas. Joint Utilities argued that if an ISP defaults on lease payments, the utility will have available legal and contractual remedies, including entering into a new lease.

#### *Commission Response*

The commission agrees with Cities, OPUC, City of Houston, and CenturyLink that the proposed rule should include additional protections for ratepayers in case a utility is unable to recoup costs associated with middle mile broadband service. It is foreseeable that an ISP may breach a middle mile broadband lease and that a utility may have unrecovered costs associated with its plan. In such an event, there is a risk that the demonstration of revenues required under subparagraph (f)(1)(M) will no longer account for all costs associated with the provision of middle mile broadband service and, as proposed, subsection (g) does not provide for this circumstance. The commission declines to adopt Cities' recommendation as paragraph (g)(3) accomplishes the same purpose. However, the commission adopts new paragraph (g)(4) which stipulates that, in the event revenues received by an electric utility from an ISP for the use of middle mile broadband service are insufficient to offset the costs of such service, the utility must ensure that its regulated rates prevent ratepayer cross-subsidization. The commission agrees with CenturyLink that increasing costs on ratepayers due to issues related to middle mile broadband is unfair to "captive" ratepayers. However, the commission agrees with Joint Utilities that requiring a utility to file up-front guarantees of payment or a demonstration of financial capability for an ISP is counterproductive to the implementation of middle mile broadband service. The commission also agrees with Joint Utilities that a utility may contract for remedies for any breach of the lease or default by an ISP.

The commission disagrees with City of Houston and declines to add a rule provision requiring an ISP to pay a CIAC. The adopted language under new paragraph (g)(4) discussed above substantively addresses City of Houston's concerns about unrecovered costs. A utility offering middle mile broadband service has the discretion to require a CIAC and other terms and conditions to reduce the risk of unrecovered cost.

Texas 2036 pointed out that one of the many challenges for households accessing broadband services is the cost. Texas 2036 proposed adding new subparagraph (f)(1)(O) which would require a utility to indicate whether the ISP will offer low-cost broadband service to the unserved or underserved area and new subparagraph (f)(1)(P) which would require a utility to indicate whether it participates in the FCC Affordable Connectivity Program. Texas 2036 commented that collecting this data will help inform public policy and improve transparency in the broadband industry.

TCA opposed Texas 2036's recommendation as beyond the scope of PURA Chapter 43 and this rulemaking.

#### *Commission Response*

The commission declines to adopt Texas 2036's recommendations for new subparagraphs (f)(1)(O) and (f)(1)(P) as collecting information to inform future public policy is beyond the scope of this rulemaking. Furthermore, whether an ISP is participating in certain FCC programs or is offering service at a particular price point should not be dispositive of the adequacy of the electric utility's plan, nor are either of these criteria included in PURA §43.102(a).

Proposed §25.218(f)(1)(A) - Demonstration of unserved and underserved areas

Proposed subparagraph (f)(1)(A) requires an electric utility to include in its submitted written middle mile broadband plan a demonstration that the middle mile broadband service will be used only for unserved and underserved areas.

As stated under the Question 1 heading, BDO recommended middle mile broadband plans submitted to the commission be validated for accuracy by the utility via reference to the BDO and FCC maps. ETI commented that the use of the term "only" in subparagraph (f)(1)(A) conflicts with the language in paragraph (c)(1) which allows the utility to provide middle mile broadband "primarily" in unserved and underserved areas.

#### Commission Response

As discussed under the Question 1 heading, the commission agrees with BDO's recommendation and revises subparagraph (f)(1)(A) to indicate that the required demonstration should be evidenced by reference to the BDO and FCC maps, to the extent those maps are available and accurate, and any other necessary information.

The commission agrees with ETI's comment and notes that its concern has already been addressed, as the commission has replaced the phrase "primarily for" with the statutory term "in" under paragraph (c)(1), as discussed under that subheading.

#### Proposed §25.218(f)(1)(B) - Sworn statement of cybersecurity expert

Proposed subparagraph (f)(1)(B) requires an electric utility to include in its submitted written middle mile broadband plan a sworn statement by a cybersecurity expert attesting that cybersecurity has been properly addressed for implementing and providing middle mile broadband service.

Joint Utilities and ETI recommended that (f)(1)(B) be clarified to provide that the sworn statement required from a cybersecurity expert relates to the security of the electric utility's system, not other systems such as the ISP.

#### Commission Response

The commission adopts Joint Utilities and ETI's recommendation to clarify that the sworn statement from the cybersecurity expert attests to only the security of the electric utility's system. The commission recognizes that, in submitting a middle mile broadband plan, the relevant cybersecurity inquiry relates to access to the electric utility's electric infrastructure, rather than the ISP's service. Therefore, the commission adds language to adopted subparagraph (f)(1)(B) specifying the sworn statement relates only to the electric utility's cybersecurity and requiring an electric utility to provide the expert's resume or curriculum vitae and describe the expert's cybersecurity expertise.

#### Proposed §25.218(f)(1)(G) - Estimated cost

Proposed subparagraph (f)(1)(G) requires an electric utility to include in its submitted written middle mile broadband plan the estimated cost of the project, including an itemization of engineering costs, construction costs, permitting costs, right-of-way costs, a reasonable allowance for funds used during construction, and all other costs associated with the lease and use of the electric utility's system for middle mile broadband service by ISPs.

TCA proposed that notice of estimated fees to internet service providers be included in the electric utility's application to allow the commission to determine whether the pricing indicated a possible prohibited cross-subsidization is occurring, and to ensure the rates are indeed recovering the costs as mandated by statute.

CenturyLink supported TCA's recommended changes for proposed subparagraph (f)(1)(G) as it would provide the commis-

sion with additional information to determine upfront whether the pricing "indicates a possible prohibited cross-subsidization by the electric utility."

Joint Utilities opposed TCA's proposal as unnecessary since the utility will already be required to provide a copy of the lease that will provide sufficient detail about the fees agreed upon between the utility and the ISP.

#### Commission Response

The commission declines to adopt TCA's recommendation to require an electric utility to disclose fees charged to the ISP as part of its middle mile broadband plan under subparagraph (f)(1)(G). The commission agrees with Joint Utilities that information contained in the lease agreement filed by the utility should include adequate and thorough details about fee arrangements between the utility and the ISP. To the extent the utility's initial filing warrants additional review and requires more detailed information, stakeholders may use the discovery process. Additionally, as a practical matter, evaluating potential instances of cross-subsidization would be beyond the scope of the commission's review of a utility's middle mile broadband plan. A definitive determination regarding the occurrence of any cross-subsidization can be made only in a comprehensive base-rate proceeding in which the entirety of an electric utility's costs is subject to review. However, as discussed under heading (g), the commission has added paragraph (g)(4) which prohibits cross-subsidization from ratepayers which addresses CenturyLink's concern.

#### Proposed §25.218(f)(1)(M) - Demonstration of revenue-cost offset

Proposed subparagraph (f)(1)(M) requires an electric utility to include in its submitted written middle mile broadband plan a demonstration that the revenues received from the provision of middle mile broadband service under the plan offset all construction, maintenance, operations, and other costs and all return associated with the service.

Joint Utilities and ETI recommended that (f)(1)(M) clarify that revenues from middle mile broadband service offset costs that are directly attributable to that service. Joint Utilities commented that because the middle mile program will be based on unused dark fiber capacity on facilities installed for electric delivery purposes, the middle mile broadband cost should only be the incremental costs directly attributable to that program such as costs of facilities to allow ISPs to interconnect with utility fiber (to the extent such costs are not paid by the ISPs) as well as program costs associated with implementing and operating the middle mile broadband program. Joint Utilities opined that capital and operation and maintenance costs related to fiber installed and used for utility purposes would not be attributable to the middle mile broadband program. Accordingly, Joint Utilities provided draft language inserting the term "directly attributable" into subparagraph (f)(1)(M).

Consistent with its comments under heading (d), City of Houston expressed concern that the Joint Utility proposal, specifically the use of the phrase, "directly attributable" could exclude some costs. City of Houston stated that the phrase "is not clear and could be interpreted to exclude some costs such as administrative and general (A&G) expenses and taxes."

#### Commission Response

The commission agrees with Joint Utilities and ETI and modifies the rule consistent with the proposed language. The costs associated with middle mile broadband implementation should

only be the incremental costs directly attributable to that program, such as costs of facilities to allow ISPs to interconnect with utility fiber (to the extent such costs are not paid by the ISPs) as well as program costs associated with implementing and operating the middle mile broadband program. Consistent with PURA §43.001(d), the intent of the rule is to encourage the deployment of middle mile broadband service in unserved and underserved areas while not increasing costs to electric customers because of the middle mile broadband service. Assigning costs to broadband service that are not directly attributable to that service would increase the complexity of identifying and recovering the costs by a utility and create a risk of under-recovery that would not be determined until a subsequent base rate case, which could unreasonably deter utilities from offering the service.

City of Houston's concerns are mitigated by the fact that in the utility's base rate case a utility will be required to provide information necessary to support a determination under subsection (g) that electric customers will not pay for costs to provide middle mile broadband service.

#### Proposed §25.218(f)(2) - Notice and intervention deadline

Proposed paragraph (f)(2) requires a utility filing a plan to issue notice on or before the day after it files its plan and must include in the notice the docket number for the new proceeding and states that failure of a utility to provide timely notice will toll the intervention deadline under proposed subparagraph (f)(2)(C).

OPUC requested that as the statutory representative for residential and small commercial consumers, it be notified when a utility provides notice of its filing of a middle mile broadband plan. OPUC proposed new subparagraph (f)(2)(C) which would require a utility to issue notice of applications to OPUC via first class mail in the unlikely event that OPUC was not a party to an electric utility's most recent base rate case.

#### Commission Response

The commission agrees with OPUC that OPUC should receive notice of a utility's middle mile broadband plan and amends the rule accordingly.

TCA proposed adding an alternative new subparagraph (f)(2)(C) which would require a utility to issue notice applications to internet service providers who offer broadband service within the proposed project area or immediately adjacent area.

Joint Utilities opposed TCA's recommendation for proposed subparagraph (f)(2)(C), because Joint Utilities are not aware of an established database for identifying ISP service areas (such as tax rolls for identifying property owners for Certificate of Convenience and Necessity notices), nor has TCA defined "immediately adjacent area" which is therefore unclear. Joint Utilities proposed as an alternative that the rule require additional notice by publication in the *Texas Register*.

TCA also proposed adding new subparagraph (f)(2)(F) to permit an ISP or telecommunications provider to intervene in any proceeding under this section under certain conditions and provided draft language for the same.

CenturyLink supported TCA's recommendation to add new subparagraphs (f)(2)(C) and (f)(2)(F) providing notice of and the opportunity to intervene in middle mile broadband applications to ISPs offering broadband service within or immediately adjacent to the proposed project area based on a showing or commitment to providing 100/20 broadband service. CenturyLink stated that

ISPs, as "active participants in the competitive broadband market," should be entitled to such notice and intervention rights in order to supplement the commission's efforts in gathering information and efficiently providing middle mile broadband service to "unserved" and "underserved" areas of Texas. CenturyLink concluded that TCA's proposed additions would assist the commission in "discouraging overbuilding, preventing waste of resources, and supporting the competitive market."

Joint Utilities opposed TCA's recommendation allowing ISPs and telecommunications providers the right to intervene in an electric utility's middle mile broadband proceeding based on the standards TCA laid out. Joint Utilities argued that the law of standing and justiciable interest is well-developed and provides appropriate standards for evaluating interventions. Joint Utilities noted that the standard has been successfully applied in commission proceedings for decades and that the commission should continue to follow that law and should not include special provisions in the rule for ISP interventions.

TCA also proposed new language for proposed subparagraph (f)(2)(G) which would permit an ISP to protest a middle mile broadband project on the same basis as an affected property owner.

#### Commission Response

The commission declines to adopt TCA's recommendation to add new subparagraphs (f)(2)(C) and (f)(2)(G) concerning intervention and protest rights of an ISP. The commission agrees with Joint Utilities that notice provisions should avoid ambiguity and that identifying ISPs providing service adjacent to unserved and underserve areas would be difficult.

However, the commission acknowledges that general publication of notice without burdening an electric utility is necessary to reach other entities that may have an interest in the proceeding. Therefore, the commission adopts rule language creating a generic project for notice to parties that do not receive notice under subparagraphs (f)(2)(A)-(C). This is consistent with the intent of Joint Utilities' proposal for notice via *Texas Register* but provides notice in a static location that is more easily accessed and located, is exclusive for middle mile broadband plan review, and does not place the burden on commission staff of publishing notice in the *Texas Register* each time an application is filed under the rule. The commission substantively discusses notice under heading (f)(2)(A).

The commission declines to adopt TCA's proposed new subparagraph (f)(2)(G) granting ISPs intervenor status in middle mile broadband proceedings. Under procedural rule §22.103(b)(2) (relating to Standing to Intervene), "a person has standing to intervene if that person" has or represents persons with a justiciable interest which may be adversely affected by the outcome of the proceeding." (Emphasis added) The commission recognizes that the parties previously listed, such as a competitor ISP or a local government, may have a justiciable interest in a commission review of an electric utility's middle mile broadband plan. Therefore, an entity with a justiciable interest may submit a motion to intervene under §22.103(b) and §22.104 (relating to Motions to Intervene). The presiding officer will determine whether the entity has standing to intervene.

The commission declines to grant ISPs the authority to protest a middle mile broadband application as requested by TCA. PURA is specific as to which entities have this authority and the commission declines to provide access to rights exclusively provided to affected property owners by statute.

The commission revises paragraph (f)(2) to require a utility to file proof of notice in the docket within 10 days of the date service of notice is completed, specifying the entities the electric utility considers to be affected property owners.

Proposed §25.218(f)(2)(A) - Notice to affected property owners

Proposed subparagraph (f)(2)(A) includes the form and manner requirements for notice issued to "affected property owners" of a middle mile broadband plan.

Joint Utilities and ETI suggested a new clause (f)(2)(A)(ii) to include in the notice to affected property owners of the utility's intent to use the easement or other property right for the provision of middle mile broadband service and provided draft language for the same. Joint Utilities and ETI also proposed new clause (f)(2)(A)(iv) which includes a draft form for issuing notice to affected property owners.

OPUC supported the recommendation of Joint Utilities for notice to be provided to affected property owners of the intent to use an existing easement for middle mile broadband implementation under proposed subparagraph (f)(2)(A). OPUC noted that middle mile broadband implementation may require additional construction and usage of easements by the electric utility and therefore landowners burdened by such easements should be made aware of that possibility through the additional proposed notice.

Cities emphasized that municipal and county governments should receive appropriate notice of middle mile broadband plans impacting their public rights-of-way. Cities argued that Joint Utilities' proposals for notice excludes local and state government bodies that own public rights of way from the definition of "affected property owner." Cities pointed out that while the utilities referred to "statutory provisions" for its exclusion of state and local government bodies, "affected property owner" is not defined under PURA, the Texas Water Code, or Local Government Code. Cities stated that utilities rely on provisions that address whether a city can recover or charge a fee for the installation of middle mile broadband services for unserved and underserved areas. Cities stated that while these may be informative excerpts from the underlying statute, they are not relevant to the question of whether a city should receive notice when its rights-of-way may be impacted by installation of middle mile broadband services. Cities argued that as stewards of safety and accessibility within its jurisdiction, cities and municipalities should receive notice when any installation or project will impact public rights-of-way. Cities proposed striking the phrase "to affected property owners" in subparagraph (f)(2)(A) to change the section into a general notice provision.

Commission Response

The commission declines to implement forms for notice as proposed by Joint Utilities but may address such a requirement in a later proceeding. However, the commission revises adopted subparagraph (f)(2)(A) to require specific information to be included in the notice to affected property owners, including a notice of intent to use the utility's easement for middle mile broadband implementation.

The commission agrees with Cities that local governments should receive notice of middle mile broadband proceedings. Adopted subparagraph (f)(2)(B) lists the parties that must be sent notice by first class mail that are not affected property owners, including municipalities crossed by or within five miles

of the planned project and counties that are crossed by the planned project.

Furthermore, adopted subparagraph (f)(2)(D) indicates that filing notice in the middle mile broadband plan Interchange project serves as notice to all other interested parties. Any interested party may subscribe to the generic Interchange project designated for the filing of notice of middle mile broadband plans. Lastly, the commission adopted subparagraph (f)(2)(E) to reflect the intervention deadline in relation to the other specified changes and to indicate that failure to intervene does not preclude an affected property owner from invoking the right to protest under adopted subparagraph (f)(2)(F).

The definition of "affected property owner" is discussed under heading (b)(1). Notice and intervention are also substantially discussed under heading (f)(2).

Proposed §25.218(f)(2)(B) - Notice to ratepayers

Proposed subparagraph (f)(2)(B) includes the form and manner requirements for notice issued to all parties in the electric utility's last comprehensive base-rate proceeding of a middle mile broadband plan.

Joint Utilities and ETI proposed a similar form notice as each recommended in subparagraph (f)(2)(A) and provided recommended language.

Commission Response

The commission declines to implement forms for such notice as proposed by Joint Utilities but may address such a requirement in a later proceeding.

Proposed §25.218(f)(2)(D) - Written protest by affected property owner

Proposed subparagraph (f)(2)(D) states that an affected property owner may invoke the right to protest the middle mile broadband plan not later than the 60th day after the date an electric utility mails notice to potential intervenors.

TCA recommended that subparagraph (f)(2)(D) should also include full notice to affected parties including newly affected internet service providers.

Commission Response

The commission declines to revise proposed subparagraph (f)(2)(D), adopted as subparagraph (f)(2)(F), per TCA's recommendation. An electric utility is not required to send ISPs first class mail notice under the adopted rule. Under adopted subparagraph (f)(2)(D) all interested persons will receive notice through the generic project established for the exclusive purpose of providing notice of middle mile broadband plans. A person or entity may subscribe to the project and receive automatic e-mail notifications of filings relating to submitted middle mile broadband plans.

Proposed §25.218(f)(3) - Commission processing of middle mile broadband plan

Proposed §25.218(f)(3) provides the requirements for the commission's processing of middle mile broadband plans.

Texas 2036 recommended the commission coordinate with BDO when reviewing middle-mile broadband plans submitted by electric utilities under proposed paragraph (f)(3). Specifically, Texas 2036 recommended adding a requirement that the Commission inform BDO of the electric utility's middle mile broadband plan since that office is charged with serving as a resource for infor-

mation on broadband service and digital connectivity in Texas. Texas 2036 recommended the commission add new subparagraph (f)(3)(A) which would require the commission to inform the BDO of the middle mile broadband plan no later than 10 days from the date the commission receives the plan.

TCA opposed Texas 2036's recommendation as beyond the scope of PURA Chapter 43 and this rulemaking.

TCA proposed that updates or amendments to the application should include notice to affected parties including newly affected ISPs. Accordingly, TCA recommended adding "including without limitation additional notice to affected property owners and ISPs" to the end of proposed paragraph (f)(3).

#### Commission Response

The commission declines to adopt Texas 2036's proposal to revise subparagraph (f)(2)(A) and TCA's proposal to revise subparagraph (f)(3)(D) for the reasons discussed under heading (f)(2)(B). Specifically, the generic project used for general notice of middle mile broadband plans will be used to file notices of amendments or updates associated with submitted middle mile broadband plans.

#### Proposed §25.218(g) - Cost recovery

Proposed subsection (g) lists the provisions governing cost recovery for deployment of middle mile broadband facilities.

Cities commented that unless the lease term lasts as long as the expected life of the asset, there exists a possibility that the participating electric utility could collect money from ratepayers for the provision of middle mile broadband service without the offsetting revenue credit from the lease. Cities pointed out that HB 3853 did not intend for electric ratepayers to backstop the provision of middle mile broadband service and opined that the rule should ensure that electric customers are not paying for the associated costs without the offsetting credit. Therefore, Cities recommended, the rule should require an incentive for the electric utility to either (1) recover all cost and returns associated with the provision of service upfront or throughout the initial lease term or (2) create incentives for the utility to sign a new lease to cover the costs for the remainder of the life of the asset.

OPUC expressed that proposed paragraph (e)(1) allows an electric utility to expand its infrastructure as necessary to accommodate middle mile broadband service. OPUC opined that in this limited scenario, where infrastructure is installed for the sole purpose of effectuating middle mile broadband service, the upfront costs should be entirely borne by the electric utility, as this infrastructure is not used or useful in providing electric service to its ratepayers. OPUC noted that as with ratepayers eventually being repaid via credit, the electric utility would presumably be made whole through charges to the internet service providers. Therefore, OPUC requested new paragraph (g)(3) which would prohibit an electric utility from including in its invested capital costs associated with facilities solely used to provide middle mile broadband service.

TCA opposed OPUC's interpretation that electric utilities would be allowed to build out communications facilities unrelated to leasing excess fiber capacity. Joint Utilities commented that OPUC's proposal misunderstands the rate treatment for middle mile broadband established in PURA §43.103. Joint Utilities opined that reasonable and necessary investment and expenses to provide middle mile broadband services are eligible for inclusion in a rate proceeding under Chapter 36, but that any revenue received from an ISP must be applied as a revenue credit to cus-

tomers in a rate proceeding. As a result, costs related to middle mile broadband service are includable for recovery in rates, but utilities do not retain the benefit of the lease revenues, all of which are credited to customers.

Joint Utilities stated that, as discussed under heading (d) and (f)(1)(M), the fiber cable being used for middle mile broadband service is installed and maintained for utility purposes and only incremental costs of the middle mile broadband program will be directly attributable to that program. Under the statute, the costs are recovered through rates, not through lease revenues. As noted in Joint Utilities' initial comments, the proposed rule should incorporate additional protection by requiring that the lease revenues cover the incremental costs directly attributable to the middle mile service.

#### Commission Response

The commission declines to modify the rule as proposed by Cities. However, Cities' concerns about insufficient cost recovery from ISPs are addressed by adopted paragraph (g)(4) which prohibits cross subsidization and is discussed in greater detail below. Additionally, the commission can disallow the shortfall in the utility's base-rate proceeding.

Regarding OPUC's proposed additional language, PURA § 43.103(a) states that "(w)here an electric utility installs facilities used to provide middle mile broadband service under Section 43.051, the electric utility's investment in those facilities is eligible for inclusion in the electric utility's invested capital, and any fees or operating expenses that are reasonable and necessary are eligible for inclusion as operating expenses for purposes of any proceeding under Chapter 36." The plain wording of this language indicates that the facilities used to provide middle mile broadband services are eligible for inclusion in the electric utility's invested capital; OPUC's proposed language, however, would specify that certain parts of the infrastructure are not eligible, thus directly contradicting the clear statutory wording. The commission retains the language as published.

#### Proposed §25.218(g)(1) - Costs eligible for recovery

Proposed paragraph (g)(1) states that a utility's investment in facilities used to provide middle mile broadband service is eligible for inclusion in the electric utility's invested capital and that any fees or operating expenses that are reasonable and necessary are eligible for inclusion as operating expenses for purposes of any proceeding under PURA Chapter 36.

As stated under heading (g), Joint Utilities and ETI commented that under PURA §43.103 the utility's investment in facilities used for the middle mile broadband service may be included in its invested capital and any fees or operating expenses that are reasonable and necessary are eligible for inclusion as operating expenses for purposes of any proceeding under PURA Chapter 36. Joint Utilities and ETI opined that the investment and costs for the middle mile broadband project will be reviewed in the utility's middle mile broadband plan. Joint Utilities and ETI also commented that the commission's review of the application should be given some weight when an electric utility comes in for a rate case and requests inclusion of the approved plan's costs in the electric utility's cost of service. Therefore, Joint Utilities and ETI recommended that a provision be added to the end of paragraph (g)(1) similar to language included in §25.130 (relating to Advanced Metering) such as "costs spent in accordance with the plan or amended plan approved by the commission are presumed to be reasonable and necessary and investment made

in accordance with the plan or amended plan approved by the commission is presumed to be prudent."

City of Houston and Cities disagreed with Joint Utilities, noting that the proposed rule states that only reasonable and necessary expenses may be eligible for inclusion in the electric utility's future rate proceeding. City of Houston and Cities concluded that expenses incurred for an approved middle mile broadband plan should be subject to review so that parties can determine if the costs were reasonable. Cities pointed out that an integral aspect of rate proceedings is ensuring a utility's incurred expenses for costs of service are reasonable and necessary, and expenses incurred for the implementation of middle mile broadband service should not be exempt from this principle. City of Houston and Cities argued that the proposed revision would eliminate this review.

OPUC also recommended the Joint Utilities' recommendation for proposed paragraph (g)(1) be rejected. OPUC noted that base rate proceedings investigate the finances and prudence of decision making by a utility. In contrast, OPUC noted, the term "prudence" is not found in the proposed rule. Therefore, OPUC opined that it would be inappropriate to make an automatic assumption of prudence for costs approved in a proceeding that does not expressly consider prudence within its parameters. OPUC concluded that these costs should be fully considered, vetted, and litigated in a base rate proceeding without any additional weight given to the initial costs approved in the middle mile broadband plan application.

CenturyLink opposed Joint Utilities recommendations for proposed paragraph (g)(1) as the change would "circumvent statutory safeguards, avoid providing the basic requirements, and sidestep the requisite burden of proof in their electric base rate cases." CenturyLink noted that PURA §43.102 uses the term "eligible" when referring to costs that could be included as invested capital or operating expenses in a base rate proceeding and that the term clearly intends for middle mile broadband costs to undergo the same "reasonable, necessary, and prudent" review as any other cost in a base rate proceeding. CenturyLink maintained that the thorough examination of ratepayer costs performed by the commission in a utility's base rate case should not be circumvented by an alternative proceeding such as commission review of a middle mile broadband application.

#### Commission Response

The commission disagrees with the Joint Utilities' comments regarding the inclusion in the rule of a presumption of reasonableness for a utility's costs related to its plans for middle mile broadband service and a presumption of prudence for investment made in accordance with the plan. Cost recovery is addressed in PURA §43.103, which states that reasonable and necessary expenses are eligible for inclusion in a utility's future rate proceeding and that the commission may allow an electric utility to recover its investment and associated costs in middle mile broadband service.

The commission agrees with the comments of the City of Houston, Cities, OPUC, and CenturyLink that a utility's base rate case proceeding is the appropriate vehicle for the commission's consideration of these issues.

#### Proposed §25.218(g)(2)- Revenue credit to customers

Proposed paragraph (g)(2) requires revenue received by an electric utility from an internet service provider for the use of middle mile broadband service to be applied as a revenue credit

to customers in proportion to the customers' funding of the underlying infrastructure in a proceeding under PURA Chapter 36.

Joint Utilities and ETI noted that in the proposed rule, the revenue that the electric utility receives from the ISP for the middle mile service must be applied as a revenue credit to customers in proportion to the customer's funding of the underlying infrastructure. They pointed out that in the context of a base rate case, such revenue credits or offsets are typically applied to "customer classes" or "rate classes" to ensure proper allocation of the offset. Joint Utilities opined that use of the term "customer" by itself could lead to disputes as to what/who constitutes the "customer" to receive the revenue credit and recommended adding a sentence to paragraph (g)(2) stating "For purposes of this section, the term 'customers' means 'rate classes.'"

#### Commission Response

The commission agrees with the Joint Utilities' comments and modifies the rule accordingly.

The new rule is adopted under PURA §14.002, which provides the commission with the authority to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction and Section 3 of HB 3853 requiring the commission to adopt rules necessary to implement the middle mile broadband requirements imposed by amended Chapter 43 of PURA within 270 days of adoption of HB 3853. The new rule is also adopted under PURA §43.102(b), which requires the commission to approve a middle mile broadband plan that meets the requirements of PURA §43.102(a) and commission rules.

Cross Reference to Statute: Public Utility Regulatory Act §14.001, 14.002 and Chapter 43.

#### §25.218. *Middle Mile Broadband Service.*

(a) Purpose and application. This section implements Public Utility Regulatory Act (PURA) Chapter 43, permitting an electric utility to implement middle mile broadband service for excess fiber capacity. This section applies to an electric utility, including a transmission and distribution utility, regardless of whether the utility is offering customer choice under PURA Chapter 39.

(b) Definitions. The following terms, when used in this section, have the following meanings, unless the context indicates otherwise.

(1) Affected property owner--an owner of real property that is burdened by an easement or other property right owned or leased by an electric utility that will be affected by the installation or operation of middle mile broadband service on an electric delivery system or other facilities of the electric utility. A state or local government body that owns a public right of way and a property owner whose real property is burdened by an existing easement or other property right that permits the provision of third-party middle mile broadband service on an electric utility delivery system are not affected property owners.

(2) Affiliated internet service provider--an internet service provider that is an affiliate of the electric utility that provides or intends to provide a plan for middle mile broadband service under this section.

(3) Broadband service--retail internet service provided by a commercial internet service provider with the capability of providing a download speed of at least 25 megabits per second and an upload speed of at least 3 megabits per second.

(4) Electric delivery system--the power lines and related transmission and distribution facilities constructed to deliver electric energy to the electric utility's customers.

(5) Excess fiber capacity--fiber capacity neither utilized nor reserved for current or planned electric utility operations.

(6) Internet service provider--a commercial entity that provides internet services to end-user customers on a retail basis.

(7) Middle mile broadband service--the provision of excess fiber capacity on an electric utility's electric delivery system or other facilities to an internet service provider to provide broadband service. The term does not include provision of internet service to end-use customers on a retail basis.

(8) Underserved area--means one or more census blocks that are not an unserved area and in which 80 percent or more of end-user addresses in each census block either lack access to broadband service with a download speed not less than 100 megabits per second and an upload speed not less than 20 megabits per second, or lack access to reliable broadband service with those speeds as determined using Federal Communications Commission mapping criteria, if available.

(9) Unserved area--means one or more census blocks, in which 80 percent or more of the end-user addresses in each census block either have no access to broadband service, or lack access to reliable broadband service as determined using Federal Communications Commission mapping criteria, if available.

(c) Authorization for middle mile broadband service.

(1) An electric utility may own, construct, maintain, and operate fiber optic cables and other facilities for providing middle mile broadband service to an internet service provider for the purpose of providing broadband service in unserved and underserved areas consistent with the requirements of this section. The electric utility has the right to decide, in its sole discretion, whether to implement middle mile broadband service and may not be penalized for deciding to implement or not to implement that service.

(2) An electric utility that elects to provide middle mile broadband service must determine on a nondiscriminatory basis which internet service providers may access excess fiber capacity on the electric utility's electric delivery system or other facilities and provide access points to allow connection between the electric utility's electric delivery system or other facilities and the systems of those internet service providers. An electric utility is prohibited from leasing excess fiber capacity to provide middle mile broadband service to an affiliated internet service provider.

(3) The electric utility must provide access to excess fiber capacity only on reasonable and nondiscriminatory terms and conditions that assure the electric utility the unimpaired ability to comply with and enforce all applicable federal and state requirements regarding the safety, reliability, and security of the electric delivery system.

(4) Nothing in this section is intended to restrict an electric utility from owning, constructing, maintaining, or operating fiber optic cables or a broadband system for the electric utility's own use to support the operation of the electric utility's electric delivery system or for other lawful purposes.

(d) Charges. An electric utility that owns and operates facilities to provide middle mile broadband service may lease excess fiber capacity on the electric utility's electric delivery system or other facilities to an internet service provider on a wholesale basis and must charge the internet service provider for the use of the electric utility's system for all costs directly attributable to providing middle mile broadband service. The rates, terms, and conditions of a lease of excess fiber capacity described by this section must be nondiscriminatory. An electric utility may not lease excess fiber capacity to provide middle mile broadband service to an affiliated internet service provider.

(e) Participation by electric utility.

(1) An electric utility may install and operate facilities to provide middle mile broadband service on any part of its electric delivery system or other facilities for internet service providers but may not construct new electric delivery facilities for the purpose of expanding the electric utility's middle mile broadband service.

(2) An electric utility that owns and operates middle mile broadband service:

(A) may lease excess fiber capacity on the electric utility's electric delivery system or other facilities to an internet service provider on a wholesale basis; and

(B) may not provide internet service to end-use customers on a retail basis.

(f) Commission review of electric utility middle mile broadband service plan.

(1) Filing requirements. An electric utility that plans to deploy middle mile broadband service must submit to the commission a written plan that includes:

(A) a demonstration that the middle mile broadband service will be used only for unserved and underserved areas based on a broadband availability map developed by the Broadband Development Office or Federal Communications Commission, to the extent that such a broadband availability map is available, accurate, and developed using criteria reasonably consistent with this section; in the absence of an appropriate map, an electric utility may demonstrate that an area is unserved or underserved using other available and necessary information;

(B) a sworn statement by a cybersecurity expert attesting that the electric utility's cybersecurity has been properly addressed for implementing and providing middle mile broadband service, a copy of the cybersecurity expert's resume or curriculum vitae, and a description of the expert's cybersecurity expertise;

(C) the route of the middle mile broadband service infrastructure proposed for the project;

(D) the location of the electric utility's infrastructure that will be used in connection with the project;

(E) an estimate of potential unserved or underserved broadband customers that would be served by the internet service provider;

(F) the capacity, number of fiber strands, and any other facilities of the middle mile broadband service that will be available to lease to internet service providers;

(G) the estimated cost of the project, including an itemization of engineering costs, construction costs, permitting costs, right-of-way costs, a reasonable allowance for funds used during construction, and all other costs associated with the lease and use of the electric utility's system for middle mile broadband service by internet service providers;

(H) the proposed schedule of construction for the project;

(I) a copy of the lease with the internet service provider for middle mile broadband service and a statement attesting that the lease is in compliance with subsections (c)(2) and (3), and subsection (d) of this section;

(J) a copy of the final order and the docket number for the electric utility's last comprehensive base-rate case proceeding;

(K) a disclosure of all state and federal funds, including but not limited to, subsidies, grants, and tax benefits, credits, or deductions, utilized by the electric utility and internet service provider in association with the provision of middle mile broadband service;

(L) a demonstration that the revenues received from the provision of middle mile broadband service under the plan offset all costs directly attributable to the middle mile broadband service, including but not limited to, construction, maintenance, operations, taxes, other costs, and return;

(M) testimony, exhibits, and other evidence that demonstrate the project will allow for the provision and maintenance of middle mile broadband service to unserved and underserved areas with a sworn statement attesting compliance with subsection (e) of this section;

(N) unless otherwise specified, testimony, exhibits, or other evidence that fully support the information required by subparagraphs (A) - (M) of this paragraph; and

(O) any other information that the applicant considers relevant.

(2) Notice and intervention deadline. On or before the day after an electric utility files its plan, the electric utility must provide notice in accordance with this paragraph. The notice must include the docket number assigned to the electric utility's filed written plan. Within 10 days of the date service of notice is completed, an electric utility must file, in the docket assigned to its written plan, proof of notice to the persons or entities specified under subparagraphs (A) and (B) of this paragraph and a list of such parties by name specifying whether the person or entity qualifies as an affected property owner under subsection (b)(1) of this section. Failure by an electric utility to provide timely notice, as determined by the presiding officer, will toll the intervention deadline under subparagraph (E) of this paragraph until the date timely notice is issued. Affected property owners automatically qualify as intervenors for proceedings under this section.

(A) Notice to affected property owners under this section must:

(i) Be sent by first class mail to the last known address of each affected property owner whose property is listed on the most recent tax roll of each county authorized to levy property taxes against the property and, if available, by electronic service.

(ii) Conspicuously state in plain language:

(I) that the electric utility has determined the recipient is an affected property owner as defined under 16 Texas Administrative Code §25.218(b)(1) and that the mailing is a notice of intent to use the utility's easement for middle mile broadband implementation;

(II) the recipient's status as an affected property owner means the utility's easement or other property right planned by the utility for the provision of third-party middle mile broadband service does not include language permitting middle mile broadband service;

(III) that under PURA Chapter 43 and 16 Texas Administrative Code §25.218, a utility may implement middle mile broadband service without modifying or expanding the easement if the affected property owner does not submit a timely written protest;

(IV) that a written protest may be submitted electronically in the docket for the middle mile broadband proceeding using the interchange on the commission's website or mailed with reference to the docket to Commission's Filing Clerk, Public Utility Commission

of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326;

(V) the project number for the filing of notice of written plans and the docket number for utility's specific middle mile broadband plan;

(VI) that a written protest can be filed for any reason;

(VII) that a written protest is considered timely if submitted not later than the 60th day from the postmarked date of the notice;

(VIII) that a submitted written protest can be retracted at any time by the recipient through a mailed or electronic filing with the commission in the specified docket, or resolved by written agreement with the electric utility;

(IX) that other legal authorization could override the written protest;

(X) an estimated schedule for construction with a statement that the schedule is subject to change;

(XI) the recipient qualifies as an intervenor and may seek to intervene in the docket, and that intervention is not the same as a written protest;

(XII) specify the intervention deadline in accordance with subparagraph (E) of this paragraph; and

(XIII) a link or website address for the commission website for public participation.

(iii) State whether any new fiber optic cables used for middle mile broadband service will be located above or below ground in the easement or other property right.

(B) Notice to the following persons or entities must be sent by first class mail to the last known address of the person or entity or by electronic service:

(i) all parties in the electric utility's last comprehensive base-rate proceeding;

(ii) property owners whose property is listed on the most recent tax roll of each county authorized to levy property taxes against the property and whose real property is burdened by an existing easement, right-of-way or other property right that permits the provision of third-party middle mile broadband service on an electric utility delivery system;

(iii) the Office of Public Utility Counsel; and

(iv) municipalities crossed by or within five miles of the planned project and counties that are crossed by the planned project.

(C) Notice to the parties described under subparagraph (B) of this paragraph must conspicuously state in plain language:

(i) that the electric utility has determined the recipient is not an affected property owner as defined under Chapter 16, Texas Administrative Code §25.218(b)(1), that the mailing is a notice of intent to use the utility's easement for implementation of middle mile broadband service, and that the electric utility's determination may be challenged in the docket listed in the notice if the person or entity files a motion to intervene in the proceeding and that motion to intervene is granted by the presiding officer;

(ii) the intervention deadline in accordance with subparagraph (E) of this paragraph; and

(iii) a link or website address for the commission website for public participation.

(D) The electric utility must file a notice of written middle mile broadband plan proceeding and must include in the notice the docket number for the proceeding. The commission will designate a project number for the filing of notice of plans under this section. This filing serves as notice to all other interested parties.

(E) The intervention deadline is 45 days from the date the utility files its notice of written middle mile broadband plan proceeding in accordance with subparagraph (D) of this paragraph. The lapse of the intervention deadline does not prevent an affected property owner from submitting a written protest under subparagraph (F) of this paragraph.

(F) Protest by affected property owner.

(i) Not later than the 60th day after the postmarked date an electric utility mails notice to affected property owners in accordance with subparagraph (A) of this paragraph, an affected property owner may submit to the electric utility a written protest of the intended use of the easement or other property right for middle mile broadband service by filing the protest with the commission in the docket assigned to the middle mile broadband plan proceeding. For purposes of this section, an electric utility is deemed to have received a written protest filed with the commission in the appropriate docket number.

(ii) If an electric utility receives a written protest directly from an affected property owner, the electric utility must file the protest with the commission within three working days of receipt.

(iii) An electric utility that receives a timely written protest from an affected property owner must not use the easement or other property right for middle mile broadband service unless that use is authorized by law or the protester later retracts its protest or agrees in writing to that use.

(iv) An electric utility that receives a timely written protest from an affected property owner regarding the proposed middle mile broadband plan may cancel the project at any time.

(v) An electric utility that receives any timely written protests must file an update with the commission that any applicable protests have been resolved in accordance with clause (iii) of this subparagraph before implementing its middle mile broadband plan.

(vi) If an affected property owner fails to submit a timely written protest, an electric utility may proceed with a commission-approved plan to provide middle mile broadband service without modifying or expanding the easement for the property owner.

(3) Commission processing of electric utility's plan.

(A) The commission must approve, modify, or reject an electric utility's middle mile broadband plan submitted to the commission under this section not later than the 181st day after the date all information necessary for the plan to be deemed materially sufficient was filed.

(B) Following the filing of a plan by an electric utility under this section, the commission may review the electric utility's plan for middle mile broadband service under subsection (f) of this section or refer the application to the State Office of Administrative Hearings (SOAH). Upon referral to SOAH:

(i) The commission delegates authority to the presiding officer to deem plans sufficient, approve plans, and modify approved plans filed under this subsection through a notice of approval under §22.35(b)(1) (relating to Informal Disposition) of this title.

(ii) The presiding officer will review for sufficiency the electric utility's plan for middle mile broadband service under paragraph (1) of this subsection and notice to potential intervenors under paragraph (2) of this subsection.

(iii) The presiding officer must establish a procedural schedule that will enable the commission to, approve, modify, or reject the plan not later than the 181st day after the date all information necessary for the plan to be deemed materially sufficient was filed.

(C) A motion to find a plan filing materially deficient must be filed no later than seven days after the intervention deadline. The motion must specify the nature of the deficiency, the relevant portions of the plan, and cite the particular requirement under paragraph (1) of this subsection with which the plan is alleged not to comply. The electric utility's response to a motion to find a plan materially deficient must be filed no later than five working days after such motion is received.

(D) An approved plan may be updated or amended subject to commission approval in accordance with this subsection.

(g) Cost recovery for deployment of middle mile broadband facilities.

(1) An electric utility's investment in facilities installed by that electric utility to provide middle mile broadband service under a plan approved by the commission under this section is eligible for inclusion in the electric utility's invested capital.

(2) In a proceeding under PURA Chapter 36, revenue received by an electric utility from an internet service provider for the use of middle mile broadband service must be applied as a revenue credit to customers in proportion to the customers' funding of the underlying infrastructure. For purposes of this paragraph, the term 'customers' refers to 'rate classes.'

(3) An electric utility submitting a plan must ensure that revenues received by the electric utility from the provision of middle mile broadband service offset all costs directly attributable to the middle mile broadband service, including but not limited to, construction, maintenance, operations, taxes, other costs, and return.

(4) If revenues received by an electric utility from an internet service provider for the use of middle mile broadband service are insufficient to offset the costs under paragraph (3) of this subsection, the utility must ensure that its regulated rates prevent ratepayer cross-subsidization.

(h) Reliability of electric systems maintained.

(1) An electric utility that installs and operates facilities to provide middle mile broadband service must employ all reasonable measures to ensure that the operation of the middle mile broadband service does not interfere with or diminish the reliability of the electric utility's electric delivery system.

(2) If a disruption in the provision of electric service occurs, the electric utility is governed by the terms and conditions of the retail electric delivery service tariff.

(3) The electric utility may take all necessary actions regarding its middle mile broadband service and the facilities required in the provision of that service to address circumstances that may pose health, safety, security, or reliability concerns.

(4) At all times, the provision of broadband service is secondary to the reliable provision of electric delivery services.

(5) Except as provided by contract or tariff, an electric utility is not liable to any person, including an internet service provider,

for any damages, including direct, indirect, physical, economic, exemplary, or consequential damages, including loss of business, loss of profits or revenue, or loss of production capacity caused by a fluctuation, disruption, or interruption of middle mile broadband service that is caused in whole or in part by:

(A) force majeure; or

(B) the electric utility's provision of electric delivery services, including actions taken by the electric utility to ensure the reliability and security of the electric delivery system and actions taken in response to address all circumstances that may pose health, safety, security, or reliability concerns.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2022.

TRD-202201119

Andrea Gonzalez

Rules Coordinator

Public Utility Commission of Texas

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Proposal publication date: December 31, 2021

For further information, please call: (512) 936-7244



## TITLE 19. EDUCATION

### PART 2. TEXAS EDUCATION AGENCY

#### CHAPTER 61. SCHOOL DISTRICTS

##### SUBCHAPTER BB. COMMISSIONER'S RULES ON REPORTING REQUIREMENTS

###### 19 TAC §61.1027

The Texas Education Agency (TEA) adopts an amendment to §61.1027, concerning report on the number of educationally disadvantaged students for calculating the compensatory education allotment. The amendment is adopted without changes to the proposed text as published in the January 28, 2022 issue of the *Texas Register* (47 TexReg 247) and will not be republished. The adopted amendment will allow students participating in virtual learning in the 2021-2022 school year to generate state compensatory education allotment funds.

**REASONED JUSTIFICATION:** Section 61.1027 establishes requirements for school districts to report the number of educationally disadvantaged students attending campuses not participating in the National School Lunch Program to derive an eligible student count by an alternative method for the purpose of receiving the compensatory education allotment.

Some students who are being taught through a virtual instruction setting during the 2021-2022 school year may not generate certain types of state funding, including compensatory education allotment funds. The adopted amendment will allow such students to generate state compensatory education allotment funds for the 2021-2022 school year in order to provide the students with the additional services they may need. School districts will be required to report the students through the Texas Student Data System Public Education Information Management System with

average daily attendance (ADA) eligibility code 9, Enrolled, Not in Membership Due to Virtual Learning.

**SUMMARY OF COMMENTS AND AGENCY RESPONSES:** The public comment period on the proposal began January 28, 2022, and ended February 28, 2022. Following is a summary of the public comment received and the agency response.

**Comment:** An individual asked if students coded with ADA eligibility code 9 would be eligible for other state allotments.

**Response:** The agency provides the following clarification. The amendment to §61.1027 allows for certain students who are enrolled but not in membership to be served by the local educational agency (LEA) and receive compensatory education funding. The LEA would be required to meet the needs of the student if the student qualifies for other supports such as special education or bilingual/English as a second language services. An FAQ document that provides more information regarding ADA eligibility code 9 is available on the TEA website at <https://tea.texas.gov/sites/default/files/covid/Non-TXVSN-Remote-Instruction.pdf>.

**STATUTORY AUTHORITY.** The amendment is adopted under Texas Education Code, §48.104, which provides funding for the compensatory education program based on students meeting certain criteria.

**CROSS REFERENCE TO STATUTE.** The amendment implements Texas Education Code, §48.104.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 30, 2022.

TRD-202201087

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

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Proposal publication date: January 28, 2022

For further information, please call: (512) 475-1497



## TITLE 22. EXAMINING BOARDS

### PART 17. TEXAS STATE BOARD OF PLUMBING EXAMINERS

#### CHAPTER 365. LICENSING AND REGISTRATION

##### 22 TAC §§365.2, 365.4, 365.6, 365.10, 365.13, 365.16 - 365.18

The Texas State Board of Plumbing Examiners (Board) in a duly noticed meeting on March 24, 2022, adopted the repeal of 22 Texas Administrative Code §365.2 relating to Exemptions; 22 Texas Administrative Code §365.4 relating to Issuance of License, Registration or Endorsement; 22 Texas Administrative Code §365.6 relating to Expiration of License, Registration or Endorsement; 22 Texas Administrative Code §365.10 relating to Application for License, Registration or Endorsement after Revocation; 22 Texas Administrative Code §365.13 relating to Licensing or Registration of Individuals in Default on a Guarant-

teed Student Loan or in Arrears on Child Support Payments; 22 Texas Administrative Code §365.16 relating to Board Approval of Course Providers for Continuing Professional Education Programs; 22 Texas Administrative Code §365.17 relating to Board Approval of Course Instructors for Continuing Professional Education Programs; and 22 Texas Administrative Code §365.18 relating to Publishers of Course Materials for Continuing Professional Education Programs. The repeals at 22 TAC §§365.2, 365.4, 365.6, 365.10, 365.13, and 365.16 - 365.18 are adopted without changes to the proposed text as published in the October 15, 2021, issue of the *Texas Register* (46 TexReg 7017). The rules will not be republished.

#### JUSTIFICATION

The adopted repeals eliminate possible industry and public confusion by removing duplicate, obsolete, and inactive rules. The repeal of §365.2 eliminates duplicate exemption language found in §§1301.051-.058 of the Texas Occupations Code. The repeal of §365.4 eliminates duplicate language found in §§1301.352, 1301.359, and 1301.401 of the Texas Occupations Code. The repeal of §365.6 eliminates duplicate language found in §§1301.403, 1301.404, and 1301.405 of the Texas Occupations Code. The repeal of §365.10(a) - (c) eliminates duplicate language found in §1301.451 of the Texas Occupations Code. The repeal of §365.10(d) refers to the Enforcement Committee, which no longer exists as a result of House Bill 636 (HB 636) passed by the 87th Legislature, Regular Session (2021). The repeal of §365.13(a) - (e) eliminates provisions rendered obsolete by Senate Bill (SB) 37 passed by the 86th Legislature, Regular Session (2019) which amended Texas Occupations Code §56.003 so that a licensing authority may not take disciplinary action against a person based on the person's default on a student loan or breach of a student loan repayment contract or scholarship contract. The repeal at §365.13(f) - (g) eliminates provisions that are addressed in §232.0135 of the Texas Family Code which makes its inclusion in the rules redundant. The repeal of §§365.16, 365.17, and 365.18 eliminate provisions rendered obsolete by statutory change. These rules provide for Board approval of continuing education and training programs, continuing education instructions, and provisions for publishers of course material. As a result of HB 636, the Board was granted explicit rule making authority to set the minimum curriculum standards for continuing education and training programs, and qualification for continuing education instructors. Notably, HB 636 did not grant the Board explicit rule making authority to regulate publishers of material. HB 636 also moved administrative approval of course providers and instructors to the Executive Director. Accordingly, the Board has determined that Rule repeals at §§365.16, 365.17 and 365.18 are appropriate given the changes implemented by HB 636.

#### HOW THE RULES WILL FUNCTION

The adopted repeals allow the efficient implementation of new rules to support statutory changes to continuing education and the efficient regulation of the program.

#### SUMMARY OF COMMENTS

No comments were received on the proposed repeals.

#### STATUTORY AUTHORITY

The repeals are adopted under the authority of §1301.251(2) of the Occupations Code, which requires the Board to adopt and enforce rules necessary to administer and enforce Chapter 1301 of the Occupations Code (Plumbing License Law).

This repeal affects the Plumbing License Law. No other statute is affected.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 31, 2022.

TRD-202201099

Lisa G. Hill

Executive Director

Texas State Board of Plumbing Examiners

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For further information, please call: (512) 936-5216

## TITLE 26. HEALTH AND HUMAN SERVICES

### PART 1. HEALTH AND HUMAN SERVICES COMMISSION

#### CHAPTER 561. EMPLOYEE MISCONDUCT REGISTRY

##### 26 TAC §§561.1 - 561.9

The Texas Health and Human Services Commission (HHSC) adopts new Chapter 561 in Title 26, Part 1, of the Texas Administrative Code (TAC), concerning Employee Misconduct Registry (EMR). The new chapter consists of §§561.1, 561.2, 561.3, 561.4, 561.5, 561.6, 561.7, 561.8, and 561.9.

The new rules are adopted without changes to the proposed text as published in the December 24, 2021, issue of the *Texas Register* (46 TexReg 8900). These rules will not be republished.

#### BACKGROUND AND JUSTIFICATION

The purpose of the new rules is to update and relocate the Employee Misconduct Registry (EMR) rules from 40 TAC Chapter 93 to 26 TAC Chapter 561. The relocation of the rules is necessary to implement Senate Bill 200, 84th Legislature, Regular Session, 2015, which transferred the functions of the Department of Aging and Disability Services (DADS) to HHSC, effective September 1, 2017. The repeal is adopted elsewhere in this issue of the *Texas Register*.

#### COMMENTS

The 31-day comment period ended January 24, 2022.

During this period, HHSC did not receive any comments regarding the proposed new rules.

#### STATUTORY AUTHORITY

The new rules are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and by Texas Health and Safety Code Chapter 253, and specifically §253.007, Employee Misconduct Registry, which requires HHSC to establish an employee misconduct registry and establish certain rules to implement the chapter.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TRD-202201144

Karen Ray

Chief Counsel

Health and Human Services Commission

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For further information, please call: (512) 438-3161



## TITLE 30. ENVIRONMENTAL QUALITY

### PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

#### CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §§114.1, 114.50, and 114.82.

Amendments to §§114.1, 114.50, and 114.82 are adopted *without changes* to the proposed text as published in the December 3, 2021, issue of the *Texas Register* (46 TexReg 8204) and, therefore, will not be republished.

Amended §§114.1, 114.50, and 114.82 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP) in a future SIP revision.

Background and Summary of the Factual Basis for the Adopted Rules

Senate Bill (SB) 604, 86th Texas Legislature, 2019, added digital license plates to Chapter 504 of the Texas Transportation Code (TTC). This adopted rulemaking will update TCEQ rules to be consistent with the TTC, relating to the display of a vehicle's registration insignia for certain commercial fleet or governmental entity vehicles on a digital license plate in lieu of attaching the registration insignia to the vehicle's windshield.

The inspection and maintenance (I/M) rules require the TCEQ to implement the I/M program in conjunction with the Texas Department of Public Safety (DPS). Currently, motorists are required to demonstrate compliance with the I/M program by displaying a current valid vehicle registration insignia sticker affixed to the vehicle's windshield, a current valid vehicle inspection report (VIR), or other form of proof authorized by the DPS. The I/M rules also require denying renewal of registration until a vehicle complies with I/M program requirements.

Demonstrating Noninterference under Federal Clean Air Act, §110(l)

The adopted amendments to Chapter 114 will allow a digital license plate in lieu of attaching the registration insignia to the vehicle's windshield. Because the emissions inspection is still required within 90 days of the registration expiration, these amendments are not intended or expected to impact the compliance rate and the effectiveness of the I/M program. The adopted rule-

making will not negatively impact the state's progress towards attainment of the 2008 and 2015 eight-hour ozone National Ambient Air Quality Standards.

#### Section by Section Discussion

The following adopted amendments will ensure compliance with Chapter 504 of the TTC and that proof of compliance with I/M requirements are consistent between the TCEQ, the Texas Department of Motor Vehicles (DMV), and the DPS.

The commission adopts non-substantive changes to update the rules in accordance with current *Texas Register* style and format requirements, improve readability, establish consistency in the rules, and conform to the standards in the Texas Legislative Council Drafting Manual, September 2020. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

#### §114.1, Definitions

The definition for vehicle registration insignia sticker included language that it be affixed on the windshield of a vehicle. The adopted revisions removed the restrictive language and added language to allow for alternative forms of proof of compliance with I/M requirements provided for by the DPS or the DMV.

#### §114.50, Vehicle Emissions Inspection Requirements

The adopted revisions to §114.50(b)(1)(B) removed language for affixing the vehicle registration insignia sticker to the vehicle windshield. In addition, the adopted revisions added language to allow for different forms of proof of compliance with I/M requirements provided by the DPS and the DMV.

#### §114.82, Control Requirements

The adopted revisions to §114.82(a)(2) removed language for affixing the vehicle registration insignia sticker to the vehicle windshield. In addition, the adopted revisions added language to allow for different forms of proof of compliance with I/M requirements provided by the DPS and the DMV.

#### Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code (TGC), §2001.0225, and determined that the adopted rules do not meet the definition of a "Major environmental rule." TGC, §2001.0225(g)(3), states that a "Major environmental rule" is "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 adopted rulemaking does not constitute a major environmental rule under TGC, §2001.0225(g)(3), because: (1) the specific intent of the adopted rulemaking is not to protect the environment or reduce risks to human health from environmental exposure, but rather to modify administrative aspects of an existing program by implementing SB 604, which allows the display of a vehicle's registration insignia for certain commercial fleet or governmental entity vehicles on a digital license plate in lieu of attaching the registration insignia to the vehicle's windshield; and (2) as discussed in the Fiscal Note, Public Benefits and Costs, Small Business Regulatory Flexibility Analysis, and the Local Employment Impact Statement sections of this preamble, the adopted rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, compe-

tion, or jobs, nor will the adopted rules adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state because the amendments are merely administrative changes to the existing program.

Additionally, the adopted rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule.

TGC, §2001.0225, applies only to a major environmental rule which: (1) exceeds a standard set by federal law, unless the rule is specifically required by state law; (2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; (3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law.

The specific intent of the adopted rulemaking is to implement applicable sections of SB 604, relating to the display of a vehicle's registration insignia. SB 604 allows the display of a vehicle's registration insignia for certain commercial fleet or governmental entity vehicles on a digital license plate in lieu of attaching the registration insignia to the vehicle's windshield. The adopted rulemaking: (1) does not exceed a standard set by federal law; (2) does not exceed an express requirement of state law; (3) is not adopted solely under the general powers of the agency; and (4) does not exceed a requirement of a delegation agreement or contract to implement a state and federal program. Because the adopted rulemaking is not a major environmental rule, it is not subject to a regulatory impact analysis under TGC, §2001.0225.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the regulatory impact analysis determination.

#### Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an analysis of whether the adopted rules constitute a taking under TGC, Chapter 2007. The commission's preliminary assessment indicates TGC, Chapter 2007, does not apply.

Under TGC, §2007.002(5), taking means: (A) 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 Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) 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 (ii) 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 specific purpose of the adopted rulemaking is to implement applicable sections of SB 604, relating to the display of a vehicle's registration insignia sticker. SB 604 allows the display of a vehicle's registration insignia for certain commercial fleet or governmental entity vehicles on a digital license plate in lieu of attaching the registration insignia to the vehicle's windshield.

Therefore, the adopted rulemaking does not have any impact on private real property.

Promulgation and enforcement of the adopted rulemaking will be neither a statutory nor a constitutional taking of private real property. These rules will not be burdensome, restrictive, or limiting of rights to private real property because the adopted rules do not affect a landowner's rights in private real property. This rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these rules will not constitute a taking under TGC, Chapter 2007.

#### Consistency with the Coastal Management Program

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(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 rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the CMP.

#### Public Comment

The comment period opened on December 3, 2021, and the commission offered a public hearing on January 4, 2022. The comment period closed on January 5, 2022. The commission received no comments.

## SUBCHAPTER A. DEFINITIONS

### 30 TAC §114.1

#### Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, General Powers; TWC, §5.103, Rules; and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The revisions are also adopted under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of THSC, Chapter 382 (Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The revisions are also adopted under THSC, §382.002, 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; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; THSC, Chapter 382, Subchapter G, Vehicle Emissions, which provides the commission the authority by rule

to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act, 42 United States Code, §§7401 et seq.; and THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorizes the commission to adopt an inspection and maintenance program for participating early action compact counties.

The rule revisions implement amendments to Texas Transportation Code, §§504.151 - 504.157, which were amended by Senate Bill 604, 86th Texas Legislature, 2019.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Charmaine Backens

Deputy Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-0600



## SUBCHAPTER C. VEHICLE INSPECTION AND MAINTENANCE; LOW INCOME VEHICLE REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE RETIREMENT PROGRAM; AND EARLY ACTION COMPACT COUNTIES

### DIVISION 1. VEHICLE INSPECTION AND MAINTENANCE

#### 30 TAC §114.50

##### Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, General Powers; TWC, §5.103, Rules; and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The revisions are also adopted under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of THSC, Chapter 382 (Texas Clean Air Act), and to adopt rules that differentiate among particular conditions, particular sources, and particular areas of the state. The revisions are also adopted under THSC, §382.002, 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; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.019, Methods

Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; THSC, Chapter 382, Subchapter G, Vehicle Emissions, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act, 42 United States Code, §§7401 et seq.; and THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorizes the commission to propose an inspection and maintenance program for participating early action compact counties.

The rule revisions implement amendments to Texas Transportation Code, §§504.151 - 504.157, which were amended by Senate Bill 604, 86th Texas Legislature, 2019.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Charmaine Backens

Deputy Director, Environmental Law Division

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## DIVISION 3. EARLY ACTION COMPACT COUNTIES

### 30 TAC §114.82

#### Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, General Powers; TWC, §5.103, Rules; and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The revisions are also adopted under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The revisions are also adopted under THSC, §382.002, 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; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; THSC, Chapter 382, Sub-

chapter G, Vehicle Emissions, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act, 42 United States Code, §§7401 et seq.; and THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorizes the commission to propose an inspection and maintenance program for participating early action compact counties.

The rule revisions implement amendments to Texas Transportation Code, §§504.151 - 504.157, which were amended by Senate Bill 604, 86th Texas Legislature, 2019.

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Charmaine Backens

Deputy Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-0600



## CHAPTER 305. CONSOLIDATED PERMITS SUBCHAPTER P. ADDITIONAL CONDITIONS FOR TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM (TPDES) PERMITS

### 30 TAC §§305.542 - 305.544

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§305.542 - 305.544.

New §§305.542 - 305.544 are adopted *without changes* to the text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6884), and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking is being adopted in response to a quadrennial rule review wherein the commission determined that 30 TAC Chapter 308 Subchapters C and J, were obsolete (Non-Rule Project Number 2019-034-308-OW; December 13, 2019, issue of the *Texas Register* (44 TexReg 7718)). Additionally, the executive director identified several rules related to the Texas Pollutant Discharge Elimination System (TPDES) program that would be more appropriately consolidated into Chapter 305, Subchapter P. These rules include 30 TAC Chapters 308, 314, and 315, which contain adoption by reference of federal regulations similar to Chapter 305, Subchapter P. Consolidating these rules will improve the overall organization of TCEQ rules related to the TPDES program.

This rulemaking adopts by reference federal regulations that were previously adopted by reference in Chapters 308, 314, and 315, except for Chapter 308, Subchapters C and J, which were identified as obsolete. Subchapter C in its entirety and Subchapter J as relating to compliance dates were not re-proposed in this rulemaking. Subchapter J relating to cooling water

intakes will be adopted in the new rule §305.544. Additionally, this rulemaking adopts by reference federal regulations related to cooling water intake structures at oil and gas facilities (40 Code of Federal Regulations (CFR) Part 125, Subpart N) that were not previously adopted in Chapter 308 because TCEQ didn't have authority to regulate oil and gas facilities until the United States Environmental Protection Agency (EPA) granted TPDES program authority for wastewater discharges from oil and gas facilities in January 2021. Concurrently with this rulemaking, the commission is repealing 30 TAC Chapters 308, 314, and 315.

Section by Section Discussion

#### §305.542. *Pretreatment Standards.*

Adopted new §305.542 adopts by reference 40 CFR Part 403, as amended, with the following exceptions. The commission is not adopting 40 CFR §§403.16 or 40 CFR §403.19 because 40 CFR §403.16 is less stringent than 30 TAC §305.535 and 40 CFR §403.19 expired in 2005. Additionally, the adopted rule states that where 40 CFR §403.11 provides procedures for requesting and holding a public hearing, the commission shall instead require notice of and hold a public meeting. Public meetings conducted by the executive director provide an opportunity for public comment and follow the procedures described in 40 CFR §403.11.

The federal regulations in 40 CFR Part 403 establish responsibilities of Federal, State, and local government, industry, and the public to implement National Pretreatment Standards to control pollutants which pass through or interfere with treatment processes in Publicly Owned Treatment Works or which may contaminate sewage sludge.

The federal regulations in 40 CFR Part 403, which were in effect on the date of TPDES program authorization (i.e., September 1998), were previously adopted by reference, as amended, in 30 TAC Chapter 315. EPA amended 40 CFR Part 403 several times after 1998. The adopted rule adopts by reference the most current version of 40 CFR Part 403 adopted on November 2, 2020, as amended.

#### §305.543. *Toxic Pollutant Effluent Standards and Prohibitions.*

Adopted new §305.543 adopts by reference 40 CFR Part 129, Subpart A, as in effect on the date of TPDES program authorization, as amended. No changes to these federal regulations have been adopted by EPA since the date of TPDES program authorization in September 1998. The federal regulations in 40 CFR Part 129 establish effluent standards or prohibitions for the discharge of toxic pollutants.

#### §305.544. *Criteria and Standards for Texas Pollutant Discharge Elimination System Permits.*

Adopted new §305.544(1), (2), (4), and (8) adopts by reference 40 CFR Part 125, Subparts A, B, G, and M, respectively, as each of these subparts were in effect on the date of TPDES program authorization, as amended. No changes to these federal regulations have been adopted by EPA since the date of TPDES program authorization in September 1998.

The federal regulations in 40 CFR Part 125, Subpart A establish criteria and standards for the imposition of technology-based treatment requirements in permits under Clean Water Act (CWA) §301(b), including the application of EPA promulgated effluent limitations and case-by-case determinations of effluent limitations under CWA §402(a)(1). 40 CFR Part 125, Subpart B estab-

lishes guidelines under CWA §318 and §402 for approval of any discharge of pollutants associated with an aquaculture project. 40 CFR Part 125, Subpart G establishes the criteria to be applied by EPA in acting on CWA §301(h) requests for modifications to the secondary treatment requirements. It also establishes special permit conditions which must be included in any permit incorporating a CWA §301(h) modification of the secondary treatment requirements. 40 CFR Part 125, Subpart M establishes guidelines for issuance of permits for the discharge of pollutants from a point source into the territorial seas, the contiguous zone, and the oceans.

Adopted new §305.544(3) adopts by reference 40 CFR Part 125, Subpart D, as amended. The federal regulations in 40 CFR Part 125, Subpart D establish the criteria and standards to be used in determining whether effluent limitations alternative to those required by promulgated EPA effluent limitations guidelines under CWA §301 and §304 (referred to as "national limits") should be imposed on a discharger because factors relating to the discharger's facilities, equipment, processes or other factors related to the discharger are fundamentally different from the factors considered by EPA in development of the national limits.

The federal regulations in 40 CFR Part 125, Subpart D, which were in effect on the date of TPDES program authorization (i.e., September 1998), were previously adopted by reference, as amended, in 30 TAC Chapter 308. EPA amended 40 CFR Part 125, Subpart D after 1998. The adopted rule adopts by reference the most current version of 40 CFR Part 125, Subpart D adopted on May 15, 2000, as amended.

Adopted new §305.544(5) adopts by reference 40 CFR Part 125, Subpart H, as amended. The federal regulations in 40 CFR Part 125, Subpart H describes the factors, criteria and standards for the establishment of alternative thermal effluent limitations under CWA §316(a) in permits issued under CWA §402(a).

The federal regulations in 40 CFR Part 125, Subpart H, which were in effect on the date of TPDES program authorization (i.e., September 1998), were previously adopted by reference, as amended, in 30 TAC Chapter 308. EPA amended 40 CFR Part 125, Subpart H after 1998. The adopted rule adopts by reference the most current version of 40 CFR Part 125, Subpart H adopted on May 15, 2000, as amended.

Adopted new §305.544(6) adopts by reference 40 CFR Part 125, Subpart I, as amended. The federal regulations in 40 CFR Part 125, Subpart I establish requirements that apply to the location, design, construction, and capacity of cooling water intake structures at new facilities. The term "new facility" is defined in 40 CFR §125.83.

The federal regulations in 40 CFR Part 125, Subpart I, which were in effect on the date of TPDES program authorization (i.e., September 1998), were previously adopted by reference, as amended, in 30 TAC Chapter 308. EPA amended 40 CFR Part 125, Subpart I after 1998. The adopted rule adopts by reference the most current version of 40 CFR Part 125, Subpart I adopted on August 15, 2014, as amended.

Adopted new §305.544(7) adopts by reference 40 CFR Part 125, Subpart J, as amended. The federal regulations in 40 CFR Part 125, Subpart J establish the requirements that apply to cooling water intake structures at existing facilities. The term "existing facility" is defined in 40 CFR §125.92.

The federal regulations in 40 CFR Part 125, Subpart J, which were in effect on the date of TPDES program authorization

(i.e., September 1998), were previously adopted by reference, as amended, in 30 TAC Chapter 308. EPA repealed 40 CFR Part 125, Subpart J after 1998 and subsequently adopted new regulations in 40 CFR Part 125, Subpart J. The adopted rule adopts by reference the most current version of 40 CFR Part 125, Subpart J adopted on August 15, 2014, as amended.

Adopted new §305.544(9) adopts by reference 40 CFR Part 125, Subpart N, as amended. The federal regulations in 40 CFR Part 125, Subpart N establish requirements that apply to the location, design, construction, and capacity of cooling water intake structures at new offshore oil and gas extraction facilities. The term "new offshore oil and gas extraction facility" is defined in 40 CFR §125.92. The adopted rule adopts by reference the current version of 40 CFR Part 125, Subpart N adopted on June 16, 2006, as amended.

#### Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §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.

Chapter 308, Subchapters A, B, D, G, H, I, and M that are adopted for repeal will be re-adopted within Chapter 305, Subchapter P in adopted new §§305.542 - 305.544 to improve the overall organization of TCEQ rules related to the TPDES program. This rulemaking is also being adopted in response to a quadrennial rule review wherein the commission determined that Chapter 308, Subchapters C and J were obsolete. Subchapter C in its entirety and Subchapter J as relating to compliance dates will not be re-adopted in this rulemaking. Subchapter J relating to cooling water intakes will be re-adopted in the new §305.544. In addition, the adopted rulemaking adopts by reference 40 CFR Part 125, Subpart N that was not previously adopted in Chapter 308. Therefore, it is not anticipated that the adopted new rules would 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 commission concludes that the adopted new rules do not meet the definition of a "Major environmental rule."

Furthermore, even if the adopted new rules did meet the definition of a major environmental rule, the adopted new rules would not be subject to Texas Government Code, §2001.0225, because they do not meet any of the four applicable requirements specified in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), applies to a rule adopted by an agency, 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 adopted new rules of §§305.542 - 305.544

would not cause any of the results listed in Texas Government Code, §2001.0225(a).

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because the adopted new rules would not constitute a major environmental rule, a regulatory impact analysis is not required.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the regulatory impact analysis determination.

#### Takings Impact Assessment

The commission evaluated the rulemaking adoption and performed an assessment of whether the rulemaking adoption constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted action is to consolidate rules from Chapters 308 (with the exception of Subchapters C and J), 314, and 315 into Chapter 305, Subchapter P. Consolidating these rules will improve the overall organization of TCEQ rules related to the TPDES program. In addition, the rulemaking adoption will adopt by reference 40 CFR Part 125, Subpart N, that was not previously adopted in Chapter 308. The rulemaking adoption will substantially advance this stated purpose. Promulgation and enforcement of this rulemaking adoption will be neither a statutory nor a constitutional taking of private real property because the rulemaking adoption will not affect real property.

In particular, there are no burdens imposed on private real property, and the rulemaking adoption will consolidate rules for the purpose of improving organization of TCEQ rules related to the TPDES program. Because the rulemaking adoption will not affect real property, it would 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 adopted new rules. Therefore, this rulemaking adoption will not constitute a taking under Texas Government Code, Chapter 2007.

#### Consistency with the Coastal Management Program

The commission reviewed the rulemaking adoption and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the rulemaking adoption in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22 and found the rulemaking adoption is consistent with the applicable CMP goals and policies.

CMP goals applicable to the rulemaking adoption includes protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and ensuring sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the rulemaking adoption includes policies for discharges of wastewater.

The rulemaking adoption is consistent with the above goals and policies by requiring wastewater discharges to comply with federal regulations established to protect water resources.

Promulgation and enforcement of the rulemaking will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules will be consistent with

these CMP goals and policies and the rulemaking will not create or have a direct or significant adverse effect on any CNRAs.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

#### Public Comment

The commission offered a public hearing on November 9, 2021. The comment period closed on November 9, 2021. No public comments were received.

#### Statutory Authority

The rulemaking is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which states the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; and TWC, §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies, and to protect water quality in the state.

The adopted new rules implement TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, and 26.011.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Charmaine Backens

Deputy Director, Environmental Law Division

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## CHAPTER 308. CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §§308.1, 308.21, 308.31, 308.41, 308.71, 308.81, 308.91, 308.101, and 308.141.

The repeal of §§308.1, 308.21, 308.31, 308.41, 308.71, 308.81, 308.91, 308.101, and 308.141 is adopted *without changes* to the text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6888), and, therefore, will not be republished.

#### Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking is being adopted in response to a quadrennial rule review wherein the commission determined that 30 TAC Chapter 308 Subchapters C and J were obsolete (Non-Rule

Project Number 2019-034-308-OW; December 13, 2019, issue of the *Texas Register* (44 TexReg 7718)). Additionally, the executive director identified several rules related to the Texas Pollutant Discharge Elimination System (TPDES) program that would be more appropriately consolidated into 30 TAC Chapter 305, Subchapter P. These rules include 30 TAC Chapters 308, 314, and 315, which contain adoption by reference of federal regulations similar to 30 TAC Chapter 305, Subchapter P. Consolidating these rules will improve the overall organization of TCEQ rules related to the TPDES program.

This rulemaking adopts the repeal of Chapter 308. Concurrently with this rulemaking, the commission is adopting new §305.544 to adopt by reference federal regulations that were previously adopted by reference in Chapter 308, except Subchapters C and J which were determined to be obsolete. Subchapter C in its entirety and Subchapter J as relating to compliance dates will not be re-proposed. Subchapter J relating to cooling water intakes will be adopted in the new rule §305.544.

#### Section by Section Discussion

The commission adopts the repeal of §§308.1, 308.21, 308.31, 308.41, 308.71, 308.81, 308.91, 308.101, and 308.141. These sections adopt by reference federal regulations in 40 Code of Federal Regulations (CFR) Part 125. In a concurrent rulemaking, the commission is adopting new §305.544 to adopt by reference 40 CFR Part 125.

#### Final Regulatory Impact Determination

The commission reviewed the adopted repeals in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the repeals are not subject to Texas Government Code, §2001.0225, because they do 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.

Chapter 308 Subchapters A, B, D, G, H, I, and M are adopted for repeal because the executive director has identified them as one of several rules related to the TPDES program that would be more appropriately consolidated into Chapter 305, Subchapter P. Chapter 308 contains adoption by reference of federal regulations, similar to Chapter 305, Subchapter P. Consolidation would improve the overall organization of TCEQ rules related to the TPDES program. This rulemaking is also being adopted in response to a quadrennial rule review wherein the commission determined that Chapter 308 Subchapters C and J were obsolete. Therefore, it is not anticipated that the adopted repeals would 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 commission concludes that the adopted repeals do not meet the definition of a "Major environmental rule."

Furthermore, even if the adopted repeals did meet the definition of a major environmental rule, the adopted repeals would not be subject to Texas Government Code, §2001.0225, because they do not meet any of the four applicable requirements specified in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) applies to a rule adopted by an agency, 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 adopted repeals of §§308.1, 308.21, 308.31, 308.41, 308.71, 308.81, 308.91, 308.101, and 308.141 would not cause any of the results listed in Texas Government Code, §2001.0225(a).

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because the adopted repeals would not constitute a major environmental rule, a regulatory impact analysis is not required.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the regulatory impact analysis determination.

#### Takings Impact Assessment

The commission evaluated the adopted repeals and performed an assessment of whether the repeals constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted action is to repeal rules that will be more appropriately consolidated into Chapter 305, Subchapter P. Chapter 308 contains adoption by reference of federal regulations, similar to Chapter 305, Subchapter P. Consolidation will improve the overall organization of TCEQ rules related to the TPDES program. In addition, this rulemaking is also being adopted in response to a quadrennial rule review wherein the commission determined that Chapter 308, Subchapters C and J were obsolete. These subchapters will not be re-proposed or consolidated into Chapter 305, Subchapter P. The adopted repeals will substantially advance these stated purposes. Promulgation and enforcement of these adopted repeals will be neither a statutory nor a constitutional taking of private real property because the adopted repeals will not affect real property.

In particular, there are no burdens imposed on private real property, and the adopted repeals will eliminate both unnecessary rules and obsolete rules. Because the repeals would not affect real property, they would 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 repeals. Therefore, these adopted repeals will not constitute a taking under Texas Government Code, Chapter 2007.

#### Consistency with the Coastal Management Program

The commission reviewed the rulemaking adoption and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted repeal in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22 and found the rulemaking adoption is consistent with the applicable CMP goals and policies.

CMP goals applicable to the rulemaking adoption include protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and ensuring sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applica-

ble to the rulemaking adoption include policies for discharges of wastewater.

The rulemaking adoption is consistent with the above goals and policies by requiring wastewater discharges to comply with federal regulations established to protect water resources.

Promulgation and enforcement of the rulemaking will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules will be consistent with these CMP goals and policies and the rulemaking will not create or have a direct or significant adverse effect on any CNRAs.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

#### Public Comment

The commission offered a public hearing on November 9, 2021. The comment period closed on November 9, 2021. No public comments were received.

## SUBCHAPTER A. CRITERIA AND STANDARDS FOR IMPOSING TECHNOLOGY-BASED TREATMENT REQUIREMENTS

### 30 TAC §308.1

#### Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which states the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; TWC, §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The adopted repeal implements TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, 26.011, and 26.027.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Charmaine Backens

Deputy Director, Environmental Law Division

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## SUBCHAPTER B. CRITERIA FOR ISSUANCE OF PERMITS TO AQUACULTURE PROJECTS

### 30 TAC §308.21

#### Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which states the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; TWC, §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The adopted repeal implements TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, 26.011, and 26.027.

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## SUBCHAPTER C. CRITERIA AND EXTENDING COMPLIANCE DATES FOR FACILITIES INSTALLING INNOVATIVE TECHNOLOGY UNDER THE CLEAN WATER ACT, §301(K)

### 30 TAC §308.31

#### Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which states the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and

the natural resources of the state; TWC, §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The adopted repeal implements TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, 26.011, and 26.027.

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## SUBCHAPTER D. CRITERIA AND STANDARDS FOR DETERMINING FUNDAMENTALLY DIFFERENT FACTORS UNDER THE CLEAN WATER ACT, §301(B)(1)(A), (B)(2)(A), AND (E)

### 30 TAC §308.41

#### Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which states the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; TWC, §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The adopted repeal implements TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, 26.011, and 26.027.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER G. CRITERIA FOR MODIFYING THE SECONDARY TREATMENT

### 30 TAC §308.71

#### Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which states the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; TWC, §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The adopted repeal implements TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, 26.011, and 26.027.

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## SUBCHAPTER H. CRITERIA FOR DETERMINING ALTERNATIVE EFFLUENT LIMITATIONS UNDER THE CLEAN WATER ACT, §316(A)

### 30 TAC §308.81

#### Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission un-

der the TWC and other laws of the state; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which states the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; TWC, §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The adopted repeal implements TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, 26.011, and 26.027.

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## SUBCHAPTER I. CRITERIA APPLICABLE TO COOLING WATER INTAKE STRUCTURES UNDER CLEAN WATER ACT, §316(b)

### 30 TAC §308.91

#### Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which states the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; TWC, §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The adopted repeal implements TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, 26.011, and 26.027.

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For further information, please call: (512) 239-0600

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## SUBCHAPTER J. CRITERIA FOR EXTENDING COMPLIANCE DATES UNDER THE CLEAN WATER ACT, §301(I)

### 30 TAC §308.101

#### Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which states the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; TWC, §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The adopted repeal implements TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, 26.011, and 26.027.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Charmaine Backens

Deputy Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-0600

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## SUBCHAPTER M. OCEAN DISCHARGE CRITERIA

### 30 TAC §308.141

## Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which states the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; TWC, §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The adopted repeal implements TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, 26.011, and 26.027.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Charmaine Backens

Deputy Director, Environmental Law Division

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## CHAPTER 314. TOXIC POLLUTANT EFFLUENT STANDARDS

### 30 TAC §314.1

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §314.1.

The repeal of §314.1 is adopted *without changes* to the text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6894) and, therefore, will not be republished.

#### Background and Summary of the Factual Basis for the Adopted Rule

The executive director identified several rules related to the Texas Pollutant Discharge Elimination System (TPDES) program that would be more appropriately consolidated into 30 TAC Chapter 305, Subchapter P. These rules include 30 TAC Chapters 308, 314, and 315, which contain adoption by reference of federal regulations, similar to 30 TAC Chapter 305, Subchapter P. Consolidating these rules will improve the overall organization of TCEQ rules related to the TPDES program.

This rulemaking adopts the repeal of 30 TAC Chapter 314. Concurrently with this rulemaking, the commission is adopting new 30 TAC §305.543 to adopt by reference federal regulations that were previously adopted by reference in 30 TAC Chapter 314.

## Section Discussion

The commission adopts the repeal of §314.1, which adopts by reference federal regulations in 40 Code of Federal Regulations (CFR) Part 129. In a concurrent rulemaking, the commission is adopting new §305.543 to adopt by reference 40 CFR Part 129.

### Final Regulatory Impact Determination

The commission reviewed the adopted repeal in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the repeal is not subject to Texas Government Code, §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.

Chapter 314 is adopted for repeal because the executive director has identified it as one of several rules related to the TPDES program that would be more appropriately consolidated into Chapter 305, Subchapter P. Chapter 314 contains adoption by reference of federal regulations, similar to Chapter 305, Subchapter P. Consolidation would improve the overall organization of TCEQ rules related to the TPDES program. Therefore, it is not anticipated that the adopted repeal would 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 commission concludes that the adopted repeal does not meet the definition of a "Major environmental rule."

Furthermore, even if the adopted repeal did meet the definition of a major environmental rule, the adopted repeal is not subject to Texas Government Code, §2001.0225, because it does not meet any of the four applicable requirements specified in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) applies to a rule adopted by an agency, 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 adopted repeal of §314.1 will not cause any of the results listed in Texas Government Code, §2001.0225(a).

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because the adopted repeal would not constitute a major environmental rule, a regulatory impact analysis is not required.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the regulatory impact analysis determination.

### Takings Impact Assessment

The commission evaluated the adopted repeal and performed an assessment of whether the adopted repeal constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted action is to repeal a rule that will be more ap-

appropriately consolidated into Chapter 305, Subchapter P. Chapter 314 contains adoption by reference of federal regulations, similar to Chapter 305, Subchapter P. Consolidation will improve the overall organization of TCEQ rules related to the TPDES program. The adopted repeal will substantially advance this stated purpose. Promulgation and enforcement of this adopted repeal will be neither a statutory nor a constitutional taking of private real property because the adopted repeal would not affect real property.

In particular, there are no burdens imposed on private real property, and the adopted repeal will eliminate an unnecessary rule that would be re-proposed and consolidated in Chapter 305, Subchapter P. Because the adopted repeal would not affect real property, it would 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 repeals. Therefore, this adopted repeal will not constitute a taking under Texas Government Code, Chapter 2007.

#### Consistency with the Coastal Management Program

The commission reviewed the rulemaking adoption and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted repeal in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22 and found the rulemaking adoption is consistent with the applicable CMP goals and policies.

CMP goals applicable to the rulemaking adoption include protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and ensuring sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the rulemaking adoption include policies for discharges of wastewater.

The rulemaking adoption is consistent with the above goals and policies by requiring wastewater discharges to comply with federal regulations established to protect water resources.

Promulgation and enforcement of the rulemaking will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules will be consistent with these CMP goals and policies and the rulemaking will not create or have a direct or significant adverse effect on any CNRAs.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

#### Public Comment

The commission offered a public hearing on November 9, 2021. The comment period closed on November 9, 2021. No public comments were received.

#### Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103(a) and §5.105, which provide the com-

mission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which states the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; TWC, §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The adopted repeal implements TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, 26.011, and 26.027.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Charmaine Backens

Deputy Director, Environmental Law Division

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## CHAPTER 315. PRETREATMENT REGULATIONS FOR EXISTING AND NEW SOURCES OF POLLUTION

### SUBCHAPTER A. GENERAL PRETREATMENT REGULATIONS FOR EXISTING AND NEW SOURCES OF POLLUTION

#### 30 TAC §315.1

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §315.1.

The repeal of §315.1 is adopted *without changes* to the text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6896), and, therefore, will not be republished.

#### Background and Summary of the Factual Basis for the Adopted Rule

The executive director identified several rules related to the Texas Pollutant Discharge Elimination System (TPDES) program that would be more appropriately consolidated into 30 TAC Chapter 305, Subchapter P. These rules include 30 TAC Chapters 308, 314, and 315, which contain adoption by reference of federal regulations, similar to 30 TAC Chapter 305, Subchapter P. Consolidating these rules will improve the overall organization of TCEQ rules related to the TPDES program.

This rulemaking adopts the repeal of Chapter 315. Concurrently with this rulemaking, the commission is adopting new §305.542 to adopt by reference federal regulations that were previously adopted by reference in Chapter 315.

#### Section Discussion

The commission adopts the repeal of §315.1 which adopts by reference federal regulations in 40 Code of Federal Regulations (CFR) Part 403. In a concurrent rulemaking, the commission is adopting new §305.542 to adopt by reference 40 CFR Part 403.

#### Final Regulatory Impact Determination

The commission reviewed the adopted repeal in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the repeal is not subject to Texas Government Code, §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.

Chapter 315 is adopted for repeal because the executive director has identified it as one of several rules related to the TPDES program that would be more appropriately consolidated into Chapter 305, Subchapter P. Chapter 315 contains adoption by reference of federal regulations, similar to Chapter 305, Subchapter P. Consolidation would improve the overall organization of TCEQ rules related to the TPDES program. Therefore, it is not anticipated that the adopted repeal would 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 commission concludes that the adopted repeal does not meet the definition of a "Major environmental rule."

Furthermore, even if the adopted repeal did meet the definition of a major environmental rule, the adopted repeal would not be subject to Texas Government Code, §2001.0225, because it does not meet any of the four applicable requirements specified in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) applies to a rule adopted by an agency, 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 adopted repeal of §315.1 would not cause any of the results listed in Texas Government Code, §2001.0225(a).

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because the adopted repeal would not constitute a major environmental rule, a regulatory impact analysis is not required.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the regulatory impact analysis determination.

#### Takings Impact Assessment

The commission evaluated the adopted repeal and performed an assessment of whether the adopted repeal constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted action is to repeal a rule that would be more appropriately consolidated into Chapter 305, Subchapter P. Chapter 315 contains adoption by reference of federal reg-

ulations, similar to Chapter 305, Subchapter P. Consolidation will improve the overall organization of TCEQ rules related to the TPDES program. The adopted repeal will substantially advance this stated purpose. Promulgation and enforcement of this adopted repeal will be neither a statutory nor a constitutional taking of private real property because the adopted repeal will not affect real property.

In particular, there are no burdens imposed on private real property, and the adopted repeal will eliminate an unnecessary rule that will be re-proposed and consolidated in Chapter 305, Subchapter P. Because the adopted repeal will not affect real property, it will 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 repeals. Therefore, this adopted repeal will not constitute a taking under Texas Government Code, Chapter 2007.

#### Consistency with the Coastal Management Program

The commission reviewed the rulemaking adoption and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted repeal in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22 and found the rulemaking adoption is consistent with the applicable CMP goals and policies.

CMP goals applicable to the rulemaking adoption include protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and ensuring sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the rulemaking adoption include policies for discharges of wastewater.

The rulemaking adoption is consistent with the above goals and policies by requiring wastewater discharges to comply with federal regulations established to protect water resources.

Promulgation and enforcement of the rulemaking will not violate or exceed any standards identified in the applicable CMP goals and policies because the rulemaking adoption will be consistent with these CMP goals and policies and the rulemaking will not create or have a direct or significant adverse effect on any CNRAs.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

#### Public Comment

The commission offered a public hearing on November 9, 2021. The comment period closed on November 9, 2021. No public comments were received.

#### Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary

to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which states the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; TWC, §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The adopted repeal implements TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, 26.011, and 26.027.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Charmaine Backens

Deputy Director, Environmental Law Division

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## CHAPTER 321. CONTROL OF CERTAIN ACTIVITIES BY RULE

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §§321.71 - 321.81, 321.91 - 321.97, and 321.211 - 321.220.

Repealed §§321.71 - 321.81, 321.91 - 321.97, and 321.211 - 321.220 are adopted *without changes* to the text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6898) and, therefore, will not be republished.

### Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking is being adopted in response to a quadrennial rule review (Non-Rule Project Number 2019-033-321-OW) wherein the commission determined that Chapter 321, Subchapters E, F, and L were obsolete (December 13, 2019, issue of the *Texas Register* (44 TexReg 7719)).

Chapter 321, Subchapter E regulated wastewater discharges from surface coal mining, preparation, and reclamation activities; Subchapter F regulated wastewater discharges from the shrimp industry; and Subchapter L regulated wastewater discharges from motor vehicles cleaning facilities. These subchapters are obsolete because the Memorandum of Agreement (MOA) between the TCEQ and the United States Environmental Protection Agency (EPA) concerning the National Pollutant Discharge Elimination System (NPDES) program prohibits the TCEQ from issuing wastewater discharge authorizations under these subchapters. The TCEQ authorizes these discharges under either an individual permit or general permit which comply with all necessary NPDES requirements.

### Section by Section Discussion

#### *Subchapter E: Surface Coal Mining, Preparation and Reclamation Activities*

The commission adopts the repeal of §§321.71 - 321.81. The MOA between the TCEQ and the EPA concerning the NPDES program prohibits the TCEQ from issuing wastewater discharge authorizations under this subchapter. The TCEQ authorizes discharges from surface coal mining, preparation and reclamation activities under an individual permit which comply with all necessary NPDES requirements.

#### *Subchapter F: Shrimp Industry*

The commission adopts the repeal of §§321.91 - 321.97. The MOA between the TCEQ and the EPA concerning the NPDES program prohibits the TCEQ from issuing wastewater discharge authorizations under this subchapter. The TCEQ authorizes discharges from shrimp facilities under either an individual permit or general permit which comply with all necessary NPDES requirements.

#### *Subchapter L: Discharges to Surface Waters from Motor Vehicles Cleaning Facilities*

The commission adopts the repeal of §§321.211 - 321.220. The MOA between the TCEQ and the EPA concerning the NPDES program prohibits the TCEQ from issuing wastewater discharge authorizations under this subchapter. The TCEQ authorizes discharges from motor vehicles cleaning facilities under an individual permit which comply with all necessary NPDES requirements.

#### Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rulemaking actions are not subject to that statute because the adopted rules do not meet the criteria for "Major environmental rules" as defined in Texas Government Code, §2001.0225(g)(3). Texas Government Code, §2001.0225 applies only to rules that are specifically intended 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 purpose of this rulemaking adoption is to repeal Chapter 321, Subchapters E, F, and L. Chapter 321, Subchapter E regulated discharges from surface coal mining, preparation, and reclamation activities; Subchapter F regulated discharges from the shrimp industry; and Subchapter L regulated discharges from motor vehicles cleaning facilities. The adopted rulemaking repeals these subchapters pursuant to the MOA between the TCEQ and the EPA concerning the NPDES program. The MOA prohibits the TCEQ from issuing authorizations under these subchapters because they do not entail all NPDES requirements. The TCEQ authorizes the discharges described in Subchapters E, F, and L under an individual permit or general permit which comply with all necessary NPDES requirements. The adopted rulemaking action will promote consistency between federal and state rules.

Furthermore, even if the rulemaking adoption did meet the definition of a "Major environmental rule," it is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicable requirements specified in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) applies only to a state agency's adoption of a major environmen-

tal rule that: (1) exceeds a standard set by federal law, unless state law specifically requires the rule; (2) exceeds an express requirement of state law, unless federal law specifically requires the rule; (3) exceeds 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) is adopted solely under the general powers of the agency instead of under a specific state law.

In this case, the rulemaking adoption does not meet any of these requirements. First, this rulemaking adoption does not exceed a standard set by federal law, because it promotes consistency with federal law and repeals rules that do exceed federal standards. Second, the rulemaking adoption does not exceed an express requirement of state law, but rather, it expands the scope of an existing state law. Third, the rulemaking adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Finally, the commission adopts the rulemaking action under Texas Water Code, §§5.013, 5.102, 5.105, 5.120, 26.011, and 26.027. Therefore, the commission does not adopt this rulemaking action solely under the commission's general powers.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the regulatory impact analysis determination.

#### Takings Impact Assessment

The commission has prepared a takings impact assessment for the adopted rulemaking action pursuant to Texas Government Code, §2007.043. The specific purpose of this adopted rulemaking is to repeal Chapter 321, Subchapters E, F, and L. Chapter 321, Subchapter E regulated discharges from surface coal mining, preparation, and reclamation activities; Subchapter F regulated discharges from the shrimp industry; and Subchapter L regulated discharges from motor vehicles cleaning facilities. These subchapters are obsolete because the MOA between the TCEQ and the EPA concerning the NPDES program prohibits the TCEQ from issuing authorizations under these subchapters. The TCEQ authorizes these discharges under an individual permit or general permit which comply with all necessary NPDES requirements.

The rulemaking adoption does not affect a landowner's rights in private real property because this adopted rulemaking does not burden, restrict, or limit the owner's right to property and reduce its value by 25% or more beyond that which will otherwise exist in the absence of the regulations. The rulemaking adoption does not constitute a taking because it does not burden private real property.

#### Consistency with the Coastal Management Program

The commission reviewed the rulemaking adoption and found the adoption was a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) (Actions and Rules Subject to the Coastal Management Program), and therefore, required that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this adopted rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the adopted rulemaking does not affect

any coastal natural resource areas because discharges from the activities regulated by the sections adopted for repeal are being authorized under either an individual permit or general permit which comply with NPDES requirements. Repealing these subchapters removes the ability of these activities to be authorized under a registration.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

#### Public Comment

The commission offered a virtual public hearing on November 9, 2021. The comment period closed on November 9, 2021. No public comments were received.

## SUBCHAPTER E. SURFACE COAL MINING, PREPARATION, AND RECLAMATION ACTIVITIES

### 30 TAC §§321.71 - 321.81

#### Statutory Authority

The rulemaking action is adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out the powers and duties under the TWC and other laws of the state; TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; TWC, §5.120, which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the TCEQ in the public interest; and TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The rulemaking adoption implements the Memorandum of Agreement between the TCEQ and the United States Environmental Protection Agency concerning the National Pollutant Discharge Elimination System program, which prohibits the TCEQ from issuing authorizations under this subchapter.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Charmaine Backens

Deputy Director, Environmental Law Division

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## SUBCHAPTER F. SHRIMP INDUSTRY

### 30 TAC §§321.91 - 321.97

#### Statutory Authority

The rulemaking action is adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out the powers and duties under the TWC and other laws of the state; TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; TWC, §5.120, which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the TCEQ in the public interest; and TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The adopted rulemaking implements the Memorandum of Agreement between the TCEQ and the United States Environmental Protection Agency concerning the National Pollutant Discharge Elimination System program, which prohibits the TCEQ from issuing authorizations under this subchapter.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER L. DISCHARGES TO SURFACE WATERS FROM MOTOR VEHICLES CLEANING FACILITIES

### 30 TAC §§321.211 - 321.220

#### Statutory Authority

The rulemaking action is adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out the powers and duties under the TWC and other laws of the state; TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC,

§5.102, which establishes the commission's authority necessary to carry out its jurisdiction; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; TWC, §5.120, which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the TCEQ in the public interest; and TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The adopted rulemaking implements the Memorandum of Agreement between the TCEQ and the United States Environmental Protection Agency concerning the National Pollutant Discharge Elimination System program, which prohibits the TCEQ from issuing authorizations under this subchapter.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Charmaine Backens

Deputy Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-0600

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## CHAPTER 351. REGIONALIZATION

### SUBCHAPTER D. LOWER RIO GRANDE VALLEY

#### 30 TAC §§351.41 - 351.45

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §§351.41 - 351.45.

Repealed §§351.41 - 351.45 are adopted *without changes* to the text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6902) and, therefore, will not be republished.

#### Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking is being adopted in response to a quadrennial rule review (Non-Rule Project Number 2019-029-351-OW) wherein the commission determined that Chapter 351, Subchapter D was obsolete (October 25, 2019, issue of the *Texas Register* (44 TexReg 6384)).

The rules in Chapter 351, Subchapter D, were based on Texas Water Code, Chapter 26, Subchapter C, Regional and Area-Wide Systems, which encourages and promotes the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state. Within any standard metropolitan statistical area in the state, the com-

mission is authorized to implement this policy by defining areas of regional or area-wide systems and designating a system to serve the area defined. In relation with this authority, the rules designated the Rio Grande Valley Pollution Control Authority as a regional provider for the Lower Rio Grande Valley Regional Area. The commission adopts this rulemaking because the Rio Grande Valley Pollution Control Authority no longer exists nor are there any wastewater permits issued to any regional system in this regional area.

#### Section by Section Discussion

##### *Subchapter D: Lower Rio Grande Valley*

The commission adopts the repeal of §§351.41 - 351.45, which designated the Rio Grande Valley Pollution Control Authority as a regional provider for the Lower Rio Grande Valley Regional Area. This subchapter is obsolete because the Rio Grande Valley Pollution Control Authority no longer exists nor are there any wastewater permits issued to any regional system in this regional area. Regulated entities that propose to install and operate a wastewater treatment plant in this regional area are currently required to obtain an individual permit to discharge wastewater.

##### Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rulemaking action is not subject to that statute because the adopted rules do not meet the criteria for "Major environmental rules" as defined in Texas Government Code, §2001.0225(g)(3). Texas Government Code, §2001.0225 applies only to rules that are specifically intended 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 purpose of this rulemaking adoption is to repeal Chapter 351, Subchapter D, which designated the Rio Grande Valley Pollution Control Authority as a regional wastewater service provider for the Lower Rio Grande Valley Regional Area. This subchapter is obsolete because the Rio Grande Valley Pollution Control Authority no longer exists nor are there any wastewater permits issued to any regional system in this regional area. Regulated entities that propose to install and operate a wastewater treatment plant in this regional area are currently required to obtain an individual permit to discharge wastewater.

Furthermore, even if the rulemaking adoption did meet the definition of a "Major environmental rule," it is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicable requirements specified in Texas Government Code, §2001.0225(a). Texas Government Code, §201.0225(a) applies only to a state agency's adoption of a major environmental rule that: (1) exceeds a standard set by federal law, unless state law specifically requires the rule; (2) exceeds an express requirement of state law, unless federal law specifically requires the rule; (3) exceeds 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) is adopted solely under the general powers of the agency instead of under a specific state law.

In this case, the rulemaking adoption does not meet any of these requirements. First, this rulemaking adoption does not exceed a standard set by federal law because it promotes consistency

with federal law and repeals rules that do exceed federal standards. Second, the rulemaking adoption does not exceed an express requirement of state law, but rather expands the scope of an existing state law. Third, the rulemaking adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Finally, the commission adopts this rulemaking action under Texas Water Code, §§5.013, 5.102, 5.105, 5.120, 26.011, and 26.027. Therefore, the commission does not adopt the rulemaking action solely under the commission's general powers.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the regulatory impact analysis determination.

##### Takings Impact Assessment

The commission has prepared a takings impact assessment for the adopted rulemaking action pursuant to Texas Government Code, §2007.043. The specific purpose of this adopted rulemaking is to repeal Chapter 351, Subchapter D, which designated the Rio Grande Valley Pollution Control Authority as a regional wastewater service provider for the Lower Rio Grande Valley Regional Area. This subchapter was obsolete because the Rio Grande Valley Pollution Control Authority no longer exists nor are there any wastewater permits issued to any regional system in this regional area. Regulated entities that propose to install and operate a wastewater treatment plant in this regional area are currently required to obtain an individual permit to discharge wastewater.

The rulemaking adoption will not affect a landowner's rights in private real property because this adopted rulemaking does not burden, restrict, or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The rulemaking adoption does not constitute a taking because it does not burden private real property.

##### Consistency with the Coastal Management Program

The commission reviewed the rulemaking adoption and found that the sections proposed for repeal are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will the repeals affect any action or authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the rulemaking adoption is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

##### Public Comment

The commission offered a public hearing on November 9, 2021. The comment period closed on November 9, 2021. No public comments were received.

##### Statutory Authority

The rulemaking action is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction; TWC, §5.103 and §5.105, which

authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; TWC, §5.120, which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the TCEQ in the public interest; TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state; and TWC, §26.081, which authorizes the commission to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state.

The rulemaking adoption implements TWC, §§5.103, 5.105, 5.013, and 26.081.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Charmaine Backens

Deputy Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-0600



## TITLE 31. NATURAL RESOURCES AND CONSERVATION

### PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

#### CHAPTER 65. WILDLIFE

##### SUBCHAPTER D. DEER MANAGEMENT

##### PERMIT (DMP)

##### 31 TAC §65.133

The Texas Parks and Wildlife Commission, in a duly noticed meeting on November 4, 2021, adopted an amendment to §65.133, concerning General Provisions, without changes to the proposed text as published in the October 1, 2021, issue of the *Texas Register* (46 TexReg 6528). The rule will not be republished.

Texas Parks and Wildlife Code, Chapter 43, Subchapter R, authorizes the department to issue a permit for the temporary detention of white-tailed deer for the purpose of propagation, known as the Deer Management Permit (DMP). The amendment is intended to eliminate the risk of exposure to chronic wasting disease (CWD) for deer in deer breeding facilities as a result of breeder bucks returning from DMP facilities. Current permit

rules allow a buck deer held under a deer breeder permit to be introduced to a DMP pen and then returned to a deer breeding facility prior to the release of deer from the DMP pen, if approved under a deer management plan. The amendment eliminates those provisions authorizing the return of buck breeder deer from DMP pens.

The amendment is in response to the threat of possible exposure to chronic wasting disease (CWD). CWD is a fatal neurodegenerative disorder that affects some cervid species, including white-tailed deer, mule deer, elk, red deer, sika, and their hybrids (referred to collectively as susceptible species). It is classified as a TSE (transmissible spongiform encephalopathy), a family of diseases that includes scrapie (found in sheep), bovine spongiform encephalopathy (BSE, found in cattle and commonly known as "Mad Cow Disease"), and variant Creutzfeldt-Jakob Disease (vCJD) in humans. CWD can be transmitted both directly (through animal-to-animal contact) and indirectly (through environmental contamination). CWD has been detected in multiple locations in Texas, primarily in deer breeding facilities. The department, along with the Texas Animal Health Commission, has been engaged in a long-term battle to detect and contain CWD. If CWD is not contained and controlled, the implications of the disease for Texas and its multi-billion dollar ranching, hunting, wildlife management, and real estate economies could be significant.

The department received 15 comments opposing adoption of the rule as proposed. Of the 15, comments, three articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that allowing movement of breeder deer from DMP pens to deer breeding facilities would allow for additional monitoring. The department disagrees with the comment and responds that the risk of spreading CWD as a result of moving breeder from DMP pens far outweighs any monitoring benefit. No changes were made as a result of the comment.

One commenter opposed adoption and stated that eliminating the ability to move breeder bucks from DMP pens would result in a black market for deer. The department disagrees with the comment and responds that the rule as adopted would require breeder bucks placed in a DMP pen to be released, which makes them free-ranging deer, the sale of which is a criminal offense. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should retain the Triple T and TTP programs. The department agrees with the comment and responds that it is not germane to the rulemaking. No changes were made as a result of the comment.

The department received five comments supporting adoption of the rule as proposed.

The amendment is adopted under the authority of Parks and Wildlife Code, Chapter 43, Subchapter R, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that white-tailed deer may be temporarily detained in an enclosure.

The amendment affects Parks and Wildlife Code, Chapter 43, Subchapter R.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 29, 2022.

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Todd S. George

Associate General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775



## TITLE 34. PUBLIC FINANCE

### PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

#### CHAPTER 3. TAX ADMINISTRATION SUBCHAPTER V. FRANCHISE TAX

##### 34 TAC §3.589

The Comptroller of Public Accounts adopts amendments to §3.589, concerning margin: compensation, without changes to the proposed text as published in the February 18, 2022, issue of the *Texas Register* (47 TexReg 753). The amendments implement statutory changes to definitions, incorporate policy decisions, and improve readability. The rule will not be republished.

Throughout the section, the comptroller adds titles to statutory citations.

The comptroller deletes subsection (b)(1) and (2) relating to the definitions of assigned employee and client company to accommodate statutorily defined terms in Tax Code, §171.0001 (General Definitions). The comptroller adds new paragraph (1) to include the statutory definition of "Client" pursuant to Tax Code, §171.0001(6) because the statute replaced the term "Client company" with "Client." The comptroller adds new paragraph (2) to include the statutory definition of "Covered employee" according to Tax Code, §171.0001(8-a).

The comptroller amends paragraphs (6) and (7) to accommodate a new statutorily defined term and maintain alphabetical order of the section. The comptroller inserts the statutory term and definition of "Professional employer organization" into paragraph (6). Professional employer organization replaced the term "staff leasing services." The comptroller amends paragraph (7) to include the definition of the statutory term "Small employer" as it was previously just a citation to Insurance Code, §1501.002 (Definitions).

The comptroller adds new paragraph (9)(B) to include language concerning wages and cash compensation paid to employees in a foreign country, pursuant to STAR Accession No. 201510539L (June 14, 2016). Former subparagraphs (B) and (C) are relettered accordingly.

The comptroller amends subsection (c)(1), including subparagraphs (A) and (B), to improve readability.

The comptroller adds new subparagraphs (C) - (H) to include compensation thresholds for years 2012 through 2024, which

reflect the biennial adjustment based on the Consumer Price Index pursuant to Tax Code, §171.006 (Adjustment of Eligibility for No Tax Due, Discounts, and Compensation Deduction).

The comptroller deletes subsection (e)(2)(B) and (D) pursuant to the findings of *Winstead PC v. Combs*, No. D-1-GN-12-000141 (201st Dist. Ct., Travis County, Tex. Feb. 7, 2013) (holding these subparagraphs were invalid to the extent the disallowed deductions were allowed for federal purposes). Subparagraph (C) is relettered as subparagraph (B).

The comptroller amends subsection (f) to reflect the new terms "professional employer organization" instead of "staff leasing company" and "covered" instead of "assigned" employee to maintain consistency with statutory definitions.

The comptroller amends paragraphs (2) and (3) to remove the word "company" from "client company" to maintain consistency with statutory terms.

The comptroller amends subsection (i) to reflect a policy change retroactively allowing the method of computing margin to be amended regardless of what method was elected on an original report pursuant to Star Accession No. 201206444L (June 12, 2012).

The comptroller deletes paragraphs (1) and (2) concerning the annual election, as they are no longer relevant pursuant to Star Accession No. 201206444L.

The comptroller adds subsection (j) to add language concerning expenses paid with qualifying loan or grant proceeds received for COVID-19 Relief pursuant to House Bill 1195, 87th Legislature, 2021, enacting Tax Code, §171.10131, and applies to reports originally due on or after January 1, 2021.

No comments were received regarding adoption of the amendment.

These amendments are adopted under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture) 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.

These amendments implement Tax Code, §§171.0001 (General Definitions), 171.1013 (Determination of Compensation) and 171.10131 (Provisions Related to Certain Money Received for COVID-19 Relief).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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William Hamner

Special Counsel for Tax Administration

Comptroller of Public Accounts

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For further information, please call: (512) 475-0387



## CHAPTER 5. FUNDS MANAGEMENT (FISCAL AFFAIRS)

## SUBCHAPTER D. CLAIMS PROCESSING-- PAYROLL

### 34 TAC §5.47

The Comptroller of Public Accounts adopts amendments to §5.47 concerning deductions for payments to credit unions, without changes to the proposed text as published in the February 18, 2022, issue of the *Texas Register* (47 TexReg 756). The rule will not be republished.

The amendments to subsection (a) add a definition of "CAPPS"; remove the definitions of "payee identification number" and "USPS" because these terms are no longer used in the rule; and simplify other definitions by adding relevant statutory citations and clarifying the language of the definitions.

The amendments to subsection (b) combine the requirements for authorizing a deduction in paragraph (2) with the requirements for authorizing a change in the amount of a deduction in former paragraph (3); clarify that a state employee may authorize a deduction or a change in the amount of a deduction, or may cancel a deduction, by submitting a properly completed authorization form or a properly completed electronic authorization; clarify the process for authorizing a deduction or a change in the amount of a deduction, or for cancelling a deduction; provide that a completed authorization form must be submitted by a credit union to an employer in a secure manner; remove "then" as unnecessary; and change "working day" to "workday" to ensure the consistent use of defined terms.

The amendments to subsection (c) combine the requirements for the effective date of new deductions in paragraph (1) with the requirements for the effective dates of changes in deductions, or cancellation of deductions in former paragraphs (2) and (3); clarify that a state employee may authorize a deduction or a change in the amount of a deduction, or may cancel a deduction, by submitting a properly completed authorization form or a properly completed electronic authorization; clarify the process for authorizing a deduction or a change in the amount of a deduction, or for cancelling a deduction; and change "state agency" to "employer," as appropriate, to ensure the consistent use of defined terms.

The amendments to subsection (d) change "state agency" to "employer," as appropriate, to ensure the consistent use of defined terms.

The amendments to subsection (e) remove unnecessary requirements regarding the size of authorization forms.

The amendments to subsection (f) require a credit union that is applying for certification to submit to the comptroller its primary contact's email address, instead of the contact's facsimile telephone number; change "payee identification number" to "Internal Revenue Service employer identification number"; clarify that notifications required under subsection (f)(4) must be made in writing, whether they are provided in a paper or an electronic format; and remove "then" as unnecessary.

The amendments to subsection (g) remove "then," as unnecessary; change "state agency" to "employer," as appropriate, to ensure the consistent use of defined terms; and correct the spelling of "hand-deliver."

The amendments to subsection (i) remove "then" as unnecessary; and clarify that notifications required under subsection (i)(2)(B) must be made in writing, whether they are provided in a paper or an electronic format.

The amendments to subsection (j) clarify that notifications required under subsections (j)(1)(A) and (E) must be made in writing, whether they are provided in a paper or an electronic format; change "state agency" to "employer," as appropriate, to ensure the consistent use of defined terms; correct the spelling of "hand-delivered"; and remove "then" as unnecessary.

The amendments to subsection (k) require a participating credit union to notify the comptroller of a change in its primary contact's email address, instead of the contact's facsimile telephone number; change "state agency" to "employer," as appropriate, to ensure the consistent use of defined terms; remove the language regarding detail reports submitted by the comptroller on behalf of a state agency because the comptroller does not submit detail reports on behalf of state agencies; provide that a credit union's report of all discrepancies between a detail report provided by an employer and the actual amount of deductions received from the employer must be submitted to an employer in a secure manner; correct the spelling of "hand-delivered"; remove "then" as unnecessary; and remove language regarding the return of magnetic tapes and cartridges because they are no longer used in this process.

The amendments to subsection (l) change "state agency" to "employer," as appropriate, to ensure the consistent use of defined terms; provide that a monthly or additional detail report submitted by an employer to a credit union must be submitted in a secure manner; remove "then" as unnecessary; remove the language regarding detail reports submitted by the comptroller on behalf of a state agency because the comptroller does not submit detail reports on behalf of state agencies; and establish a standard deadline by which an employer must submit a monthly detail report or an additional detail report to a participating credit union or other entity, no matter what type of process is used to submit the report.

The amendments to subsection (m) clarify that notifications required under this subsection must be made in writing, whether they are provided in a paper or an electronic format.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Government Code, §659.110, which authorizes the comptroller to establish procedures and adopt rules to administer the credit union program authorized by Government Code, Chapter 659, Subchapter G.

The amendments implement Government Code, §§659.101, 659.103, and 659.104-659.110.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Victoria North

General Counsel for Fiscal and Agency Affairs

Comptroller of Public Accounts

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For further information, please call: (512) 475-0387



## TITLE 40. SOCIAL SERVICES AND ASSISTANCE

### PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

#### CHAPTER 93. EMPLOYEE MISCONDUCT REGISTRY (EMR)

##### 40 TAC §§93.1 - 93.9

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts the repeal of Texas Administrative Code, Title 40, Part 1, Chapter 93, concerning Employee Misconduct Registry, consisting of §§93.1, 93.2, 93.3, 93.4, 93.5, 93.6, 93.7, 93.8, and 93.9.

The repeals are adopted without changes to the proposed text as published in the December 24, 2021, issue of the *Texas Register* (46 TexReg 8992). These rules will not be republished.

#### BACKGROUND AND JUSTIFICATION

The repeals allow the rules to be updated and relocated to Texas Administrative Code, Title 26, Part 1, Chapter 561. The relocation is necessary to implement Senate Bill 200, 84th Legislature, Regular Session, 2015, which transferred the functions of the Department of Aging and Disability Services (DADS) to HHSC, effective September 1, 2017.

New rules replacing Title 40, Part 1, Chapter 93, are being adopted simultaneously elsewhere in this issue of the *Texas Register*.

#### COMMENTS

The 31-day comment period ended January 24, 2022. During this period, HHSC did not receive any comments regarding the proposed repeal.

#### STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. The repeal is also authorized by Texas Health and Safety Code Chapter 253, which grants the Executive Commissioner of HHSC authority to implement Chapter 253, and specifically §253.007, Employee Misconduct Registry, which requires HHSC to establish an employee misconduct registry.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-3161

