

TEXAS TRANSPORTATION COMMISSION

CHAMBERS County

MINUTE ORDER

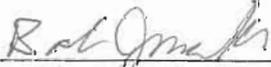
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BEAUMONT District

On May 27, 2010 the Texas Department of Transportation considered the staff's proposed cancellation of Outdoor Advertising Permit Number 013510, held by CBS Outdoor, Inc. (CBS). CBS requested an administrative hearing and the matter was referred to the State Office of Administrative Hearings. The proposal for decision concluded that the permit should not be canceled. Under the Administrative Procedure Act and the Texas Transportation Commission's (commission) rules, the matter is now appropriate for entry of a final order by the commission.

IT IS THEREFORE ORDERED that the commission issues the attached order in the case of CBS Outdoor, Inc. v. Texas Department of Transportation, Docket No. 601-09-4322, and directs the executive director to dismiss the enforcement action against CBS.

Submitted and reviewed by:


General Counsel

Recommended by:


Executive Director

112269 MAY 27 10

Minute Number Date Passed

SOAH DOCKET NO. 601-09-4322

CBS OUTDOOR, INC.,
Petitioner

VS.

TEXAS DEPARTMENT OF
TRANSPORTATION,
Respondent

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TEXAS TRANSPORTATION

COMMISSION

ORDER

Came on for consideration this 27th day of May, 2010, the above-styled and numbered cause.

After proper notice was given to the parties, this matter was heard by an Administrative Law Judge who made and filed a proposal for decision containing the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. National Advertising Company originally applied for outdoor advertising sign Permit Number 013510, which was granted on July 26, 1978.
2. The permit was transferred to CBS Outdoor, Inc. (CBS) on September 4, 2008, under License Number 5787.
3. The permitted site is in Chambers County, Texas, near the town of Mont Belvieu, approximately 0.6 of a mile east of State Highway 146.
4. The sign is an unlighted, single-sided, painted bulletin, 25 feet long and 10 feet high. It is a nonconforming sign, which subjects it to particular Texas Department of Transportation (department) rules.
5. In September 2008, Hurricane Ike struck the northern portion of the Texas Gulf Coast and environs, doing extensive damage. As part of that destruction, Hurricane Ike destroyed, damaged, or blew down numerous outdoor advertising signs.
6. The sign fell down on the ground due to the heavy rains and wet ground, but was otherwise undamaged by the storm.
7. On September 17, 2008, after the hurricane, the department informed its permit holders by letter that outdoor advertising signs (OAS) could not be repaired without a new permit, within the requirements set by the department's rules.
8. The September 17th letter also instructed permit holders to submit repair estimates to the department. Those estimates were needed to determine whether the repairs

would cost more than 60 percent of the cost to erect a new sign of the same type at the same location, which is one of the standards set by the department's rules.

9. The department conducted a field inspection of the sign on September 18, 2008. TxDOT Beaumont District Inspector Vivian Bagwell determined that the sign was on the ground.
10. On October 14, 2008, CBS emailed the department, asserting that the cost to repair the sign was below the 60 percent threshold.
11. Although the issue was raised by the department subsequently, both parties now agree that the repair cost was in fact below that 60 percent figure.
12. While awaiting the department's reply, CBS, in response to complaints from the landowners and passersby, dismantled the sign and placed the pieces on higher ground on the same property, approximately 10-30 feet away from where it had blown down.
13. Ms. Bagwell and fellow inspector Wayne David conducted a second field inspection on November 13, 2008. The field inspection log for that date noted that the sign had been removed.
14. On November 18, 2008, the department wrote CBS, denying permission to repair the sign. The pertinent portions of that letter stated:
By letter dated 9-17-08, the Right of Way Division advised you that signs structures sustaining damaged (sic) or destroyed by Hurricane Ike are regulated and enforced by Texas Department of Transportation (TxDOT) under regulations in 43 Texas Administrative Code (TAC), Section 21.156 Discontinuance (a) Damage (A)(B). Under TAC Section 21.156, Discontinuance (a) Damage (2) the damage is considered substantial if (A) the cost to repair the sign would exceed 60% of the cost to replace it with a sign of the same basic construction at the same location and (B) if repairs cannot be made in accordance with Section 21.143 (b) (relating to Maintenance and Continuance) and (3)(G) moving the sign structure of sign face in any way unless the movement is made in accordance with 21.160 (relating to Relocation) and (H) replacement of poles, as long as no more than one-half of the pole are replaced in any 12-month period.

An inspection of signs after Hurricane Ike revealed that the sign structure under Permit No. 013510 was sustained (sic) substantial damage in that it was lying on the ground and appeared that 4 out of 4 poles were broken and therefore is not eligible to be repaired. Therefore, we are requesting that the Director of Right of Way cancel Permit Number 013510. The Director of Right of Way will give you the opportunity to request an administrative hearing on the issue of the cancellation (emphasis in original)
15. The letter went on to say that after the permit was officially cancelled, CBS would be required to remove the remainder of the sign from the property.

16. On December 5, 2008, the department's Right-of-Way Division sent CBS its letter of cancellation of the permit. The letter stated, in pertinent part,

The Division is in receipt of the district request of cancellation of the non-conforming OAS permit. District recommendations cite the following non-compliance of TAC rules and regulations for purpose of cancellation of the sign:

**Title 43, Part 1, Chapter 21, Subchapter I Rule 43 TAC § 21.156
Discontinuance of Signs**

**Title 43, Part 1, Chapter 21, Subchapter I Rule 43 TAC § 21.143
Maintenance and Continuance**

**Title 43, Part 1, Chapter 21, Subchapter I Rule 43 TAC § 21.161
Destruction of Trees/Violation of Control of Access**

District Comments:

An on-site field inspection was completed by the district on September 19, 2008, and a second re-inspection of the OAS site on November 13, 2008. During the first inspection on September 19, 2008, the district noted that the OAS sign was damaged with all four (4) broken poles and blown down. Upon re-inspection on November 13, 2008, the district observed and noted that the OAS sign has been removed. The district sent a letter of violation to OAS permit holder on November 18, 2008 advising that the OAS sign structure was substantially damaged and all four (4) poles were broken from Hurricane Ike and the OAS sign is not eligible to be repaired.

The district requests cancellation of the OS permit by the ROW Division.

Division Comments:

The ROW Division performed a desk compliance review of the illegal OAS permit file and the desk review indicates the district performed in the correct manner for cancellation and removal of the illegal OAS.

Division Conclusion:

The ROW Division completed the compliance review of the district's recommendation for cancellation of the OAS permit and based on information provided by the district, the aforementioned OAS display is in violation of Title 43 of the Texas Administrative Code ("TAC") and the ROW Division concurs with the district decision to cancel the permit for non-compliance with TAC rules:

**Title 43, Part 1, Chapter 21, Subchapter I Rule 43 TAC § 21.156
Discontinuance of Signs**

**Title 43, Part 1, Chapter 21, Subchapter I Rule 43 TAC § 21.143
Maintenance and Continuance**

**Title 43, Part 1, Chapter 21, Subchapter I Rule 43 TAC § 21.161
Destruction of Trees/Violation of Control of Access**

Therefore, effective on the date of this letter, the aforementioned permit is hereby cancelled. (emphasis in original)

17. The letter informed CBS of its right to request an administrative hearing.
18. CBS filed a timely request for such a hearing.
19. The department sent its Amended Notice of Hearing to CBS on June 11, 2009.
20. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted, although it also referred to some matters not properly at issue in this proceeding.
21. The hearing was convened before State Office of Administrative Hearings (SOAH) ALJ Henry D. Card on September 23, 2009. Both CBS and the department appeared and presented evidence. The hearing was adjourned and the record closed the same day.
22. Although it raised additional issues in its Case Introduction and Synopsis, which was incorporated by reference into its Amended Notice of Hearing, the department ultimately argued there were three reasons for cancellation: (1) the sign had been removed [43 TAC § 21.143 (a)(2)(C)]; (2) the sign structure or sign face had been moved [43 TAC § 21.143(c)(1)(G)]; and more than half the poles had to be replaced [43 TAC § 21.143(c)(1)(H)].
23. On the third issue—the replacement of poles—the department no longer contended that any of the poles were broken or that new poles would have to be used. Instead it argued that placing the original poles back into the ground would constitute more than half the poles having to be “replaced” within the meaning of 43 TAC §21.143(c)(1)(H).
24. The December 5, 2008, letter of cancellation generally cited various department rules. The only factual bases it listed for cancellation, however, were that the sign had been blown down with all four poles broken and that the sign had been removed.
25. The alleged moving of the sign and the alleged prohibition against putting the original poles back into the ground were not cited in the letter of cancellation.

26. The department's "replacement" argument was not implied in the letter's passing reference to the sign having been blown down.
27. The only factual bases for cancellation cited in the cancellation letter were whether more than half the poles were broken and had to be replaced—in the sense that new poles had to be substituted for the old—and whether the sign was removed within the meaning of the department's rules.
28. None of the poles were broken.
29. The parts and materials of the sign, which had already fallen down in the Hurricane, are still in view of the motoring public.
30. The failure to consider the standard set out in the rule regarding removal, combined with the admittedly inaccurate assertion in the cancellation letter that all four poles were broken, show a gross mistake and failure to exercise an honest judgment in this instance.

CONCLUSIONS OF LAW

1. The department has jurisdiction over CBS's petition pursuant to Chapter 391 of the Texas Transportation Code, which grants the department authority to regulate outdoor advertising signs along state highways and to promulgate regulations to that end.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Chapter 2003.
3. CBS has the burden of proof in this proceeding. 43 TEX. ADMIN. CODE (TAC) § 1.26(d).
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052, as set forth in the Findings of Fact and Conclusions of Law.
5. The department's contentions that the sign had been moved, in violation of 43 TAC § 21.143 (c)(1)(G), and that placing the original poles in the ground constituted "replacing" them, in violation of 43 TAC § 21.143 (c)(1)(H), were not bases for the department's actions within the meaning of 43 TAC § 1.26(c)(2).
6. Pursuant to 43 TAC § 1.26(c)(2), the department cannot rely on the allegations described in Conclusion of Law No. 5 in defense of its cancellation.
7. CBS did not remove the sign in violation of 43 TAC § 21.143(a)(2)(C).
8. The department's action in this instance was based on such gross mistake as would

imply failure to exercise an honest judgment, within the meaning of 43 TAC § 1.26(c)(2).

9. The department's cancellation of CBS's permit should be rescinded.

The proposal for decision was properly served on all parties, who were given an opportunity to file exceptions and replies. CBS filed no exceptions. Department staff (through the Office of the Attorney General) filed no exceptions.

After full and complete consideration of the proposal for decision, including the opinion, findings of fact, and conclusions of law of the Administrative Law Judge, the Texas Transportation Commission issues this Order. The findings of fact and conclusions of law of the Administrative Law Judge are adopted.

IT IS ORDERED that the department staff's proposed cancellation of Permit Number 013510 is dismissed.

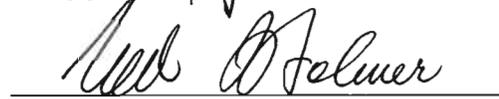
Signed this 27th day of May, 2010.



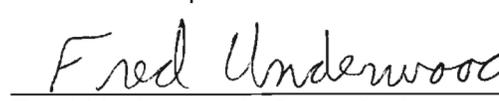
Deirdre Delisi, Chair
Texas Transportation Commission



Ted Houghton, Commissioner
Texas Transportation Commission



Ned S. Holmes, Commissioner
Texas Transportation Commission



Fred Underwood, Commissioner
Texas Transportation Commission



William Meadows, Commissioner
Texas Transportation Commission