

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

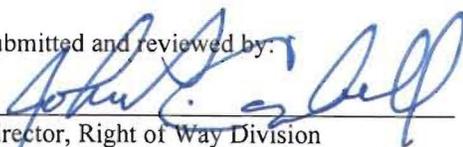
The Texas Transportation Commission (commission) finds it necessary to adopt new §21.24, State Participation in Gas Pipeline Relocations, and amendments to §21.31, Definitions, §21.33, Applicability, §21.34, Scope, §21.36, Rights of Utilities, §21.37, Design, and new §21.42, Appeal Process, all concerning the installation and adjustment of utility facilities in state highway rights of way to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted amendments and new sections, attached to this minute order as Exhibits A - C, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the General Counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the commission that new §21.24, the amendments to §21.31, §21.33, §21.34, §21.36, §21.37, and new §21.42 are adopted and are authorized for filing with the Office of the Secretary of State.

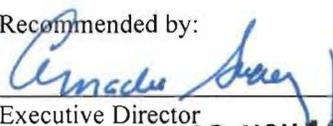
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Director, Right of Way Division

Recommended by:



Executive Director

112040 NOV 19 09

Minute
Number

Date
Passed

Proposed Preamble

1
2 The Texas Department of Transportation (department) adopts new
3 §21.24, State Participation in Gas Pipeline Relocations;
4 amendments to §21.31, Definitions, §21.33, Applicability,
5 §21.34, Scope, §21.36, Rights of Utilities, §21.37, Design; and
6 new §21.42, Appeal Process, all concerning the installation and
7 adjustment of utility facilities in state highway rights of way.
8 The amendments to §21.33 and §21.34 are adopted without changes
9 to the proposed text as published in the September 11, 2009
10 issue of the *Texas Register* (34 TexReg 6304) and will not be
11 republished. New §21.24, the amendments to §21.31, §21.36, and
12 §21.37, and new §21.42 are adopted with changes to the proposed
13 text as published in the September 11, 2009 issue of the *Texas*
14 *Register* (34 TexReg 6304).

15

16 EXPLANATION OF ADOPTED AMENDMENTS AND NEW SECTIONS

17 Title 43, Texas Administrative Code (TAC), Chapter 21,
18 Subchapter B, Utility Adjustment, Relocation, or Removal, was
19 adopted to prescribe requirements for the adjustment,
20 relocation, and removal of utility facilities on the state
21 highway system and provide for reimbursement for the costs of
22 that work in accordance with Transportation Code, Chapter 203,
23 Subchapter E. Similarly, Title 43, TAC Chapter 21, Subchapter
24 C, Utility Accommodation, was adopted to prescribe minimum
25 requirements for the accommodation, method, materials, and

1 location for the installation, adjustment, and maintenance of
2 public and private utilities within the right for way for the
3 state highway system. House Bill 2572, 81st Legislature,
4 Regular Session, 2009, amended Utilities Code, §181.005 and
5 authorized gas corporations to lay and maintain gas pipelines
6 along public roads, subject to certain conditions relating to
7 compliance with Railroad Commission of Texas safety regulations,
8 state and federal regulations regarding the accommodation of
9 utility facilities, and limitations on state reimbursement for
10 the cost of pipeline relocations caused by highway improvement
11 projects. The proposed amendments and new sections are
12 necessary to comply with the provisions of HB 2572 and clarify
13 existing language.

14

15 New §21.24, establishes a procedure for determining the
16 circumstances under which the department must reimburse a gas
17 corporation for the adjustment, modification, relocation, or
18 removal of the gas corporation's pipeline made necessary by an
19 improvement to a state highway. House Bill 2572 creates a
20 distinction among different types of gas corporations and,
21 except for pipelines located on land in which the gas
22 corporation has a property interest, authorizes the state to
23 reimburse the cost of adjusting only those gas pipelines that
24 are owned or operated by a gas utility, as defined under
25 Utilities Code, §181.021, or a common carrier subject to the

1 Natural Resources Code, Chapter 111. Prior to the enactment of
2 HB 2572, those two types of entities were already authorized to
3 locate gas pipelines longitudinally on a state highway right of
4 way, and the department, under Transportation Code, §203.092,
5 was authorized to reimburse a gas utility and a common carrier
6 for the cost of adjustment required by improvement of interstate
7 highway or toll highway projects. Although Utilities Code,
8 §181.005, as amended by HB 2572, increases the types of gas
9 corporations that may locate their gas pipelines longitudinally
10 on a state highway right of way, the additional authorized gas
11 corporations are not entitled to state reimbursement under
12 Transportation Code, §203.092 on interstate highway or toll
13 highway projects.

14

15 New §21.24(a) clarifies that the limitation on reimbursement
16 only applies to a gas pipeline owned or operated by a gas
17 corporation authorized to act under Utilities Code, §181.005
18 that is located longitudinally on a state highway right of way.
19 If the gas pipeline crosses the right of way, but is not located
20 longitudinally, the limitation described in §21.24(b) does not
21 apply and eligible costs would be entitled to reimbursement.

22

23 New §21.24(b) describes the general rule that the adjustment of
24 a gas pipeline will be at the sole expense of the gas
25 corporation. It then sets out two exceptions: (1) the owner or

1 operator of the gas corporation pipeline has a private property
2 interest in the land occupied by the pipeline that is adjusted,
3 or (2) the gas corporation pipeline is owned or operated by a
4 gas utility as defined in Utilities Code, §181.021, or a common
5 carrier subject to the Natural Resources Code, Chapter 111, and
6 also meets the requirements of Transportation Code, §203.092.
7 This is a restatement of the statutory language in Utilities
8 Code, §181.005.

9
10 New §21.24(c) establishes department procedure for making a
11 determination that state reimbursement for the cost of adjusting
12 a gas pipeline is authorized. The requesting pipeline owner or
13 operator must provide: (1) a written certification that it is a
14 gas utility or common carrier that qualifies for reimbursement
15 under Utilities Code, §181.005; and (2) documentation issued by
16 the Railroad Commission of Texas that substantiates that it is a
17 gas utility or common carrier as described in subsection (b).
18 The information required by this new subsection will enable the
19 department to exercise due diligence in making a decision to
20 reimburse the owner or operator. Revisions to new §21.24 are
21 addressed in the COMMENTS section of this preamble.

22
23 Amendments to §21.31(4) delete the word "utilities" and replace
24 it with the words "utility facilities" in the definition of "As-
25 Built plans." This change clarifies that the definition relates

1 to the actual lines, pipelines, conduits, cables, and their
2 appurtenances rather than the entity that owns the utility
3 facilities.

4
5 Amendments to §21.31(8) add the word "facility" in the
6 definition of "Certified as-installed construction plans." This
7 change clarifies that the definition relates to the actual
8 lines, pipelines, conduits, cables, and their appurtenances
9 rather than the entity that owns the utility facilities.

10
11 Amendments to §21.31(11) delete the word "utilities" and replace
12 it with the words "utility facilities" in the definition of
13 "Conduit." This change clarifies that the definition relates to
14 the actual lines, pipelines, cables, and their appurtenances
15 rather than the entity that owns the utility facilities.

16
17 A definition of "Director" is added as new §21.31(16). It
18 identifies the chief administrative officer in charge of the
19 Maintenance or Right of Way Divisions, or any successor
20 divisions, as the director. There is no current definition for
21 this term and it is important to clearly identify the person
22 responsible for authorizing exceptions under 43 TAC §21.35 and
23 determining appeals under new 43 TAC §21.42.

24
25 Subsequent definitions following new §21.31(16) are renumbered

1 for consistency and clarity.

2

3 A definition of "Engineering study" is added as new §21.31(22).

4 It refers to an engineering analysis that determines the

5 expected impact that permitting vehicular access will have on

6 mobility, safety, and the efficient operation of the state

7 highway system. Use of the term is necessary for describing the

8 conditions of establishing a utility strip under amended 43 TAC

9 §21.31(b)(8).

10

11 Amendments to renumbered §21.31(23) add the words "or that

12 officer's designee not below the level of assistant executive

13 director" to the definition of "Executive director." This

14 addition allows the executive director to expedite the decision

15 making process by delegating responsibilities exercised under 43

16 TAC, Chapter 21, Subchapter C to other upper level

17 administration employees in the department.

18

19 Amendments to renumbered §21.31(26) add the words "a" and

20 "utility" to clarify the nature of the lines governed by the

21 subchapter and delete the words "and is private in function and

22 does not directly or indirectly serve the public." The change

23 to the definition of "Gathering line" is necessary to be

24 consistent with the expanded authority of gas corporations to

25 place different types of gas pipelines along state highway right

1 of way under Utilities Code, §181.005. A gathering line that is
2 operated by a gas corporation is no longer automatically
3 considered to be a private line. Revisions to §21.31(26) are
4 addressed in the COMMENTS section of this preamble.

5
6 Renumbered §21.31(39) is completely revised. Instead of the
7 current definition of "Private utility," which focuses on the
8 exclusive private nature of the particular lines, pipelines,
9 conduits, cables, and their appurtenances, the new definition
10 focuses on the nature of the utility's business. A private
11 utility is now considered to be any business that is not a
12 public utility as defined in renumbered 43 TAC §21.31(40). A
13 public utility is a business that is authorized by state law to
14 place its facilities longitudinally in state highway right of
15 way. The change is necessary to be consistent with the expanded
16 authority of gas corporations to place different types of gas
17 pipelines along state highway right of way under Utilities Code,
18 §181.005.

19
20 Amendments to renumbered §21.31(40) delete the words "for public
21 consumption" and replace them with the words "which directly or
22 indirectly serves the public and that is authorized by state law
23 to operate, construct, and maintain its facilities over, under,
24 across, on, or along highways," and in addition, add the words
25 "that is" and "producing." This expanded definition of "Public

1 utility" more accurately describes the legal standard for
2 determining those types of utilities that are authorized to
3 place utility facilities longitudinally in state highway right
4 of way. The terms "public utility" and "private utility" are
5 used in the context of authorizing longitudinal placement.

6 Revisions to proposed §21.31(40) are addressed in the COMMENTS
7 section of this preamble.

8

9 A definition of "Traffic impact analysis" is added as new
10 §21.31(46). It refers to a specific type of engineering study
11 that determines the potential current and future traffic impacts
12 of a proposed traffic generator on the state highway system.

13 The traffic impact analysis must be signed, sealed, and dated by
14 an engineer licensed to practice in the state of Texas. Use of
15 the term is necessary for describing the conditions of
16 establishing a utility strip under 43 TAC §21.31(b)(8).

17

18 Amendments to renumbered §21.31(50) add the words "communication
19 controller boxes and pedestals, electric boxes" to the
20 definition of "Utility appurtenances." The change gives more
21 examples of a utility appurtenance to clarify that it is an
22 inclusive term that covers all types of utility facilities.

23

24 Amendments to renumbered §21.31(51) add the word "utility" to
25 the definition of "Utility facilities". The word was mistakenly

1 omitted in the original text and its addition clarifies the
2 reference to lines, pipelines, conduits, cables, and their
3 appurtenances that carry a utility product.

4

5 As a result of comments received, a definition of "Utility
6 product" is added as new §21.31(52). It identifies a commodity
7 such as water, steam, electricity, gas, oil, or crude resources
8 or communications, cable television, or waste disposal services
9 that directly or indirectly serves the public. There is no
10 current definition for this term and it is important to clearly
11 identify the types of product that are transported or
12 distributed through utility facilities by entities authorized to
13 use highway right of way under 43 TAC §21.31(40) and §21.36.
14 This new definition is discussed further in the COMMENTS section
15 of this preamble.

16

17 Amendments to the definition of "utility strip" in renumbered
18 §21.31(53) delete the words "border width, where an assignment
19 may be designated for a utility delineating the area of" and
20 replace it with the following phrase: "area between the outer
21 traveled way and the right of way line, for the nonexclusive
22 use, occupancy, and access by one or more authorized public
23 utilities." The change describes the area covered by the
24 previously undefined term "border width," and clarifies that a
25 utility strip may contain more than one utility facility.

1

2 Proposed renumbered definition §21.31(53), "Utility structure,"
3 is renumbered to definition §21.31(54).

4

5 Amendments to §21.33(d) include three changes. The first change
6 deletes the words "or designee." Since the definition of
7 "district engineer" already includes the district engineer's
8 designee, the reference in this section is redundant. The other
9 changes to §21.33(d) clarify that a special district requirement
10 on a specific installation or adjustment of a utility facility
11 is classified as a supplemental accommodation requirement and,
12 if stricter than the minimum requirements of 43 TAC, Chapter 21,
13 Subchapter C, must be detailed in writing.

14

15 Amendments to §21.34 include two changes. The first change
16 concerns the effect of other conflicting law on the enforcement
17 of regulations contained in Subchapter C. The existing
18 discussion on the effect of other laws is too general and
19 ambiguous. It does not specify the type of applicable law and
20 implies that a conflict results in the entire subchapter being
21 superseded. The amended language clarifies that only other
22 federal or state law (excluding municipal ordinances and county
23 orders) can cause a conflict, and provides that the higher
24 degree of federal or state law protection applies only to the
25 particular issue. Further changes to §21.34 delete references

1 to district supplemental accommodation requirements and a
2 utility's ability to appeal those additional district
3 requirements. The references to district supplemental
4 accommodation requirements are moved into 43 TAC §21.33(d) and
5 consolidated with other special district requirements. The
6 references to an appeal are moved into new 43 TAC §21.42 and
7 consolidated with an expanded appeal process.

8

9 Amendments to §21.36(a) delete the word "certain" as a general
10 modifier of the word "utilities" and replace it with the more
11 specific and defined word "public." The word "lines" is
12 replaced with the broader and more accurate word "facilities."
13 These changes clarify the types of utilities that are authorized
14 to place utility facilities longitudinally in state highway
15 right of way and are consistent with the expanded authority of
16 gas corporations under Utilities Code, §181.005. Revisions to
17 §21.36(a) are addressed in the COMMENTS section of this
18 preamble.

19

20 Amendments to §21.36(b) delete specific references to the types
21 of "private lines" that cannot be placed longitudinally on a
22 highway right of way and replace the language with the more
23 precise and defined phrase "private utility." The amended
24 language focuses on the nature of the utility's business, as
25 opposed to the nature of the particular utility line, and is

1 necessary to be consistent with the expanded authority of gas
2 corporations to place different types of gas pipelines along
3 state highway right of way under Utilities Code, §181.005.

4

5 New §21.36(c) authorizes the department to require a utility
6 seeking to install or adjust a utility facility longitudinally
7 within a highway right of way to provide: (1) a written
8 certification that it is an entity authorized by state law to
9 place its facilities along state highways, and (2) documentation
10 issued by the applicable state regulatory agency that
11 substantiates that the utility and its facilities are subject to
12 public regulation. The documentation may be required by the
13 department if the utility's legal authority for placement of its
14 facilities longitudinally in highway right of way is not readily
15 evident. The two listed documents provide necessary information
16 that will assist the department in making a determination that
17 the utility is a defined "public utility" entitled under
18 existing law to install or adjust a utility facility
19 longitudinally within state highway right of way. Without the
20 state regulatory agency information, the department is not able
21 to determine if a gas company is a "gas corporation" under
22 Utilities Code, §181.005. Revisions to §21.36(c) are addressed
23 in the COMMENTS section of this preamble.

24

25 New §21.37(a)(10) adds "applicable Railroad Commission of Texas

1 safety regulations" to the list of other regulations to which
2 utility installations must conform. The change is necessary to
3 be consistent with the expanded authority of gas corporations to
4 place different types of gas pipelines along state highway right
5 of way under Utilities Code, §181.005.

6
7 Amendments to §21.37(b)(4) add the word "overhead" and delete
8 the reference to subsection "(c)" of 43 TAC §21.41. Title 43,
9 Chapter 21, §21.41 concerns only overhead electric and
10 communication lines. Subsection (c) of 43 TAC §21.41 is limited
11 to horizontal clearance, thus it is too limiting and is
12 incorrect for the purposes of §21.37(b)(4). These changes
13 provide the proper cross-reference and clarify the meaning of
14 the subparagraph.

15
16 Section 21.37(b)(5) relates to a utility's responsibility to
17 determine whether other utility lines exist at the proposed
18 installation area. The amendments to §21.37(b)(5) delete the
19 word "utilities" and replaces it with the words "utility
20 facilities." This change clarifies that the subparagraph
21 relates to the actual lines, pipelines, conduits, cables, and
22 their appurtenances rather than the entity that owns the utility
23 facilities.

24
25 Section 21.37(b)(6) relates to the preferred areas for a

1 utility's access to its facility on controlled access highways
2 or freeways. The amendments to §21.37(b)(6) delete three
3 references to the words "utilities" and "utility" and replace
4 them with the words "utility facilities" and "facility." These
5 changes clarify that the subparagraph relates to the actual
6 lines, pipelines, conduits, cables, and their appurtenances
7 rather than the entity that owns the utility facilities. The
8 phrase "shall not" is also replaced with "may not" to be more
9 grammatically correct.

10

11 Amendments to §21.37(b)(7) delete the word "lines" and replace
12 it with the broader and more accurate word "facilities." This
13 paragraph is revised from the proposed version of the paragraph
14 as published in the *Texas Register* to be consistent with other
15 references in Subchapter C.

16

17 Amendments to §21.37(b)(8) retain the department's authority to
18 establish a utility strip for longitudinal installation of a
19 utility facility within existing access denial lines of a
20 controlled access highway or freeway without frontage roads and
21 add specific procedures and requirements to provide a well-
22 defined process for this alternative.

23

24 New §21.37(b)(8)(A) requires the utility to submit a written
25 request for the installation that includes: (i) the information

1 required by 43 TAC §21.35; (ii) survey data to identify and
2 designate the location of the utility strip, its relationship to
3 the existing highway facilities and right of way line; (iii) an
4 access plan with clearly described procedures to preserve the
5 safety and free flow of traffic on the highway during periods of
6 installation, maintenance, and emergency service or repair; and
7 (iv) any additional information including an engineering study,
8 requested by the department, that is reasonably necessary for a
9 determination of the impact of the proposed utility facility on
10 the controlled access highway.

11
12 New §21.37(b)(8)(B) requires the department to establish a
13 utility strip if the utility satisfies the conditions described
14 in 43 TAC §21.35 and §21.37(b)(8)(A). This is consistent with
15 federal regulation 23 C.F.R. §645.209(c)(5). In establishing
16 the utility strip, the department shall locate a utility access
17 denial line between the proposed utility facility and the
18 mainlanes and connecting ramps, and designate the specific area
19 of use, occupancy, and access for installation and maintenance
20 of the requested utility facility.

21
22 New §21.37(b)(8)(C)-(F) authorizes the department to adjust the
23 utility access denial line of an established utility strip to
24 accommodate any additional approved utility facilities,
25 clarifies that the requesting utility is responsible for all

1 costs associated with providing the information required for
2 designation of a new or expanded utility strip, requires the
3 utility to delineate the utility-access denial line on the
4 ground by installing permanent markers, and retains the existing
5 requirements of §21.37(b)(8) pertaining to the location of
6 fences at the right of way line and the continuation of access
7 denial regarding property adjoining the right of way line.

8
9 Section 21.37(c)(4) describes the requirements for a utility's
10 installation plan. The amendment to §21.37(c)(4) deletes the
11 word "utilities" and replaces it with the words "utility
12 facilities." This change clarifies that the paragraph relates
13 to the actual lines, pipelines, conduits, cables, and their
14 appurtenances rather than the entity that owns the utility
15 facilities.

16
17 New §21.42 establishes an appeal process under which a utility
18 can contest the department's application of the accommodation
19 requirements in 43 TAC, Chapter 21, Subchapter C. It
20 incorporates provisions from the limited appeal process in
21 existing 43 TAC §21.34 into a comprehensive appeal procedure
22 that allows the utility to challenge any denial of a utility's
23 request for the installation of a new utility facility or the
24 adjustment or relocation of an existing utility facility. The
25 appeal process gives the utility an opportunity to appeal a

1 district decision first to a division director, and if not
2 satisfied at that level, the appeal can be presented to the
3 department's executive director, and finally relief can be
4 requested from a board of variance. The appeal process is
5 consistent with the requirements of Utilities Code, §181.005.
6 Revisions to new §21.42 are addressed in the COMMENTS section of
7 this preamble.

8
9 New §21.42(a) authorizes a utility to file a petition of appeal
10 to contest: (1) a supplemental accommodation requirement
11 prescribed under 43 TAC §21.33; (2) the application of a design,
12 construction, or maintenance requirement under 43 TAC §§21.37,
13 21.38, 21.40, and 21.41; (3) a denial of the utility's request
14 for an exception under 43 TAC §21.35; or (4) a denial of the
15 utility's request for either the installation of a new utility
16 facility or the adjustment or relocation of an existing utility
17 facility. Revisions to new §21.42(a) are addressed in the
18 COMMENTS section of this preamble.

19
20 New §21.42(b) requires that the petition of appeal be filed with
21 either the director of the Right of Way Division, if the utility
22 facility that is the subject of the appeal occupies or is
23 proposing to occupy the right of way under a utility joint use
24 agreement, or with the director of the Maintenance Division, if
25 the utility facility that is the subject of the appeal occupies

1 or is proposing to occupy the right of way under a use and
2 occupancy agreement other than a utility joint use agreement.

3
4 New §21.42(c) requires that the petition must: (1) be in
5 writing; (2) completely and succinctly state the grounds for
6 appeal and its factual basis; and (3) include sufficient factual
7 documentation, such as drawings, surveys, or photographs, to
8 establish the merits of the appeal.

9
10 New §21.42(d) provides that the utility has the burden of
11 proving its appeal. This subsection is revised after
12 publication of the proposed text in the *Texas Register* to
13 clarify the burden of proof.

14
15 New §21.42(e) requires the division director to issue, within 45
16 days after the date of receipt of the petition, a written
17 decision approving or disapproving the appeal, and to
18 immediately send the decision to the utility. If a written
19 decision is not issued within the 45-day period, the appeal is
20 considered to be disapproved and the decision of disapproval is
21 considered to be issued on the 46th day. This provision allows
22 the utility to continue with the appeal in a timely manner in
23 the event that the director is unable or unwilling to act within
24 the designated period.

25

1 New §21.42(f) provides the utility an opportunity to appeal a
2 director's decision under §21.42(e). It must submit a written
3 petition of appeal to the department's executive director within
4 30 days after issuance of the division director's decision. The
5 executive director will issue, within 30 days after the date of
6 receipt of the petition, a final written decision approving or
7 disapproving the appeal. Revisions to new §21.42(f) are
8 addressed in the COMMENTS section of this preamble.

9

10 New §21.42(g) provides the utility with an opportunity to appeal
11 to a board of variance the executive director's decision under
12 new §21.42(f). The utility must submit to the executive
13 director its written petition of appeal to a board of variance,
14 before the 31st day after the date that written notice of the
15 adverse decision is received. The executive director will then
16 appoint a board of variance composed of at least three persons
17 who are not below the level of department division director,
18 office director, or district engineer and each of whom was not
19 involved in the original decision to deny the utility's request.
20 A majority of the members of the board constitutes a quorum.
21 The board of variance shall, before the 10th day preceding the
22 date of the board meeting, give the utility notice of the time
23 and place of the meeting and afford the utility an opportunity
24 to attend and present evidence regarding the appeal. Before the
25 11th day after the date of the meeting, the board of variance

1 will issue a final written decision approving or disapproving
2 the appeal. Revisions to new §21.42(g) are addressed in the
3 COMMENTS section of this preamble.

4

5 COMMENTS

6 Comments on the proposed new rules and amendments were received.

7

8 **COMMENT :**

9 The Executive Director of the Texas Pipeline Association,
10 Patrick J. Nugent, submitted the following written comments to
11 proposed new §21.24, amendments to §21.31, §21.36, and §21.37,
12 and new §21.42.

13

14 (1) New §21.24(b) and (c), State Participation in Gas Pipeline
15 Relocations - The use of the words "owner or operator of the gas
16 pipeline" instead of using the words "gas corporation" in
17 several places in the subsections tends to mix the terms in a
18 manner that causes unnecessary confusion. Mr. Nugent requests
19 that the words "gas corporation" be consistently used throughout
20 the two subsections.

21

22 (2) New §21.24(c)(2), State Participation in Gas Pipeline
23 Relocations - The requirement in new §21.24(c)(2) that a "gas
24 utility" file with the department a document issued by the
25 Railroad Commission of Texas that it is a "gas utility" as

1 defined by Utilities Code, §181.021 or a "common carrier" as
2 defined by Natural Resources Code, Chapter 111 is not
3 appropriate. The Railroad Commission of Texas does not issue
4 such a document and does not use the definition of a "gas
5 utility" in Utilities Code, §181.021 to determine gas utility
6 status. Mr. Nugent suggests that §21.24(c)(2) simply provide
7 that the document "substantiates that the pipeline has filed its
8 status with the Railroad Commission and is a gas utility or
9 common carrier."

10

11 (3) Amended §21.31(26), Definitions - The description of
12 products being transported through a gathering line owned by a
13 gas corporation as "utility product" is inappropriate because
14 many such gathering lines are not utilities. Mr. Nugent
15 suggests that this portion of the definition be left as it is
16 presently written.

17

18 (4) Amended §21.31(40), Definitions - The inclusion of the
19 phrase "directly or indirectly serves the public" in the
20 definition of "public utility" introduces concepts that are not
21 required by Utilities Code, §181.005 and creates the potential
22 for controversy between the department and gas corporations on
23 issues that HB 2572 was designed to resolve. Use of the word
24 "producing" in the definition also adds unnecessary verbiage
25 that could cause confusion by expanding the scope of the rule

1 beyond the statutory grant in HB 2572. Mr. Nugent suggests that
2 the phrase "directly or indirectly serves the public," the word
3 "producing," and the words "for public consumption" be deleted.
4 The phrase "which is authorized by state law to operate,
5 construct, and maintain its facilities over, under, across, on,
6 or along highways" should be sufficient for the definition. Mr.
7 Nugent also requests that the term "gas corporation" be
8 specifically included in the definition of "public utility" as a
9 type of entity authorized to use state highway rights of way.

10

11 (5) Amended §21.36(a), Rights of Utilities - The provisions of
12 §21.36(a) do not clearly include "gas corporations" in the
13 description of entities that have the right to operate,
14 construct, and maintain utility facilities over, under, across,
15 on, or along highways. Mr. Nugent requests that the term "gas
16 corporation" be specifically included in the subsection as a
17 type of entity authorized to use highway rights of way.

18

19 (6) Amended §21.36(c), Rights of Utilities - The provisions of
20 §21.36(c) should be revised to explicitly recognize that a "gas
21 corporation" has the right to operate, construct, and maintain
22 its facilities over, under, across, on, or along highways. The
23 proposed §21.36(c)(2) should be deleted because any "gas
24 corporation" is authorized under HB 2572 to lay lines
25 longitudinally in highway rights of way. There is no need for

1 any documentation regarding the entity being subject to public
2 regulation.

3

4 (7) Amended §21.37, Design - The language of proposed §21.37(6)
5 should be revised to delete the prohibition on the longitudinal
6 placement of utility facilities in the outer separation of
7 controlled access highways or freeways. There is no safety
8 reason to maintain this prohibition, and in congested urban
9 areas, such a prohibition may constitute an effective denial of
10 the use of the highway right of way due to the lack of available
11 space within the right of way outside of the frontage road.

12

13 (8) New §21.42, Appeal Process - The proposed rule specifically
14 provides for an appeal of a decision made under §21.33 and
15 §21.35, but does not specifically include an appeal from the
16 design requirement decisions made under §21.37. The design
17 requirements for installation of pipeline facilities is exactly
18 the type of issue that HB 2572 intended to be included in a
19 reasonable appeal process. Mr. Nugent requests that a decision
20 made under §21.37 should be specified as a type of decision that
21 can be appealed. In addition, the proposed appeal process stops
22 with the executive director. Since the commissioner is the
23 final authority at the department, the appeal process needs to
24 provide for a decision by the commissioner if a facility owner
25 is dissatisfied with the executive director's decision.

1

2 **RESPONSE:**

3

4 (1) The purpose of new §21.24(b) is to focus on a gas pipeline
5 owned or operated by a gas corporation and identify those two
6 statutory exceptions under which a gas corporation can be
7 reimbursed for the cost of the pipeline's relocation. The
8 "owner or operator of the pipeline" as referenced in
9 §21.24(b)(1) clearly refers to the phrase "owned or operated by
10 a gas corporation" in the introductory sentence of §21.24(b).
11 Also, §21.24(a) provides that the entire section applies only to
12 the adjustment of a gas pipeline that is owned or operated by a
13 gas corporation. There should be no confusion.

14

15 The purpose of new §21.24(c) is to require any owner or operator
16 of a gas pipeline to show that it is a gas utility or common
17 carrier to justify its request for reimbursement. Whether or
18 not it is also a gas corporation does not impact the decision.

19

20 No changes to §21.24(b) and (c) are made as a result of these
21 comments.

22

23 (2) The requirement in new §21.24(c)(2) for documentation issued
24 by the Railroad Commission of Texas that substantiates that the
25 requesting pipeline owner or operator is a gas utility or common

1 carrier is necessary to satisfy the department's due diligence
2 obligation to verify the entity's legal status and eligibility
3 for reimbursement under Utilities Code, §181.005. The specific
4 type of documentation, however, may take different forms. In
5 order to resolve Mr. Nugent's concern and add flexibility, new
6 §21.24(c)(2) is revised to add language similar to his
7 suggestion.

8
9 (3) With regard to the definition of "gathering line" in
10 §21.31(26), Mr. Nugent correctly points out that there is no
11 definition of a "utility product." A new definition is added as
12 new §21.31(52). Although a gas gathering line may not be a "gas
13 utility" as defined in the Utilities Code, §181.021, it is
14 carrying a "utility product" as defined in new §21.31(52). The
15 new definition is consistent with federal regulation 23 C.F.R.
16 §645.105.

17
18 (4) The amended definition of "public utility" in §21.31(40) is
19 intended to comply with Utilities Code, §181.005 by deleting
20 existing language that requires the entity to be engaged in the
21 business of transporting or distributing a utility product "for
22 public consumption." Under Utilities Code, §181.005, that
23 requirement no longer applies to gas corporations. The phrase
24 "directly or indirectly serves the public" was intended to
25 explain the undefined term "utility product" and link that term

1 to the definition of "public utility." Since a definition of
2 "utility product" is added as new §21.31(52), it is no longer
3 necessary to provide that link. To resolve Mr. Nugent's concern
4 that the definition may create controversy as it applies to gas
5 corporations, the definition of "public utility" in new
6 §21.31(40) is revised to: delete the word "producing"; delete
7 the phrase "directly or indirectly serves the public"; retain
8 the primary description that a public utility is one "that is
9 authorized by state law to operate, construct, and maintain its
10 facilities over, under, across, on, or along highways,"; and
11 specifically add the phrase "including a common carrier and gas
12 corporation."

13
14 (5) The purpose of amended §21.36 is to identify those entities
15 that have legal authority to place utility facilities
16 longitudinally in the state highway rights of way. To
17 incorporate Mr. Nugent's suggestion that gas corporations should
18 be clearly included in this section, subsection §21.36(a) is
19 revised to change the phrase "utilities authorized by law to
20 transport or distribute" to the more inclusive phrase "entities
21 authorized by law to transport or distribute." The revised
22 definition of "public utility" in amended 43 TAC §21.31(40)
23 should also assist in clarification of the gas corporation's
24 authority under §21.36.

25

1 (6) The purpose of amended §21.36(c) is to authorize the
2 department to require documentation necessary to satisfy it's
3 due diligence obligation to verify the entity's legal status for
4 placement of its utility facilities longitudinally in the state
5 highway rights of way. This requirement is limited to only
6 those situations in which the entity's legal authority is not
7 readily evident and applies to all applicants - not just gas
8 corporations. To clarify this general applicability, the word
9 "utility" is replaced with the word "entity" in §21.36(c), and
10 the word "lines" is replaced with the words "utility facilities"
11 in §21.36(c)(1). Instead of deleting §21.36(c)(2) as requested
12 by Mr. Nugent, paragraph (2) is revised to provide more
13 flexibility in the type of documentation required. The revised
14 paragraph requires documentation that substantiates that the
15 entity filed its status with the applicable state regulatory
16 commission or agency and that its facilities are subject to
17 public safety regulation. The safety regulation requirement is
18 consistent with the provisions of Utilities Code, §181.005.

19

20 (7) The proposed amendments to §21.37(b)(6) were for
21 clarification purposes and only changed three references to the
22 term "utility facilities." The prohibition on longitudinal
23 placement of utility facilities in the outer separation of
24 controlled access highways or freeways was already contained in
25 §21.37 prior to the proposed amendment, and similar provisions

1 have been part of the existing rule for many years. The origin
2 of this requirement is based primarily on safety considerations.
3 The area between the mainlanes of a highway for through traffic
4 and a frontage road (the definition of "outer separation" in
5 §21.31(37)) is normally within the clear zone of both the high
6 speed mainlanes and the frontage road. Any installation or
7 maintenance of a utility facility in this area would adversely
8 impact the safety of the traveling public by periodically
9 placing utility personnel, material, and equipment in the clear
10 zone. It would also encourage the utilities to access their
11 facilities from the mainlanes. In the event of a catastrophic
12 occurrence such as a gas pipeline explosion, the close proximity
13 of the utility facilities to the traveling public and highway
14 facility significantly increases the danger to both.
15 Longitudinal installation in the outer separation rather than
16 along the outer edge of the highway right of way also creates
17 greater difficulties for the department's operation and
18 maintenance of the highway facility, particularly with regard to
19 traffic control devices. Consideration of an adverse impact on
20 highway and traffic safety caused by the placement of utility
21 facilities along controlled access highways, and a preference
22 for locating those utility facilities close to the outer edge of
23 the highway right of way is mandated by 23 C.F.R. §645.209. No
24 changes to §21.36(b)(6) are made as a result of the comments.
25

1 (8) New rule §21.42(a) provides for an appeal of specific
2 decisions under 43 TAC §21.33 and §21.35 as well as a general
3 denial of a utility's request for installation under
4 §21.42(a)(3). An appeal of a design requirement under §21.37
5 may be submitted under either the general denial clause or the
6 utility may request an exception to the design requirement under
7 §21.35 and then appeal the adverse decision. To resolve Mr.
8 Nugent's concern that a design requirement is not included and
9 to clarify the procedure, new §21.42(a) is revised to
10 specifically add the application of a design, construction, or
11 maintenance requirement under §21.37, §21.38, §21.40, and
12 §21.41. The exception provision and general denial clause are
13 also still available.

14
15 The second concern involving §21.42 relates to a utility's
16 inability to appeal an adverse decision to the Texas
17 Transportation Commission (commission) as the final authority
18 for the department. A decision involving utility accommodation
19 requirements normally requires a certain amount of engineering
20 expertise which members of the commission generally do not
21 possess. Rather than provide an additional appeal to the
22 commission, new §21.42(g) is added to permit an appeal to a
23 three person board of variance composed of senior department
24 employees not below the level of division directors, office
25 directors, or district engineers. The board of variance will

1 provide a hearing and an opportunity for the utility to present
2 evidence. The addition of a board of variance will make the
3 utility accommodation appeal process similar to the appeal
4 process for control of outdoor advertising in 43 TAC Chapter 21,
5 Subchapter K. Since an additional appeal to a board of variance
6 was added, the word "final" is deleted from the last sentence of
7 §21.42(f).

8

9 STATUTORY AUTHORITY

10 The amendments and new sections are adopted under Transportation
11 Code, §201.101, which provides the commission with the authority
12 to establish rules for the conduct of the work of the
13 department, and more specifically, Transportation Code,
14 §203.095, which directs the commission to adopt rules to
15 implement Transportation Code, Chapter 203, Subchapter E,
16 concerning relocation of utility facilities required by
17 improvements to the state highway system, and Utilities Code,
18 §181.005, which directs the commission to adopt rules to provide
19 an appeals process relating to the department's utility
20 accommodation regulations.

21

22 CROSS REFERENCE TO STATUTE

23 Transportation Code, §§203.002, 203.003, 203.031, and 203.092;
24 and Utilities Code, §181.005.

1 SUBCHAPTER B. UTILITY ADJUSTMENT, RELOCATION, OR REMOVAL

2 §21.24. State Participation in Gas Pipeline Relocations

3 (a) This section applies only to the adjustment,
4 modification, relocation, or removal of a gas pipeline that is
5 owned or operated by a gas corporation authorized to act under
6 Utilities Code, §181.005, and that is located longitudinally on
7 a state highway right of way.

8 (b) The adjustment, modification, relocation, or removal of
9 a gas pipeline owned or operated by a gas corporation made
10 necessary by an improvement to a state highway will be at the
11 sole cost and expense of the gas corporation, except that the
12 department will reimburse the gas corporation for that cost and
13 expense if:

14 (1) the owner or operator of the pipeline has a private
15 property interest in the land occupied by the pipeline that is
16 adjusted, modified, relocated, or removed; or

17 (2) the pipeline is owned or operated by a gas utility,
18 as defined in the Utilities Code, §181.021 or a common carrier
19 subject to Natural Resources Code, Chapter 111, and meets the
20 requirements of Transportation Code, §203.092.

21 (c) If an owner or operator of a gas pipeline requests
22 reimbursement from the department for the costs of adjustment,
23 modification, relocation, or removal of its pipeline under

1 subsection (b)(2) of this section, the pipeline owner or
2 operator must provide:

3 (1) a written certification that it is a gas utility or
4 common carrier that qualifies for reimbursement under subsection
5 (b)(2) of this section; and

6 (2) documentation that substantiates that the pipeline
7 owner or operator properly filed its status with the Railroad
8 Commission of Texas and is a gas utility, as defined in the
9 Utilities Code, §181.021 or a common carrier subject to Natural
10 Resources Code, Chapter 111.

1 SUBCHAPTER C. UTILITY ACCOMMODATION

2 §21.31. Definitions. The following words and terms, when used
3 in this subchapter, shall have the following meanings, unless
4 the context clearly indicates otherwise.

5 (1) AASHTO--American Association of State Highway and
6 Transportation Officials.

7 (2) Abandoned utility--A utility facility that no longer
8 carries a product or performs a function and for which the
9 owner:

10 (A) does not plan to use in future operations; or

11 (B) is unknown or cannot be located.

12 (3) Access denial line--A line concurrent with the common
13 property line across which access to the highway facility from
14 the adjoining property is not permitted.

15 (4) As-Built plans--Drawings showing the actual locations
16 of installed or relocated utility facilities [~~utilities~~].

17 (5) Border width--The area between the edge of pavement
18 structure or back of curb to the right of way line.

19 (6) Bridge abutment joint--The joint between the approach
20 slab and bridge structure.

21 (7) Center median--The area between opposite directions
22 of travel on a divided highway.

23 (8) Certified as-installed construction plans--The

1 construction plans for the installation of a utility facility,
2 accompanied by an affidavit certifying that the facility was
3 installed in accordance with the plans.

4 (9) Commission--The Texas Transportation Commission.

5 (10) Common carrier--As defined in the Natural Resources
6 Code, §111.002.

7 (11) Conduit--A pipe or other opening, buried or above
8 ground, for conveying fluids or gases, or serving as an envelope
9 containing pipelines, cables, or other utility facilities
10 [~~utilities~~].

11 (12) Controlled access highway--A highway so designated
12 by the commission on which owners or occupants of abutting lands
13 and other persons are denied access to or from the highway
14 mainlanes .

15 (13) Department--The Texas Department of Transportation.

16 (14) Depth of cover--The minimum depth as measured from
17 the top of the utility line to the ground line or top of
18 pavement.

19 (15) Design vehicle load (HS-20)--A design load
20 designation used for bridge design analysis representing a
21 three-axle truck loaded with four tons on the front axle and 16
22 tons on each of the other two axles. The HS-20 designation is
23 one of many established by AASHTO for use in the structural

1 design and analysis of bridges.

2 (16) Director--The chief administrative officer in charge
3 of either the Maintenance Division or the Right of Way Division,
4 or a successor division of either the Maintenance Division or
5 the Right of Way Division.

6 (17) [~~+16~~] Distribution line--That part of a utility
7 system connecting a transmission line to a service line.

8 (18) [~~+17~~] District--One of the 25 geographical
9 districts into which the department is divided.

10 (19) [~~+18~~] District engineer--The chief administrative
11 officer in charge of a district, or his or her designee.

12 (20) [~~+19~~] Duct--A pipe or other opening, buried or
13 above ground, containing multiple conduits.

14 (21) [~~+20~~] Engineer--A person licensed to practice
15 engineering in the state of Texas.

16 (22) Engineering study--An appropriate level of analysis
17 as determined by the department, which may include a traffic
18 impact analysis, that determines the expected impact that
19 permitting access will have on mobility, safety, and the
20 efficient operation of the state highway system.

21 (23) [~~+21~~] Executive director--The chief administrative
22 officer of the department, or that officer's designee not below
23 the level of assistant executive director.

1 (24) [~~22~~] Freeway--A divided highway with frontage
2 roads or full control of access.

3 (25) [~~23~~] Frontage road--A street or road auxiliary to,
4 and located alongside, a controlled access highway or freeway
5 that separates local traffic from high-speed through traffic and
6 provides service to abutting property.

7 (26) [~~24~~] Gathering line--A line that delivers a raw
8 utility product from various sites to a central distribution or
9 feed line for the purposes of refining, collecting, or storing
10 the product[, ~~and is private in function and does not directly~~
11 ~~or indirectly serve the public~~].

12 (27) [~~25~~] Hazardous material--Any gas, material,
13 substance, or waste that, because of its quantity,
14 concentration, or physical or chemical characteristics, is
15 deemed by any federal, state, or local authority to pose a
16 present or potential hazard to human health or safety or to the
17 environment. The term includes hazardous substances, hazardous
18 wastes, marine pollutants, elevated temperature materials,
19 materials designated as hazardous in the Hazardous Materials
20 Table (49 CFR §172.101), and materials that meet the defining
21 criteria for hazard classes and divisions in 49 CFR Part 173 (49
22 CFR §171.8).

23 (28) [~~26~~] High-pressure gas or liquid petroleum lines--

1 Gas or liquid petroleum pipelines that are operated, or may
2 reasonably be expected to operate in the future, at a pressure
3 of over 60 pounds per square inch.

4 (29) [~~+27~~] Horizontal clearance--The areas of highway
5 roadsides designed, constructed, and maintained to increase
6 safety, improve traffic operation, and enhance the appearance of
7 highways.

8 (30) [~~+28~~] Idled facility--A utility conduit or line
9 which temporarily does not carry a product, or does not perform
10 a function and whose owner has not provided a date for its
11 return to operation.

12 (31) [~~+29~~] Inclement weather--Weather conditions that
13 are hazardous to the safety of the traveling public, highway or
14 utility workers, or the preservation of the highway.

15 (32) [~~+30~~] Joint use agreement--A use and occupancy
16 agreement that describes the obligations, responsibilities,
17 rights, and privileges vested in the department and retained by
18 the utility, and used for situations in which the utility has a
19 compensable interest in the land occupied by its facilities and
20 the land is to be jointly occupied and used for highway and
21 utility purposes.

22 (33) [~~+31~~] Low-pressure gas or liquid petroleum lines--
23 Gas or liquid petroleum pipelines that are operated at a

1 pressure not exceeding 60 pounds per square inch.

2 (34) [~~+32~~] Mainlanes--The traveled way of a freeway or
3 controlled access highway that carries through traffic.

4 (35) [~~+33~~] Maintenance Division--The administrative
5 office of the department responsible for the maintenance and
6 operation of the state highway system.

7 (36) [~~+34~~] Noncontrolled access highway--A highway on
8 which owners or occupants of abutting lands or other persons
9 have direct access to or from the mainlanes by department
10 permit.

11 (37) [~~+35~~] Outer separation--The area between the
12 mainlanes of a highway for through traffic and a frontage road.

13 (38) [~~+36~~] Pavement structure--The combination of the
14 surface, base course, and subbase.

15 (39) [~~+37~~] Private utility--A person, firm, corporation,
16 or other entity engaged in a business other than a business
17 described in paragraph (40) of this section, including an
18 individual who owns a service line [~~Any utility facility, its~~
19 ~~accessories, and appurtenances, including gathering lines~~
20 ~~devoted exclusively to private use].~~

21 (40) [~~+38~~] Public utility--A person, firm, corporation,
22 river authority, municipality, or other political subdivision
23 that is engaged in the business of transporting or distributing

1 a utility product and that is authorized by state law to
2 operate, construct, and maintain its facilities over, under,
3 across, on, or along highways. The term includes a common
4 carrier and a gas corporation [~~for public consumption~~].

5 (41) [~~(39)~~] Ramp terminus--The entrance or exit portion
6 of a controlled access highway ramp adjacent to the through
7 traveled lanes.

8 (42) [~~(40)~~] Right of Way Division (ROW)--The
9 administrative office of the department responsible for the
10 acquisition and management of the state right of way.

11 (43) [~~(41)~~] Riprap--An appurtenance placed on the exposed
12 surfaces of soils to prevent erosion, including a cast-in-place
13 layer of concrete or stones placed together.

14 (44) [~~(42)~~] Service line--A utility facility that conveys
15 electricity, gas, water, or telecommunication services from a
16 main or conduit located in the right of way to a meter or other
17 measuring device that services a customer or to the outside wall
18 of a structure, whichever is applicable and nearer the right of
19 way.

20 (45) [~~(43)~~] TMUTCD--The most recent edition of Texas
21 Manual on Uniform Traffic Control Devices for Streets and
22 Highways.

23 (46) Traffic impact analysis--A traffic engineering study

1 that determines the potential current and future traffic impacts
2 of a proposed traffic generator and that is signed, sealed, and
3 dated by an engineer licensed to practice in the state of Texas.

4 (47) [~~44~~] Transmission line--That part of a utility
5 system connecting a main energy or material source with a
6 distribution system.

7 (48) [~~45~~] Use and occupancy agreement--The written
8 document, whether in the form of an agreement, acknowledgment,
9 notice, or request, by which the department approves the use and
10 occupancy of highway right of way by utility facilities.

11 (49) [~~46~~] Utility--Any entity owning a public or
12 private utility.

13 (50) [~~47~~] Utility appurtenances--Any attachments or
14 integral parts of a utility facility, including fire hydrants,
15 valves, communication controller boxes and pedestals, electric
16 boxes, and gas regulators.

17 (51) [~~48~~] Utility facilities--All utility lines,
18 pipelines, conduits, cables, and their appurtenances within the
19 highway right of way except those for highway-oriented needs,
20 including underground, surface, or overhead facilities either
21 singularly or in combination, which may be transmission,
22 distribution, service, or gathering lines.

23 (52) Utility product--A commodity, such as water, steam,

1 electricity, gas, oil, or crude resources or communications,
2 cable television, or waste disposal services, that directly or
3 indirectly serves the public.

4 (53) [~~49~~] Utility strip--The area of land established
5 within a control of access highway, located longitudinally
6 within the area between the outer traveled way and the right of
7 way line, for the nonexclusive [~~border width, where an~~
8 ~~assignment may be designated for a utility delineating the area~~
9 ~~of~~] use, occupancy, and access by one or more authorized public
10 utilities.

11 (54) [~~50~~] Utility structure--A pole, bridge, tower, or
12 other aboveground structure on which a conduit, line, pipeline,
13 or other utility facility is attached.

14

15 §21.33. Applicability.

16 (a) For highways under department jurisdiction, the
17 provisions of this subchapter concerning utility accommodation
18 apply to:

19 (1) new utility installations;

20 (2) additions to or maintenance of existing utility
21 installations;

22 (3) adjustments or relocations of utilities; and

23 (4) existing utility installations retained within the

1 right of way.

2 (b) The provisions of this subchapter concerning utility
3 accommodation do not apply to utilities located within the
4 rights of way of completed highways for which agreements with
5 the department were entered into before the effective date of
6 this subchapter.

7 (c) This subchapter applies to utility lines not
8 specifically mentioned in accordance with the nature of the
9 line. All lines carrying caustic, flammable, or explosive
10 materials shall conform to the provisions for high-pressure gas
11 and liquid fuel lines.

12 (d) The district engineer [~~or designee~~] may prescribe
13 special district supplemental accommodation requirements on a
14 specific installation or adjustment based on the specific soil,
15 terrain, climate, vegetation, traffic characteristics, type of
16 utility line, or other factors unique to the area. If the
17 district supplemental accommodation requirements are more strict
18 than the minimum requirements of this subchapter, the
19 supplemental accommodation requirements must be detailed in
20 writing.

21
22 §21.34. Scope. This subchapter governs matters concerning
23 accommodation, location, and methods for the installation,

1 adjustment, relocation, and maintenance of utilities on state
2 highway rights of way, but does [~~do~~] not alter current authority
3 for their installation nor determination of financial
4 responsibilities for placement or adjustment. To the extent
5 that a federal or state [~~Any~~] law, code, regulation, rule, or
6 order [~~that~~] prescribes a higher degree of protection for
7 highway facilities or the traveling public than the protection
8 provided by this subchapter, the federal or state provision
9 controls. [~~shall supersede this subchapter. District~~
10 ~~supplemental accommodation requirements shall be detailed where~~
11 ~~more than the minimums of this subchapter are required. If a~~
12 ~~utility contests such supplemental requirements, they may appeal~~
13 ~~to the district engineer. The district engineer's decision may~~
14 ~~be appealed to the Maintenance Division or Right of Way~~
15 ~~Division, as appropriate.]~~

16

17 §21.36. Rights of Utilities.

18 (a) Under state law, public [~~certain~~] utilities have a
19 right to operate, construct, and maintain their facilities
20 [~~lines~~] over, under, across, on, or along highways, subject to
21 highway purposes. This includes entities [~~utilities~~] authorized
22 by law to transport or distribute natural gas, water, electric
23 power, telephone, cable television, or salt water and those that

1 are authorized to construct and operate common carrier petroleum
2 and petroleum product lines.

3 (b) A private utility [~~Private lines~~] may place a utility
4 facility over, under, or across a highway, subject to highway
5 purposes [~~eross~~], but it is [~~are~~] not permitted to place a
6 utility facility longitudinally on a highway right [~~rights~~] of
7 way. [~~This includes privately owned lines from gas or oil~~
8 ~~wells, lines owned by oil companies within refinery and oil~~
9 ~~storage complexes or by firms engaged in businesses other than~~
10 ~~those described in subsection (a) of this section, private~~
11 ~~purpose lines of an entity described in subsection (a) of this~~
12 ~~section, and service lines owned by individuals].~~

13 (c) If an entity requests the installation of a new utility
14 facility or the adjustment or relocation of an existing utility
15 facility longitudinally within a highway right of way and the
16 entity's legal authority to install, adjust, or relocate its
17 facility longitudinally within the highway right of way is not
18 readily evident, the department may require that the entity
19 provide:

20 (1) a written certification that it is an entity
21 authorized by state law to operate, construct, and maintain its
22 utility facilities over, under, across, on, or along state
23 highways; and

1 (2) documentation that substantiates that the entity
2 filed its status with the applicable state regulatory commission
3 or agency and its facilities are subject to public safety
4 regulation.

5

6 §21.37. Design.

7 (a) General. The design of any utility installation,
8 adjustment, or relocation is the responsibility of the utility.
9 Utility design will be accomplished in a manner and to a
10 standard acceptable to the department. The location and manner
11 in which a utility installation, adjustment, or relocation work
12 will be performed within the right of way must be reviewed and
13 approved by the department. The department will review the
14 measures to be taken to preserve the safety and free flow of
15 traffic, structural integrity of the highway or highway
16 structure, ease of highway maintenance, appearance of the
17 highway, and the integrity of the utility facility. Utility
18 installations shall conform with:

19 (1) the requirements of this subchapter;

20 (2) the National Electrical Safety Code rules for the
21 installation and maintenance of electric supply and
22 communication lines;

23 (3) 23 CFR Part 645B, Accommodation of Utilities;

1 (4) 49 CFR Part 192, Transportation of Natural and Other
2 Gas by Pipeline: Minimum Federal Safety Standards;

3 (5) 49 CFR Part 195, Transportation of Hazardous Liquids
4 by Pipeline;

5 (6) the latest American Society for Testing and Materials
6 (ASTM) specifications;

7 (7) the latest edition of the Texas Manual on Uniform
8 Traffic Control Devices;

9 (8) 30 TAC §§290.38 - 290.47, relating to Rules and
10 Regulations for Public Water Systems; [~~and~~]

11 (9) applicable state and federal environmental
12 regulations, including storm water pollution prevention,
13 endangered species, and wetlands; and [-]

14 (10) applicable Railroad Commission of Texas safety
15 regulations.

16 (b) Location.

17 (1) Utility lines shall be located to avoid or minimize
18 the need for adjustment for future highway projects and
19 improvements, to allow other utilities equal access in the right
20 of way, and to permit access to utility facilities for their
21 maintenance with minimum interference to highway traffic.

22 (2) Longitudinal installations, if allowed, shall be
23 located on uniform alignments to the right of way line to

1 provide space for future highway construction and possible
2 future utility installations.

3 (3) New utility lines crossing the highway shall be
4 installed at approximately 90 degrees to the centerline of the
5 highway.

6 (4) The horizontal and vertical location of overhead
7 utility lines shall conform with §21.41 [~~§21.41(e)~~] of this
8 subchapter (relating to Overhead Electric and Communication
9 Lines), consistent with the clearances applicable to all
10 roadside obstacles. No aboveground fixed objects will be
11 allowed in the horizontal clearance.

12 (5) The utility is responsible for determining whether
13 other utility lines exist at, or if plans have been submitted to
14 the department regarding, the proposed installation area. The
15 utility must make every effort to insure that the proposed
16 installation is compatible with existing and approved future
17 utility facilities [~~utilities~~].

18 (6) A utility facility [~~Utilities~~] on controlled access
19 highways or freeways shall be located to permit maintenance of
20 the facility [~~utility~~] by access from frontage roads, nearby or
21 adjacent roads and streets, or trails along or near the right of
22 way line without access from the mainlanes or ramps. A utility
23 facility may [~~Utilities shall~~] not be located longitudinally in

1 the center median or outer separation of controlled access
2 highways or freeways.

3 (7) On highways with frontage roads, longitudinal utility
4 installations may be located between the frontage road and the
5 right of way line. Utility facilities [~~lines~~] shall not be
6 placed or allowed to remain in the center median, outer
7 separation, or beneath any pavement, including shoulders.

8 (8) The procedures and requirements of this paragraph
9 apply if [~~When~~] a longitudinal installation is proposed within
10 existing access denial lines of a controlled access highway or
11 freeway without frontage roads [~~and meets the conditions of~~
12 ~~§21.35 of this subchapter, the department may establish a~~
13 ~~utility strip, specific to the requesting utility, designating~~
14 ~~the area of use, occupancy, and access. All existing and~~
15 ~~proposed fences shall be located at the freeway right of way~~
16 ~~line. Denial of access regarding property adjoining the right~~
17 ~~of way line will not be altered].~~

18 (A) The public utility seeking the installation shall
19 submit to the district engineer a written request that includes
20 for each facility proposed for installation the following
21 detailed information:

22 (i) the information required by §21.35 of this
23 subchapter (relating to Exceptions);

1 (ii) survey data as directed by the department to
2 identify and designate the location of a utility strip, the
3 utility strip's relationship to existing highway facilities and
4 the right of way line, and the specific area of use, occupancy,
5 and access for installation and maintenance of the utility
6 facility;

7 (iii) a plan for the utility's access to, from, and
8 within the utility strip with clearly described procedures that
9 preserve the safety and free flow of traffic on the controlled
10 access highway or freeway during installation, maintenance, and
11 emergency service or repair of the utility facility; and

12 (iv) any additional information, including an
13 engineering study requested by the department, that is
14 reasonably necessary for a determination of the impact of the
15 proposed utility facility on the safety, design, construction,
16 operation, maintenance, and stability of the controlled access
17 highway.

18 (B) If the requested utility facility installation
19 meets the conditions of §21.35 of this subchapter and the other
20 applicable requirements of this subchapter, the department shall
21 establish a utility strip along the outer edge of the right of
22 way by:

23 (i) locating a utility-access denial line between the

1 proposed utility facility installation and the mainlanes and
2 connecting ramps; and

3 (ii) designating the specific area of use, occupancy,
4 and access for installation and maintenance of the requested
5 utility facility.

6 (C) The department may adjust the utility-access denial
7 line of an established utility strip to accommodate additional
8 authorized utility facilities within the utility strip.

9 (D) The utility requesting installation of the utility
10 facility is responsible for all costs associated with providing
11 the information required for designation of a new or expanded
12 utility strip. The utility shall delineate the utility-access
13 denial line on the ground by setting readily identifiable,
14 durable, and weatherproof permanent markers to represent or
15 reference the corners, angle points, and points of curvature or
16 tangency of the utility-access denial line.

17 (E) All existing and proposed fences shall be located
18 at the freeway right of way line.

19 (F) Denial of access regarding property adjoining the
20 right of way line will not be altered.

21 (c) Plans. Utilities shall be responsible and accountable
22 for protecting the public investment in the highway, inclusive
23 of all its components, and to maintain traffic capacity and

1 safety for each highway user.

2 (1) All utility installations shall be of durable
3 materials designed for long life expectancy and relatively free
4 from the need for routine servicing or maintenance. In addition
5 to the requirements of this subchapter, any existing utility
6 lines to remain in place must be of satisfactory design and
7 condition in the opinion of the district.

8 (2) Utilities shall avoid disturbing existing drainage
9 courses. In addition, soil erosion shall be held to a minimum
10 and sediment from the construction site shall be kept away from
11 the highway and drain inlets.

12 (3) Utility expansions shall be planned to minimize
13 hazards to, and interference with, future highway projects or
14 other utility installations.

15 (4) Plans shall include the design, proposed location,
16 vertical elevations, and horizontal alignments of the utility
17 facility based on the department's survey data [~~datum~~], the
18 relationship to existing highway facilities and the right of way
19 line, and location of existing utility facilities [~~utilities~~]
20 that may be affected by the proposed utility facility.

21 (5) As-built plans or certified as-installed construction
22 plans shall include the installed location, vertical elevations,
23 and horizontal alignments of the utility facility based upon the

1 department's survey data [~~datum~~], the relationship to existing
2 highway facilities and the right of way line, and access
3 procedures for maintenance of the utility facility. As-
4 installed construction plans certified by a utility or its
5 representative shall be submitted to the department for each
6 relocation or new installation. In the alternative, if approved
7 by the director of the Maintenance Division or Right of Way
8 Division, a district may require a utility to deliver either as-
9 installed construction plans that are certified by an
10 independent party or final as-built plans that are signed and
11 sealed by an engineer or registered professional land surveyor.
12 In determining whether to authorize a requirement for
13 independently certified or signed and sealed plans, the director
14 shall consider:

15 (A) the amount of available right of way or the
16 proposed utility facility's proximity to department facilities
17 and other utility facilities that may be impacted; and

18 (B) past performance of the utility in providing
19 accurate location data and conformance with its certified as-
20 installed construction plans.

21 (6) If approved by the director of the Maintenance
22 Division or the Right of Way Division, a district may require a
23 utility to deliver plans that are signed and sealed by an

1 engineer. In determining whether to authorize a requirement for
2 signed and sealed plans, the director shall consider:

3 (A) the amount of available right of way or the
4 proposed utility facility's proximity to department facilities
5 or other utility facilities that may be impacted;

6 (B) the complexity of required traffic control plans;

7 (C) whether the installation or adjustment activity
8 requires a storm water pollution prevention plan; and

9 (D) the utility's past performance in providing
10 accurate location data and conformance with its construction
11 plans.

12 (d) Tunnels and bridges.

13 (1) Interstate highways. In providing a utility tunnel
14 or utility bridge, the requirements in subparagraphs (A) - (I)
15 apply.

16 (A) Mutually hazardous transmittants, such as fuels and
17 electric energy, shall be isolated by compartmentalizing or by
18 auxiliary encasement of incompatible carriers.

19 (B) The utility tunnel or utility bridge structure
20 shall conform in design, appearance, location, bury, earthwork,
21 and markings to the culvert and bridge practices of the
22 department.

23 (C) Where a pipeline on or in a utility structure is

1 encased, the casing shall be effectively opened or vented at
2 each end to prevent possible build up of pressure and to detect
3 leakage of gases or fluids.

4 (D) Where a casing is not provided for a pipeline on or
5 in a utility structure, additional protective measures shall be
6 taken, such as employing a higher factor of safety in the
7 design, construction, and testing of the pipeline than would be
8 required for cased construction.

9 (E) Communication and electric power lines shall be
10 insulated, grounded, and carried in protective conduit or pipe
11 from the point of exit from the ground to reentry, and the cable
12 carried to a manhole located beyond the backwall of the
13 structure.

14 (F) Carrier and casing pipe for gas, liquid petroleum,
15 hazardous product, and water lines shall be insulated from
16 electric power line attachments.

17 (G) Sectionalized block valves shall be installed in
18 lines at or near ends of utility structures, pursuant to 49 CFR
19 §192.179, Transmission Line Valves, unless segments of the lines
20 can be isolated by other sectionalizing devices within a
21 distance acceptable to the department.

22 (H) Any maintenance, servicing, or repair of the
23 utility lines will be the responsibility of the utility.

1 (I) The utility shall notify the district 48 hours in
2 advance of any maintenance, servicing, or repair; however, in an
3 emergency situation, the utility shall notify the district as
4 soon as practicable.

5 (2) Non-interstate highways. If a utility's line exists
6 on its own easement and it would be more economical to the
7 department to adjust the line across a highway by use of a
8 utility tunnel or bridge rather than to provide separately
9 trenched and cased crossing, consideration should be given to
10 provision of such a structure. Where the utility line was
11 placed through an approved use and occupancy agreement and the
12 adjustment of the utility is the sole responsibility of the
13 utility owner, the department may allow for the provision of a
14 utility structure without cost to the department, provided the
15 conditions outlined in subsection (a) of this section and all
16 other pertinent requirements are met. If a structure is to
17 serve as a joint utility/pedestrian crossing or a joint
18 utility/sign support structure, the department will participate
19 to the extent necessary for accommodation of pedestrians or
20 highway signs only.

21 (e) Joint use of utility and highway structures.

22 (1) The attachment of utility lines to bridges and grade
23 separation structures is prohibited if other locations are

1 feasible and reasonable.

2 (2) Where other arrangements for a utility line to span
3 an obstruction are not feasible, the utility may submit a
4 request to the district for attachment of the line to a bridge
5 structure through a bridge attachment agreement. Each
6 attachment will be considered on an individual basis, and
7 permission to attach will not be considered as establishing a
8 precedent for granting of subsequent requests for attachment.

9 (A) When it is impractical to carry a self-supporting
10 communication line across a stream or other obstruction, the
11 department may permit the attachment of the line to its bridge.
12 If approved on existing bridges, the line must be enclosed in a
13 conduit and so located on the structure as not to interfere with
14 stream flow, traffic, or routine maintenance operations. When a
15 request is made before construction of a bridge, if approved,
16 suitable conduits may be provided in the structure if the
17 utility bears the cost of all additional work and materials
18 involved.

19 (B) If it is the department's responsibility to provide
20 for the adjustment of telephone lines or telephone conduits to
21 accommodate the construction of a highway and the adjustment
22 provides for the placement of telephone conduits in a bridge,
23 the department will allow a reasonable number of spare telephone

1 conduits in the structure if the spares are placed at the time
2 of construction and the telephone company bears the cost of the
3 spare conduits.

4 (C) A utility shall not attach gas or liquid fuel lines
5 to a bridge without the written approval of the executive
6 director.

7 (D) Power lines carrying greater than 600 volts shall
8 not be permitted on bridges.

9 (E) When a utility is granted permission to attach a
10 pipeline to a proposed bridge prior to construction, any
11 additional costs associated with the design or construction to
12 accommodate the pipeline are the responsibility of the utility.

13 (F) A utility requesting permission to attach a
14 pipeline to an existing bridge shall submit sufficient
15 information to allow the department to conduct a stress analysis
16 to determine the effect of the added load on the structure. The
17 department may require other details of the proposed attachment
18 as they affect safety and maintenance.

19 (f) Aesthetics. A utility will notify the department
20 before removing, trimming, or replacing trees, bushes,
21 shrubbery, or any other aesthetic features. The department must
22 approve the extent and method of removal, trimming, or
23 replacement of trees, bushes, shrubbery, or any other aesthetic

1 feature.

2

3 §21.42. Appeal Process.

4 (a) A utility may file a petition of appeal to contest:

5 (1) a supplemental accommodation requirement prescribed

6 under §21.33 of this subchapter (relating to Applicability);

7 (2) the application of a design, construction, or

8 maintenance requirement under §21.37 (relating to Design),

9 §21.38 (relating to Construction and Maintenance), §21.40

10 (relating to Underground Utilities), and §21.41 (relating to

11 Overhead Electric and Communication Lines)of this subchapter;

12 (3) the denial of the utility's request for an exception

13 under §21.35 of this subchapter (relating to Exceptions); or

14 (4) the denial of the utility's request under this

15 subchapter for either the installation of a new utility facility

16 or the adjustment or relocation of an existing utility facility.

17 (b) The petition must be filed with:

18 (1) the director of the Right of Way Division, if the

19 utility facility that is the subject of the appeal occupies or

20 is proposed to occupy the right of way under a utility joint use

21 agreement; or

22 (2) the director of the Maintenance Division, if the

23 utility facility that is the subject of the appeal occupies or

1 is proposed to occupy the right of way under a use and occupancy
2 agreement other than a utility joint use agreement.

3 (c) The petition must:

4 (1) be in writing;

5 (2) completely and succinctly state the grounds for
6 appeal and its factual basis; and

7 (3) include sufficient factual documentation, such as
8 drawings, surveys, or photographs, to establish the merits of
9 the appeal.

10 (d) The utility has the burden of demonstrating that the
11 department incorrectly applied its utility accommodation
12 requirements to the applicable facts.

13 (e) The director of the division to which a petition that
14 satisfies the requirements of this section is submitted will
15 issue, within 45 days after the date of receipt of the petition,
16 a written decision approving or disapproving the appeal and, on
17 issuance, immediately send the decision to the utility. If a
18 written decision is not issued within the 45-day period, the
19 appeal is considered to be disapproved and the decision of
20 disapproval is considered to be issued on the 46th day after the
21 date of receipt of the petition.

22 (f) To appeal a decision issued under subsection (e) of
23 this section, the utility must submit a written petition of

1 appeal to the executive director within 30 days after the date
2 that the division director's decision is issued. The petition
3 must satisfy the requirements of subsection (c) of this section.
4 The executive director will issue, within 30 days after the date
5 of receipt of the petition, a written decision approving or
6 disapproving the appeal.

7 (g) To appeal a decision of the executive director issued
8 under subsection (f) of this section, the utility must submit to
9 the executive director its written petition of appeal to a board
10 of variance, before the 31st day after the date that the
11 executive director's decision under subsection (f) of this
12 section is received. On receipt of the petition, the procedure
13 set out in this subsection applies.

14 (1) The executive director will appoint a board of
15 variance composed of at least three persons, each of whom is not
16 below the level of department division director, office
17 director, or district engineer and was not involved in a
18 decision to deny the utility's request under subsection(a), (e),
19 or (f) of this section. A majority of the members of the board
20 constitutes a quorum.

21 (2) The board of variance will meet and consider the
22 appeal. Before the 10th day preceding the date of the meeting,
23 the board will give the utility notice of the time and place of

1 the meeting and afford the utility an opportunity to attend and
2 present evidence regarding the appeal.

3 (3) Before the 11th day after the date of the meeting,
4 the board of variance will issue a final written decision
5 approving or disapproving the appeal.