

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose repeal of §§1.21 - 1.33 and new §§1.21 - 1.38, all relating to procedures in contested cases to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed repeals 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 the repeal of §§1.21 - 1.33 and new §§1.21 - 1.38 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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:

General Counsel

Recommended by:

Executive Director

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Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes the
3 repeal of §§1.21 - 1.33 and simultaneously proposes new §1.21,
4 Scope and Purpose, §1.22, Definitions, §1.23, Computation of
5 Time, §1.24, Filing of Petition; Procedure for Filing Petition
6 and Other Documents, §1.25, Procedure for Service of Documents,
7 §1.26, Content of Petition, §1.27, Examination by Executive
8 Director, §1.28, Initiation of Contested Case, §1.29, Notice of
9 Hearing, §1.30, Standard of Review, and Burden of Proof, §1.31,
10 Provisions for Contract Claims, §1.32, Ex parte Communications,
11 §1.33, Issuance of Subpoena or Commission to Take Deposition,
12 §1.34, Form of Subpoena or Commission to Take Deposition, §1.35,
13 Witness Fees, §1.36, Proposal for Decision; Filing of Exceptions
14 and Replies, §1.37, Notification of Decisions and Orders, and
15 §1.38, Motions for Rehearing all concerning procedures in
16 contested cases.

17

18 EXPLANATION OF PROPOSED REPEALS AND NEW SECTIONS

19 Current 43 TAC Chapter 1, Subchapter E describes the procedures
20 to be followed in contested case hearings that are authorized by
21 statute or by the rules of the Texas Transportation Commission
22 (commission). The new sections change provisions related to
23 filing documents, referring a case to the State Office of
24 Administrative Hearings (SOAH), requesting a subpoena, the
25 burden of proof, and standard of review and add provisions on

1 serving documents, ex parte communications, and contract claims.
2 The process of repeal and adoption is used instead of amending
3 the current sections because the rules are being reorganized for
4 clarity and ease of use and using only the amendatory process
5 would result in sections that are difficult to comprehend.

6
7 New §1.21 provides that a matter may be the subject of the
8 contested case procedure only if a statute provides that the
9 matter may be the subject of a contested case hearing under the
10 Administrative Procedure Act (Government Code, Chapter 2001) or
11 if a commission rule expressly provides for a hearing under 43
12 TAC Chapter 1, Subchapter E. New §1.21 omits the statement that
13 is in the current rules that except as provided in 43 TAC
14 Chapter 1, Subchapter E, the procedural rules of SOAH govern a
15 contested case. To comply with Government Code, §2003.050(b),
16 the procedural rules of the commission govern procedural matters
17 that relate to a hearing only to the extent that SOAH's rules
18 adopt the commission's procedural rules by reference.

19
20 New §1.22 provides definitions applicable for 43 TAC Chapter 1,
21 Subchapter E. Definitions for terms in current §1.22 that are
22 not included in new §1.22 are "claim" and "contract claim." The
23 definition of claim is no longer needed because, as explained in
24 the explanation of §1.31, the commission will no longer impose
25 the standard of review that relates to contract claims to other

1 types of contested cases, such as an enforcement case related to
2 a license or permit issued under the outdoor advertising
3 program. Therefore, it is no longer necessary to define as a
4 "claim" a contested case concerning those other program areas.
5 The definition of "contract claim" also is not needed. The
6 types of contract claims that may be the subject of a contested
7 case are identified in statute. Current definitions that are
8 being revised for clarity are "administrative law judge",
9 "executive director," "party," "petition," and "petitioner."
10 Under the new rules, the term "judge" is used rather than
11 "administrative law judge." New definitions are proposed for
12 "APA," "contested case," "person," and "SOAH."

13
14 New §1.23 states the process that the department will use to
15 compute the deadline for filing a petition or other document
16 that is set by statute or another rule. The section will be
17 used, for example, to determine the last day on which exceptions
18 to the judge's proposal for decision under new §1.36 may be
19 filed.

20
21 New §1.24 describes the procedure for filing a petition or other
22 document. Compared to the current rules, the proposed rule adds
23 specific directions on how to file by United States mail, hand
24 delivery, or by facsimile. It specifies when a given filing
25 will be determined to be received by the executive director.

1 The added provisions are intended to add clarity to the process
2 of filing a document with the executive director. The proposed
3 rule does not include the statement in the current §1.23
4 concerning a contract claim regarding sanctions. That statement
5 is omitted because a contract claim case and a sanctions case
6 are distinct types of matters and because the restriction on
7 when a sanctions case may be referred to SOAH conflicts with the
8 provision in 43 TAC §9.2(i).

9
10 New §1.25 describes the procedure for serving a copy of a
11 document, other than a petition, on the other parties. To avoid
12 ex parte communications with the judge, executive director, or
13 commission, the parties in a contested case have usually served
14 a copy of their filings on the other parties. The added
15 provisions are intended to add clarity to the process.

16
17 New §1.26 describes the required content of a petition. The
18 proposed rule is generally the same as current 43 TAC §1.24, but
19 is revised for clarity. Section 1.26(c) requires a petition
20 concerning a contract claim include a copy of the claim "and
21 detailed report, if such a report is required by statute or
22 commission rule, that provides the basis of the claim." The
23 requirement is reasonable because a claimant must explain the
24 basis of the claim in detail so that it can be evaluated. Also,
25 as described later concerning proposed §1.31, a claimant may be

1 entitled to interest under the Prompt Payment Act (PPA),
2 (Government Code, Chapter 2251). The department can promptly
3 pay a claim only if the claim is explained. The requirement to
4 submit a detailed report is in current 43 TAC §1.24(c), but
5 applies only to claims under 43 TAC §9.2. The requirement is
6 rephrased to apply to all claims in which a statute or
7 commission rule requires a claim be accompanied by a detailed
8 report. The statute concerning claims on a purchase order,
9 Government Code, §2260.051(c), requires that a notice of claim
10 "must state with particularity" the basis of the claim. Also,
11 it is anticipated the rules relating to claims on purchase
12 orders, 43 TAC §9.1, will be amended in the future to require a
13 detailed report.

14

15 New §1.27 describes the executive director's review of a
16 petition, and request for clarification of a deficient petition.
17 The proposed rule does not include the provision in the current
18 43 TAC 1.25(c) that authorizes the executive director to reject
19 a petition. A court reviewing a similar question related to
20 another state agency determined the agency must refer the
21 petition for hearing, even if only to determine whether the
22 petition was timely. Hawkins v. Community Health Choice, Inc.,
23 127 S.W.3d 322 (Tex. App. - Austin 2004, no pet.). Proposed
24 §1.27(c) concerns a petition filed under a department rule that
25 does not expressly refer to 43 TAC Chapter 1, Subchapter E

1 concerning the filing of the request. This is relevant to
2 petitions filed under 43 TAC §21.149(f) concerning permanent
3 revocation or permanent suspension of an outdoor advertising
4 license, under 43 TAC §21.150(k) concerning cancellation of an
5 outdoor advertising permit along an interstate or primary
6 highway, under 43 TAC §21.572 concerning revocation of an
7 outdoor advertising permit on a rural road or imposition of
8 administrative penalties, and under 43 TAC §28.304 and §28.306
9 concerning an enforcement action related to oversize and
10 overweight vehicles and loads. The executive director shall
11 examine the request concerning whether it meets the requirements
12 of the rule under which the petition was filed and not 43 TAC
13 Chapter 1, Subchapter E. The executive director may, however,
14 require the petitioner to file an amended petition that also
15 satisfies the requirements of 43 TAC Chapter 1, Subchapter E.
16 The subsection is meant to avoid unfair surprise to petitioners
17 concerning the requirements to file a petition. It is
18 anticipated that the rules listed above concerning the filing of
19 a petition will be amended in the future to include an express
20 reference to 43 TAC Chapter 1, Subchapter E.

21
22 New §1.28 describes the executive director's initiation of a
23 contested case by referring the petition to SOAH. The
24 department may initiate a contested case on its own initiative.
25 The proposed rule is generally the same as the current 43 TAC

1 §1.26(a). As described in the preceding paragraph, the
2 executive director may refer a case even if only to request a
3 determination whether the petition was timely. New §1.28
4 specifies that the executive director's referral may request a
5 summary disposition of the case if the executive director
6 believes the petition was not timely filed or fails to meet
7 other procedural requirements. Section 1.28(c) specifies the
8 department's office of general counsel will transmit all
9 requests for a contested case to SOAH. The requirement will
10 promote uniformity in the processing of requests and facilitate
11 the tracking of cases referred.

12
13 New §1.29 describes the required notice of hearing. The
14 proposed rule is generally the same as the current 43 TAC
15 §1.26(b), but imposes on the department the obligation to issue
16 notice in accordance with the instructions of the judge.

17
18 New §1.30 describes the standard of review, and burden of proof.
19 Section 1.30(a) provides that except for contract claims, the
20 standard of review is reasonableness. With changes as described
21 in the following paragraph, this is the same as current 43 TAC
22 §1.26(c). Section 1.30(b) provides the applicant shall have the
23 burden of proof concerning an application for a permit, license,
24 or other approval from the department. The claimant bears the
25 burden of proof concerning a contract claim. The commission

1 notes that the subsection itself does not confer a right to a
2 contested case hearing concerning an application or contract
3 claim, but only sets the burden of proof assuming the applicant
4 or claimant is entitled to a contested case hearing. As
5 specified in new §1.21, a matter may be the subject of the
6 contested case procedure only if a statute provides that the
7 matter may be the subject of a contested case hearing under the
8 Administrative Procedure Act (Government Code, Chapter 2001) or
9 if a commission rule expressly provides for a hearing under 43
10 TAC Chapter 1, Subchapter E. For example, current 43 TAC
11 Chapter 27, Subchapter C concerns a person authorized to
12 construct a private toll project. The person may submit an
13 application to interconnect with the state highway system, and
14 current §27.37(d) provides an applicant is entitled to a
15 contested case hearing under 43 TAC Chapter 1, Subchapter E
16 concerning a decision to deny the application. Section 1.30(c)
17 provides that in a proceeding concerning an enforcement matter,
18 the department bears the burden of proof to show the person's
19 violations of law or department policy. The person bears the
20 burden of proof to show mitigating factors that show enforcement
21 is not necessary. The commission believes this is an
22 appropriate assignment of the burden of proof because in each
23 instance the burden is placed on the person who has the greatest
24 access to information that is the basis of the dispute. Current
25 43 TAC 1.26(d) provides that a party seeking monetary damages or

1 penalties shall bear the burden of proof. In all other
2 instances, the party challenging a department decision or action
3 shall bear the burden of proof. The commission's current
4 proposal would not effect a change to the first sentence,
5 because department staff in an enforcement case, whether or not
6 they seek a monetary penalty, will have the burden of proof.
7 The commission believes it should change the standard set in the
8 second sentence. The department staff should have the burden of
9 proof in all enforcement cases, and concerning counter-claims
10 filed by the department in a contract claim case, because staff
11 has the greatest access to information concerning the basis for
12 the staff's actions.

13
14 New §1.31 describes provisions that are unique to contract
15 claims. Section 1.31(a) provides that the section applies only
16 to a contested case concerning a contract claim. Department
17 claims are processed under 43 TAC §9.1 and §9.2. Section
18 1.31(b) provides that if the parties to a contract agree to
19 submit questions that arise under the contract to the decision
20 of a department employee, the employee's decision is final and
21 conclusive unless in making the decision, the employee is guilty
22 of fraud, misconduct, or such gross mistake as would imply bad
23 faith or a failure to exercise an honest judgment. This is the
24 standard established in Texas Department of Transportation v.
25 Jones Brothers Dirt & Paving Contractors, Inc., 92 S.W.3d 477

1 (Tex. 2002). The proposed subsection does not impose this
2 standard of review on other types of disputes that may be the
3 subject of a contested case hearing, as does the current 43 TAC
4 §1.26(c). The change in the rule is appropriate because the
5 precedent set in the Jones Brothers case related to interpreting
6 an underlying contract in which the parties agreed to delegate
7 to a specific person the role of resolving disputes. In the
8 absence of a contractual agreement, the standard of review in
9 the Jones Brothers case does not apply. Section 1.31(c) applies
10 to a contractor's claims for interest under the Prompt Payment
11 Act. The Austin Court of Appeals has determined that the PPA
12 applies to a contract claim. State of Texas v. Mid-South
13 Pavers, Inc., 246 S.W.3d 711 (Tex. App.-Austin 2007, pet.
14 den'd.). The proposed rule tracks the recommendations of an
15 administrative law judge, which were later adopted by the
16 executive director, in a contested case in which the issue was
17 how to implement the PPA to calculate the interest due. Adding
18 this to the commission's rules will add certainty to the process
19 of calculating interest payments both in settlement negotiations
20 and in contested cases. Section 1.31(d) adds a new provision
21 that a settlement offer concerning a contract claim is an offer
22 to compromise a disputed claim, and its admission into evidence
23 is controlled by Rule 408, Texas Rules of Evidence. The new
24 provision would replace the current 43 TAC §1.28 which states a
25 settlement offer is not admissible for any purpose, which

1 oversimplifies the rule of evidence.

2

3 New §1.32 adds the prohibition on ex parte communications set
4 forth in Government Code, §2001.061. Having the prohibition in
5 the commission's rules will remind parties of this obligation.

6

7 New §§1.33 - 1.35 concern the department's issuance of a
8 subpoena or commission to take deposition, including the payment
9 of witness fees, if required. For purposes of clarity, the
10 proposed rules give greater detail compared to the process
11 described in the current 43 TAC §1.27. The new rules authorize
12 the executive director, the general counsel, or an attorney in
13 the office of general counsel to sign a subpoena or commission
14 to take deposition. The new rules require the requestor to file
15 with the executive director both the request and any required
16 witness fees by certified check. After the subpoena is issued,
17 testimony is taken, and the requestor directly pays the witness
18 any required witness fees, the executive director will return to
19 the requestor the certified check filed with the request.

20

21 New §1.36 concerns the filing of the proposal for decision, and
22 exceptions and replies to exceptions. The requirements are
23 generally the same as those in the current 43 TAC §§1.29 - 1.31,
24 but have been reorganized and clarified. The new section does
25 not include the provisions of the current 43 TAC §1.33

1 concerning the judge's extension of time for final order and
2 making a note of this in the proposal for decision. The
3 department believes that the rule has not been used by judges or
4 the department. The deadline for filing exceptions has been
5 changed from 20 days to 15 days after service of the proposal
6 for decision. SOAH's rule, 1 TAC §155.507, requires filing
7 within 15 days. To prevent confusion the new rule uses the same
8 deadline. The new rules specify that the judge, rather than the
9 executive director, would rule upon any request for shortening
10 or extending the deadlines for exceptions or replies to
11 exceptions. It is preferable that the judge continue to manage
12 the case at this point. Also, the change makes the commission's
13 rule consistent with SOAH's rule. Finally, the new rules
14 specify that if the judge submits an amended proposal for
15 decision after reviewing the exceptions and replies, the parties
16 do not have the opportunity to submit additional exceptions.
17 The case is ready for decision.

18

19 New §1.37 adds provisions on notification of decision. The
20 commission or the executive director, as specified by statute or
21 commission rule, will issue the decision in a case. No matter
22 who issues the decision, the executive director is responsible
23 for mailing notice of the decision to the parties.

24

25 New §1.38 concerns motions for rehearing. The requirements are

1 generally the same as those in the current 43 TAC §1.32, but
2 have been reorganized and clarified. The deadline to file a
3 reply to a motion for rehearing has been changed from 15 days
4 after the filing of the motion to 30 days after the date the
5 party or party's authorized representative is notified of the
6 decision. The Administrative Procedure Act (APA) in Government
7 Code, §2001.146 requires filing 30 days after the date the party
8 or party's authorized representative is notified of the
9 decision. To prevent confusion the new rule uses the same
10 deadline. The new rules do not include the current prohibition
11 against a party requesting an extension of the deadline to file
12 a motion for rehearing. The APA allows a state agency to extend
13 the deadline, within certain limits, and so the change will make
14 the commission's rules more consistent with the APA.

15

16 FISCAL NOTE

17 James Bass, Chief Financial Officer, has determined that for
18 each of the first five years the repeals and new sections as
19 proposed are in effect, there will be no fiscal implications for
20 state or local governments as a result of enforcing or
21 administering the repeals and new sections.

22

23 Bob Jackson, General Counsel, has certified that there will be
24 no significant impact on local economies or overall employment
25 as a result of enforcing or administering the repeals and new

1 sections.

2

3 PUBLIC BENEFIT AND COST

4 Mr. Jackson has also determined that for each year of the first
5 five years the sections are in effect, the public benefit
6 anticipated as a result of enforcing or administering the
7 repeals and new sections will be the rules will be better
8 organized and have greater clarity. There are no anticipated
9 economic costs for persons required to comply with the sections
10 as proposed. There will be no adverse economic effect on small
11 businesses.

12

13 SUBMITTAL OF COMMENTS

14 Written comments on the proposed repeal of §§1.21 - 1.33 and new
15 §§1.21 - 1.38 may be submitted to Bob Jackson, General Counsel
16 Texas Department of Transportation, 125 East 11th Street,
17 Austin, Texas 78701-2483. The deadline for receipt of comments
18 is 5:00 p.m. on September 13, 2010.

19

20 STATUTORY AUTHORITY

21 The repeals and new sections are proposed under Transportation
22 Code, §201.101, which provides the Texas Transportation
23 Commission with the authority to establish rules for the conduct
24 of the work of the department, and more specifically,
25 Transportation Code, §201.112, which provides the commission

1 with the authority to establish rules governing procedures in
2 certain contract claims, and Government Code, §2001.004, which
3 requires each agency to adopt rules of practice stating the
4 nature and requirements of all available formal and informal
5 procedures.

6

7 CROSS REFERENCE TO STATUTE

8 Transportation Code, §201.101 and §201.112 and Government Code,
9 §2001.004.

1 SUBCHAPTER E. PROCEDURES IN CONTESTED CASE

2 §1.21. Scope and Purpose. This subchapter describes the
3 procedures to be followed in a contested case. The procedures
4 in this subchapter may be used only if a statute provides that
5 the matter may be the subject of a contested case hearing under
6 the Administrative Procedure Act (Government Code, Chapter 2001)
7 or a department rule expressly provides for a hearing under this
8 subchapter.

9
10 §1.22. Definitions. The following words and terms, when used
11 in this subchapter, shall have the following meanings, unless
12 the context clearly indicates otherwise.

13 (1) APA--The Administrative Procedure Act (Government
14 Code, Chapter 2001).

15 (2) Contested case--A proceeding in which the legal
16 rights, duties, or privileges of a party are to be determined
17 after opportunity for an adjudicative hearing.

18 (3) Department--The Texas Department of Transportation.

19 (4) Executive director--The chief administrative officer
20 of the department.

21 (5) Judge--The administrative law judge assigned by the
22 State Office of Administrative Hearings' chief administrative
23 law judge to preside at an administrative hearing held under
24 this subchapter.

1 (6) Party--A person, including the department, that is
2 named or permitted to participate in a contested case hearing by
3 the judge.

4 (7) Person--An individual, representative, corporation,
5 or other entity, including any public or non-profit corporation,
6 or any agency or instrumentality of federal, state, or local
7 government.

8 (8) Petition--The document that initiates a contested
9 case hearing.

10 (9) Petitioner--A person who files a petition under this
11 subchapter.

12 (10) SOAH--The State Office of Administrative Hearings.

13

14 §1.23. Computation of Time. In computing a period of days for
15 the purposes of this subchapter, unless otherwise provided by
16 statute, the period begins on the day after the act, event, or
17 default in question and concludes at the end of the last day of
18 that designated period, unless that day is a Saturday, Sunday,
19 or legal holiday on which the office of the executive director
20 is closed, in which event the period concludes at the end of the
21 next day that is not a Saturday, Sunday, or legal holiday.

22

23 §1.24. Filing of Petition; Procedure for Filing Petition and
24 Other Documents.

1 (a) A person begins a contested case by filing an original
2 and one copy of a petition with the executive director.

3 (b) Filing a document, including a petition, with the
4 executive director must be made by:

5 (1) sending the document by United States mail or by
6 overnight delivery service to: Executive Director, Texas
7 Department of Transportation, 125 East 11th Street, Austin,
8 Texas 78701;

9 (2) hand delivering the document to: Executive Director,
10 Texas Department of Transportation, 125 East 11th Street,
11 Austin, Texas; or

12 (3) except as provided by subsection (e) of this section,
13 faxing the document to: Executive Director, Texas Department of
14 Transportation at (512) 305-9567.

15 (c) The time and date of filing the document is determined
16 by the file stamp affixed by the office of the executive
17 director, except as provided by subsection (e) of this section
18 for a document filed by facsimile transmission.

19 (d) For a document other than a petition, only an original
20 is required to be filed.

21 (e) This subsection applies only to filings made by
22 facsimile transmission.

23 (1) A document may not be filed by facsimile transmission
24 if the document consists of more than 35 pages.

1 (2) The quality of the document filed by facsimile
2 transmission must be sufficiently clear to transmit legibly.

3 (3) To be an effective filing, the first sheet of
4 facsimile transmission must indicate the number of pages being
5 transmitted and contain a telephone number to call if there are
6 transmission problems.

7 (4) If a document is filed by facsimile transmission, the
8 sender shall maintain the original of the document with the
9 original signature. The sender is not required to file an
10 additional copy of the document by another means.

11 (5) The time and date imprinted by the facsimile machine
12 in the office of the executive director on the accompanying
13 transaction report is the filing time and date, except if a
14 document is received when the office of the executive director
15 is closed, the filing time and date is the beginning of the next
16 business day.

17

18 §1.25. Procedure for Service of Documents.

19 (a) On the date that a party files a document, other than a
20 petition, with the executive director, the party shall also
21 serve a copy of the document on the judge and each party or the
22 party's authorized representative. If the judge has designated
23 a department employee as a party in the case, the Office of the
24 Attorney General is the employee's authorized representative and

1 service must be made on the Office of the Attorney General
2 rather than the employee.

3 (b) Service of the document on the judge must be in
4 accordance with SOAH rules. To any person other than the judge,
5 service of the document must be made by:

6 (1) hand-delivery;

7 (2) regular, certified, or registered mail;

8 (3) overnight delivery service;

9 (4) facsimile transmission; or

10 (5) electronic mail, if the parties have agreed to that
11 manner of service.

12 (c) A person who files a document must include with the
13 document a certificate of service that certifies compliance with
14 this section.

15 (d) If a certificate of service is not included with the
16 document, the executive director may:

17 (1) return the document;

18 (2) send notice of noncompliance to all parties, stating
19 the document will not be considered until all parties have been
20 served; or

21 (3) send a copy of the document to the judge and all
22 parties.

23

24 §1.26. Content of Petition.

1 (a) A petition must include:

2 (1) the name of the petitioner;

3 (2) a department reference number, if applicable;

4 (3) a concise statement of the facts on which the
5 petitioner relies, including as an attachment, if applicable,
6 the document issued by the department that notified the
7 petitioner of the decision or action challenged by the
8 petitioner;

9 (4) a statement of the relief demanded by the petitioner;

10 (5) the names of all known persons, other than the
11 petitioner, with an interest in the outcome of the contested
12 case;

13 (6) any other matter required by statute; and

14 (7) the signature of the petitioner or the petitioner's
15 authorized representative.

16 (b) A petition may not include any information showing a
17 settlement offer by a party, and may not refer to the substance
18 of a settlement offer.

19 (c) A petition concerning a contract claim must include a
20 copy of the contract claim request and detailed report, if such
21 a report is required by statute or commission rule, that
22 provides the basis of the claim. The petition must state the
23 date on which the petitioner received written notice of the
24 proposed disposition of the claim. The petition and its

1 attachments may not otherwise refer to the proposed disposition
2 and may not include a copy of the proposed disposition.

3

4 §1.27. Examination by Executive Director.

5 (a) The executive director will examine a petition and make
6 a preliminary determination whether the petition states a claim
7 that entitles the petitioner to initiate a contested case, and
8 whether the petition meets the procedural requirements of this
9 subchapter and of the APA.

10 (b) If the executive director determines that the petition
11 is deficient, the executive director will give written notice to
12 the petitioner that explains the determination. For the
13 deficient petition to become effective, the petitioner must file
14 a corrected petition within 20 days of the date that the
15 petitioner receives the written notice.

16 (c) If the department rule that authorizes a person to file
17 a request for a contested case hearing does not expressly refer
18 to this subchapter concerning the filing of the request then the
19 executive director shall examine the request concerning whether
20 it meets the requirements of that rule and not this subchapter.
21 In accordance with subsection (b) of this section, the executive
22 director may require the petitioner to file an amended petition
23 that satisfies the requirements of this subchapter.

24 (d) The executive director's preliminary determination of a

1 petition's legal sufficiency is without prejudice to the
2 department's right to assert in litigation that a contested case
3 should be dismissed for any reason.

4

5 §1.28. Initiation of Contested Case.

6 (a) The executive director will refer a petition to SOAH to
7 initiate a contested case. The executive director's referral
8 may request that the judge consider a summary disposition of the
9 case if the executive director believes the petition was not
10 timely filed or fails to meet other procedural requirements.

11 (b) The department may initiate a contested case on its own
12 initiative in accordance with the rules of SOAH.

13 (c) The department's office of general counsel will
14 transmit a request to SOAH to initiate a contested case.

15

16 §1.29. Notice of Hearing.

17 (a) Issuance. The department will issue notice of a
18 hearing in accordance with the instructions of the judge and by
19 certified or registered mail to each party's last known address
20 as shown in the department's records.

21 (b) Content. A notice of hearing is sufficient if it
22 includes:

23 (1) a statement of the time, place, and nature of the
24 hearing;

1 (2) a statement of the legal authority and jurisdiction
2 under which the hearing is to be held;

3 (3) reference to the particular sections of the statutes
4 and rules involved; and

5 (4) a short, plain statement of the matters asserted or,
6 alternatively, the ALJ may direct the department to include a
7 copy of the petition with the notice.

8

9 §1.30. Standard of Review and Burden of Proof.

10 (a) Except as provided in §1.31 of this subchapter
11 (relating to Provisions for Contract Claims), the standard of
12 review is reasonableness.

13 (b) The applicant bears the burden of proof in a case
14 concerning an application for a permit, license, or other
15 approval from the department. The claimant bears the burden of
16 proof concerning a contract claim.

17 (c) In a proceeding concerning an enforcement matter,
18 including the department's imposition of a sanction, penalty, or
19 temporary or permanent cancellation of an existing permit,
20 license, or approval, the department bears the burden of proof
21 to show the person's violations of law or department policy.
22 The person bears the burden of proof to show mitigating factors
23 that show enforcement is not necessary.

24

1 §1.31. Provisions for Contract Claims.

2 (a) This section applies only to a contested case
3 concerning a contract claim.

4 (b) If the parties to a contract agree to submit questions
5 that arise under the contract to the decision of a department
6 employee, the employee's decision is final and conclusive unless
7 in making the decision, the employee is guilty of fraud,
8 misconduct, or such gross mistake as would imply bad faith or a
9 failure to exercise an honest judgment.

10 (c) This subsection applies only to a claimant's request
11 for interest under Government Code, Chapter 2251 (the Prompt
12 Payment Act (PPA)).

13 (1) A determination of the application of this subsection
14 and the amount of interest due must be made for each claim made
15 for a good or service.

16 (2) If a claim is resolved in favor of a claimant,
17 interest begins to accrue on the 31st day after the date that
18 the claimant files the claim and detailed report, if such a
19 report is required by statute or commission rule, that provides
20 the basis of the claim under §9.1 or §9.2 of this title
21 (relating to Claims for Purchase Contracts and Contract Claim
22 Procedure, respectively). If a claim is not resolved in favor
23 of the claimant, the claimant must submit a corrected invoice
24 and interest will accrue on the claim only if the payment of the

1 corrected amount becomes overdue under the PPA.

2 (3) For purposes of this subsection, a claim is resolved
3 in favor of a claimant only if it is determined that the amount
4 to be paid on a claim is 50 percent or more of the greater of:

5 (A) the claimant's original claim as shown in the claim
6 and detailed report, if required, submitted under §9.1 or §9.2
7 of this title; or

8 (B) the claimant's amended claim.

9 (d) An offer by the executive director to settle a claim
10 under §9.1 of this title or a decision by the contract claim
11 committee under §9.2 of this title is an offer to compromise a
12 disputed claim. Its admission into evidence is controlled by
13 Rule 408, Texas Rules of Evidence.

14
15 §1.32. Ex parte Communications. Unless required for the
16 disposition of an ex parte matter authorized by law or as
17 expressly authorized by this section, during the pendency of a
18 contested case either at SOAH or before the commission or
19 executive director, a party, person, or representative of a
20 party or person is prohibited from communicating directly or
21 indirectly with any commissioner, the executive director, or the
22 judge, concerning any issue of fact or law relative to the
23 pending case, except after notice and with the opportunity for
24 all parties to participate. For the purpose of using the

1 special skills or knowledge of the department and its staff in
2 evaluating the evidence, a commissioner, the executive director,
3 or the judge may communicate ex parte with a department employee
4 who has not participated in a hearing in the case without
5 providing notice of the communication to the parties.

6

7 §1.33. Issuance of Subpoena or Commission to Take Deposition.

8 (a) On proper request by a party, the department will issue
9 subpoenas and commissions to take depositions in accordance with
10 the APA, unless it appears that the subpoena or commission is
11 sought for the purpose of harassment or that the subpoena or
12 commission would unduly inconvenience the person to whom it is
13 addressed.

14 (b) The party requesting the issuance of a subpoena or
15 commission must file the request with the executive director,
16 and serve a copy of the request on the judge and each party or
17 the party's representative. The request must identify any
18 documents sought with as much detail as possible and must
19 include a statement of the documents' relevance to the issues in
20 the case. The requestor must submit a proposed subpoena or
21 commission that satisfies the requirements of §1.34 of this
22 subchapter (relating to Form of Subpoena or Commission to Take
23 Deposition).

24 (c) Before seeking issuance of a subpoena or commission,

1 the requestor must attempt to secure the voluntary appearance of
2 the witness or production of materials. If this is not
3 possible, the requestor must indicate in the request the
4 circumstances that prevent the voluntary appearance or
5 production.

6 (d) Except when the department as a party requests the
7 subpoena, the requestor must submit a deposit that will
8 reasonably ensure payment of the witness' or deponent's expenses
9 as required by the APA. Only a non-party witness or deponent is
10 entitled to receive reimbursement of expenses as provided by
11 §1.35 of this subchapter (relating to Witness Fees). The amount
12 of the required deposit is based on an estimate of the mileage
13 to be traveled to and from the hearing or deposition, if over 25
14 miles, and days expected to be spent in the hearing or
15 deposition. The requestor shall make the deposit in the
16 appropriate amount by certified check payable to Texas
17 Department of Transportation and filed with the request.

18 (e) On receipt of the deposit, the department will issue
19 the subpoena or commission. If the requestor and witness sign
20 an Agreement to Waive Fee, the department may issue the subpoena
21 or commission without a witness fee deposit.

22 (f) A party who is granted a subpoena is responsible for
23 having the subpoena served in accordance with Rule 176.5, Texas
24 Rules of Civil Procedure.

1 (g) A properly issued subpoena remains in effect until the
2 judge releases the witness or grants a motion to quash or motion
3 for protective order.

4

5 §1.34. Form of Subpoena or Commission to Take Deposition. The
6 heading of the subpoena or commission must be "The Texas
7 Department of Transportation." It must state the style of the
8 case, that the case is pending before SOAH, the time and place
9 at which the witness is required to appear, the party at whose
10 insistence the witness is summoned, and the date of its
11 issuance. It must be signed by the executive director, the
12 department's general counsel, or an attorney in the department's
13 office of general counsel. It must be addressed to any sheriff
14 or constable of the State of Texas or other person authorized to
15 serve subpoenas or commissions as provided in Rule 176.5, Texas
16 Rules of Civil Procedure.

17

18 §1.35. Witness Fees.

19 (a) A person who is not a party and is compelled to attend
20 any hearing or proceeding or to produce books, records, papers,
21 or other objects is entitled to receive reimbursement of
22 expenses as provided in the APA. A witness or deponent who is a
23 department employee may receive reimbursement for expenses only
24 to the extent allowed by applicable law and commission policy.

1 (b) The party at whose request a witness appears or a
2 deposition is taken shall pay the expenses to which the witness
3 or deponent is entitled under this section, on presentation of
4 proper vouchers sworn by the witness or deponent and approved by
5 the judge. On the party's payment of those expenses, the
6 department will return to the party the certified check filed
7 with the request for subpoena or commission under §1.33 of this
8 subchapter (relating to Issuance of Subpoena or Commission to
9 Take Deposition).

10

11 §1.36. Proposal for Decision; Filing of Exceptions and Replies.

12 (a) Proposal for decision. For contested cases in which
13 the judge does not have authority to issue a final decision, the
14 judge shall prepare a proposal for decision.

15 (b) Submission of the proposal for decision. The judge
16 shall submit the proposal for decision to the executive director
17 and furnish a copy to each party.

18 (c) Exceptions and replies. A party may submit to the
19 judge an exception to the proposal for decision or a reply to an
20 exception. The party must file a copy of the exception to the
21 proposal for decision or the reply with the executive director,
22 regardless of whether the final order in the case is to be
23 issued by the executive director or the commission.

24 (1) To be effective:

1 (A) an exception must be submitted to the judge and
2 filed with the executive director within 15 days after the date
3 that the party receives service of the proposal for decision;
4 and

5 (B) a reply to an exception must be submitted to the
6 judge and filed with the executive director within 15 days of
7 the date on which the exception is filed.

8 (2) If the proposal for decision is served by hand
9 delivery or by facsimile, the date of service of the proposal is
10 presumed to be the date of delivery. If the proposal for
11 decision is served by regular mail, interagency mail, certified
12 mail, or registered mail, the date of service of the proposal is
13 presumed to be the third calendar day after the date of the
14 mailing.

15 (3) The judge may extend or shorten the time to file
16 exceptions or replies.

17 (4) The parties shall submit to SOAH and file with the
18 executive director any motion for an extension of time to file
19 an exception or reply not later than the fifth day before the
20 applicable deadline for submission of the exception or reply.
21 The motion must show either:

22 (A) good cause for the requested extension; or

23 (B) agreement of all other parties to the extension.

24 (d) Judge's review of exceptions and replies. The judge

1 shall review all exceptions and replies and notify the executive
2 director and parties whether the judge recommends any changes to
3 the proposal for decision.

4 (e) Judge's authority. The judge may:

5 (1) amend the proposal for decision in response to
6 exceptions and replies to exceptions; and

7 (2) correct any clerical errors in the proposal for
8 decision.

9 (f) Response to amended proposal. A party is not entitled
10 to file an exception or brief in response to an amended proposal
11 for decision.

12

13 §1.37. Notification of Decision.

14 (a) The commission or the executive director, as specified
15 by statute or department rule, will issue the decision in a
16 contested case.

17 (b) After the commission or executive director issues the
18 decision, the executive director will send a copy of the
19 decision by first class mail to each party or the party's
20 authorized representative and will keep an appropriate record of
21 the mailing.

22

23 §1.38 Motions for Rehearing.

24 (a) Prerequisite to appeal. A motion for rehearing is a

1 prerequisite to appeal.

2 (b) Filing motion. A party must file a motion with the
3 executive director within 20 days after the date the party or
4 party's authorized representative is notified of the decision.
5 For purposes of this subsection, a party or attorney of record
6 is presumed notified on the third day after the date that the
7 decision or order is mailed by first-class mail. The motion
8 must contain:

9 (1) the name and representative capacity of the person
10 filing the motion;

11 (2) the style and official docket number assigned by
12 SOAH, and a department reference number, if applicable;

13 (3) the date of the decision or order; and

14 (4) a concise statement of each alleged error.

15 (c) Reply to motion for rehearing. A reply to a motion for
16 rehearing must be filed with the executive director within 30
17 days after the date the party or party's authorized
18 representative is notified of the decision. For purposes of
19 this subsection, a party or attorney of record is presumed
20 notified on the third day after the date that the decision or
21 order is mailed by first-class mail.

22 (d) Ruling on motion for rehearing. The commission or the
23 executive director, as specified by statute or department rule,
24 will rule on a motion for rehearing and issue the ruling in

1 accordance with the APA.

2 (e) Notice of ruling. After the commission or executive
3 director issues a ruling on a motion for rehearing, the
4 executive director will send a copy of the ruling by first class
5 mail to each party or the party's authorized representative and
6 will keep an appropriate record of the mailing.

1 SUBCHAPTER E. PROCEDURES IN CONTESTED CASES

2 §1.21. Scope and Purpose. The sections in this subchapter
3 describe the procedures to be followed in contested cases
4 arising under Government Code, Chapter 2001. Except as provided
5 in this subchapter, all contested cases shall be governed by the
6 procedural rules of the State Office of Administrative Hearings.

7
8 §1.22. Definitions. The following words and terms, when used
9 in this subchapter, shall have the following meanings, unless
10 the context clearly indicates otherwise.

11 (1) Administrative Law Judge--A person appointed by the
12 State Office of Administrative Hearings to conduct a hearing on
13 matters within the department's jurisdiction.

14 (2) Claim--A claim made pursuant to §21.572 of this title
15 (relating to Notice and Appeal) concerning control of signs
16 along rural roads; §21.149(f) of this title (relating to
17 Licenses) concerning revocation or suspension of a county sign
18 license; or §21.150(k) of this title (relating to Permits)
19 concerning cancellation of a permit.

20 (3) Contract claim--Any claim arising under a contract
21 governed by Transportation Code, §22.018 (concerning the
22 designation of the department as agent in contracting and
23 supervising for aviation projects); by Transportation Code,

1 Chapter 223 (concerning bids and contracts for highway
2 improvement projects); Transportation Code, §391.091 (concerning
3 erection and maintenance of signs); Chapter 361 (concerning
4 state highway turnpike projects); or by Government Code, Chapter
5 2254 (concerning professional and consulting services).

6 (4) Department--The Texas Department of Transportation.

7 (5) Executive director--The chief administrative officer
8 of the department or, if permitted by law, the director's
9 designee.

10 (6) Party--The department or a person named or permitted
11 to participate in a contested case.

12 (7) Petition--The document that initiates a contested
13 case.

14 (8) Petitioner--A party who files a petition.

15

16 §1.23. Filing of Petition. An individual, representative,
17 partnership, corporation, association, governmental subdivision,
18 or public or private organization, the department, or any other
19 entity may seek to initiate a contested case by filing an
20 original and one copy of a petition with the executive director
21 at the department's headquarters building in Austin. A contract
22 claim regarding sanctions cannot be appealed to the State Office
23 of Administrative Hearings unless the Contract Claim Committee

1 procedure is completed.

2

3 §1.24. Content of Petition.

4 (a) A petition must include:

5 (1) the name of the petitioner;

6 (2) the names of all other known persons with an
7 interest in the outcome of the contested case;

8 (3) a concise statement of the facts on which the
9 petitioner relies, including as an attachment, if applicable,
10 the document issued by the department that notified the
11 petitioner of the decision or action challenged by the
12 petitioner;

13 (4) a statement of the relief demanded by the
14 petitioner;

15 (5) any other matter required by statute;

16 (6) the signature of the petitioner or the petitioner's
17 authorized representative; and

18 (7) a department reference number, if applicable.

19 (b) No document including a settlement offer by a party may
20 be enclosed with the petition, and the petition may not refer to
21 the substance of a settlement offer.

22 (c) If the petition concerns a contract claim, a copy of
23 the detailed report and request filed under §9.2(b)(2) of this

1 title (relating to Contract Claim Procedure) must be enclosed
2 with the petition, and the petition must state the date on which
3 the petitioner received written notice of the proposed
4 disposition by the contract claim committee under §9.2(b)(6) of
5 this title. The petition and its attachments may not otherwise
6 refer to the proposed disposition and may not include a copy of
7 the written notice of the proposed disposition.

8

9 §1.25. Examination by Executive Director.

10 (a) The executive director will examine a petition and make
11 a preliminary determination whether the petition states a claim
12 that entitles the petitioner to initiate a contested case and
13 whether the petition meets the procedural requirements of §1.23
14 and §1.24 of this subchapter and of Government Code, Chapter
15 2001.

16 (b) If the executive director finds that the petition does
17 not meet all legal requirements, the executive director will
18 return the petition to the petitioner along with a statement of
19 the reasons for rejecting it. The petitioner will be given at
20 least 10 days in which to file a corrected petition.

21 (c) If a corrected petition is rejected under this section,
22 the executive director will return the corrected petition to the
23 petitioner along with a statement of the reasons for rejecting

1 it. The petitioner will not be given an opportunity to file
2 another corrected petition.

3 (d) The executive director's preliminary determination of a
4 petition's legal sufficiency is without prejudice to the
5 department's right to assert in litigation that a contested case
6 should be dismissed for any reason.

7

8 §1.26. Initiation of Contested Cases, Service of Notice of
9 Hearing, Standard of Review, and Burden of Proof.

10 (a) Initiation.

11 (1) If the executive director finds that a petition meets
12 all legal requirements, the department will initiate a contested
13 case in accordance with the rules of the State Office of
14 Administrative Hearings.

15 (2) The department may initiate a contested case on its
16 own initiative in accordance with the rules of the State Office
17 of Administrative Hearings.

18 (b) Service of notice of hearing. Service of the Notice of
19 Hearing shall be accomplished by certified or registered mail to
20 the party's last known address as shown in the department's
21 records. A notice of a hearing in a contested case is
22 sufficient for purposes of notice if it includes a copy of the
23 petition prepared in accordance with §1.24 of this subchapter

1 (relating to Content of Petition), and the following
2 information, unless it is included in the petition:

3 (1) a statement of the time, place, and nature of the
4 hearing;

5 (2) a statement of the legal authority and jurisdiction
6 under which the hearing is to be held; and

7 (3) reference to the particular sections of the statutes
8 and rules involved.

9 (c) Standard of review.

10 (1) The standard of review is reasonableness, if not
11 otherwise specified.

12 (2) The standard of review is whether the agency's
13 actions were based on fraud, misconduct, or such gross mistake
14 as would imply bad faith or failure to exercise an honest
15 judgment for:

16 (A) contract claims;

17 (B) claims related to revocation or suspension of a
18 county sign license under §21.149(f) of this title (relating to
19 Licenses);

20 (C) claims related to cancellation of a permit under
21 §21.150(k) of this title (relating to Permits); and

22 (D) claims related to control of signs along rural
23 roads under §21.572 of this title (relating to Notice and

1 Appeal).

2 (d) Burden of proof. A party seeking monetary damages or
3 penalties shall bear the burden of proof. In all other
4 instances, the party challenging a department decision or action
5 shall bear the burden of proof.

6

7 §1.27. Discovery.

8 (a) Commissions to take depositions. At the written
9 request of a party, the executive director will issue a written
10 commission directed to officers authorized by statute to take a
11 deposition of a witness.

12 (b) Subpoenas for the production of documents. At the
13 verified written request of a party, the executive director will
14 issue a subpoena for the production of documents. The written
15 request must identify the documents with as much detail as
16 possible and must include a statement of their relevance to the
17 issues in the case.

18 (c) Subpoenas for attendance at hearings. At the written
19 request of a party, the executive director will issue a subpoena
20 for the attendance of a witness at a hearing in a contested
21 case. The subpoena may be directed to any person within the
22 department's jurisdiction, without regard to the distance
23 between the location of the witness and the location of the

1 hearing.

2 (d) Limits on discovery. A commission or subpoena will
3 only be issued on a showing of good cause and receipt of a
4 deposit sufficient to ensure payment of expenses and fees
5 related to the subpoena, including statutory witness fees. A
6 commission or subpoena will not be issued if it appears that it
7 is sought for the purpose of harassment or if it would unduly
8 inconvenience the person to whom it is directed. Issuance of a
9 commission or subpoena will be subject to the provisions of
10 Government Code, Chapter 2001, and the rules of the State Office
11 of Administrative Hearings.

12
13 §1.28. Evidence. The admissibility of evidence in a contested
14 case shall be governed by Government Code, Chapter 2001, and by
15 the rules of the State Office of Administrative Hearings, except
16 that a settlement offer, including any reference to a proceeding
17 conducted under §9.2 of this title (relating to Contract Claim
18 Procedure), shall not be admissible for any purpose.

19
20 §1.29. Withdrawal or Amendment of Proposal for Decision. The
21 administrative law judge may withdraw or amend a proposal for
22 decision at any time before a final order is issued.

23

1 §1.30. Filing of Exceptions and Replies.

2 (a) A party may file exceptions to an administrative law
3 judge's proposal for decision or an amended proposal for
4 decision no more than 20 days after service of the proposal for
5 decision. A reply to exceptions must be filed no more than 15
6 days after the filing of the exceptions.

7 (b) Exceptions and replies to exceptions must be filed with
8 the executive director at the department's headquarters building
9 in Austin. A copy must be filed simultaneously with the
10 administrative law judge.

11 (c) A request for an extension of time in which to file
12 exceptions or a reply must be filed with the executive director
13 no later than three days before the date sought to be extended.
14 The request must be served on all parties by facsimile or hand
15 delivery on the date on which it is filed, or if that is not
16 feasible, by overnight delivery service. A request for an
17 extension of time will be granted only in extraordinary
18 circumstances when it is necessary in the interest of justice.

19
20 §1.31. Form of Exceptions and Replies. Exceptions and replies
21 must conform to the following standards.

22 (1) Exceptions and replies must be typewritten or printed
23 on paper 8-1/2 inches wide by 11 inches long with an inside

1 margin at least one inch wide. Reproductions are acceptable if
2 all copies are legible.

3 (2) Exceptions and replies must contain:

4 (A) the names of all parties;

5 (B) a concise statement of the facts and law on which
6 the submitting party relies;

7 (C) a statement of the relief desired;

8 (D) a certificate of service;

9 (E) the signature of the submitting party or the
10 submitting party's authorized representative; and

11 (F) any other matter required by statute.

12 (3) Each specific exception must be separately numbered,
13 separately set forth, and concisely stated, and it must
14 incorporate all facts and law relating to that specific
15 exception.

16

17 §1.32. Motions for rehearing.

18 (a) A party may file a motion for rehearing no more than 20
19 days after service of the final order. A reply to a motion for
20 rehearing must be filed no more than 15 days after the filing of
21 the motion.

22 (b) A request for an extension of time in which to file a
23 motion for rehearing will not be granted.

1 (c) A motion for rehearing must conform to the standards
2 for exceptions and replies set forth in §1.31 of this
3 subchapter.

4
5 §1.33. Extension of time for final order. When the
6 administrative law judge determines that a final order cannot
7 reasonably be issued within 60 days after the date on which the
8 hearing is finally closed, the administrative law judge shall
9 announce at the conclusion of the hearing that the time for a
10 final order will be extended. The proposal for decision shall
11 include a reference to the announced extension. The extension
12 shall be for a period extending at least 45 days after the
13 issuance of the proposal for decision to ensure enough time for
14 the filing of exceptions and replies. A longer extension shall
15 be granted in matters of unusual complexity.