

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to adopt the 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 adopted 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 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:



General Counsel

Recommended by:



Executive Director

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Minute
Number

Date
Passed

Adoption Preamble

1
2 The Texas Department of Transportation (department) adopts the
3 repeal of §§1.21 - 1.33 and simultaneously adopts 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 Decision, and §1.38, Motions
15 for Rehearing all concerning procedures in contested cases. The
16 repeal of §§1.21 - 1.33 and new §§1.21 - 1.38 are adopted
17 without changes to the proposed text as published in the August
18 13, 2010 issue of the *Texas Register* (35 TexReg 7012) and will
19 not be republished.

20

EXPLANATION OF ADOPTED REPEALS AND NEW SECTIONS

21
22 Current 43 TAC Chapter 1, Subchapter E describes the procedures
23 to be followed in contested case hearings that are authorized by
24 statute or by the rules of the Texas Transportation Commission
25 (commission). The new sections change provisions related to

1 filing documents, referring a case to the State Office of
2 Administrative Hearings (SOAH), requesting a subpoena, the
3 burden of proof, and standard of review and add provisions on
4 serving documents, ex parte communications, and contract claims.
5 The process of repeal and adoption is used instead of amending
6 the current sections because the rules are being reorganized for
7 clarity and ease of use and using only the amendatory process
8 would result in sections that are difficult to comprehend.

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

22
23 New §1.22 provides definitions applicable for 43 TAC Chapter 1,
24 Subchapter E. Definitions for terms in current §1.22 that are
25 not included in new §1.22 are "claim" and "contract claim." The

1 definition of claim is no longer needed because, as explained in
2 the explanation of §1.31, the commission will no longer impose
3 the standard of review that relates to contract claims to other
4 types of contested cases, such as an enforcement case related to
5 a license or permit issued under the outdoor advertising
6 program. Therefore, it is no longer necessary to define as a
7 "claim" a contested case concerning those other program areas.
8 The definition of "contract claim" also is not needed. The
9 types of contract claims that may be the subject of a contested
10 case are identified in statute. Current definitions that are
11 being revised for clarity are "administrative law judge",
12 "executive director," "party," "petition," and "petitioner."
13 Under the new rules, the term "judge" is used rather than
14 "administrative law judge." New definitions are adopted for
15 "APA," "contested case," "person," and "SOAH."

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

23
24 New §1.24 describes the procedure for filing a petition or other
25 document. Compared to the current rules, the adopted rule adds

1 specific directions on how to file by United States mail, hand
2 delivery, or by facsimile. It specifies when a given filing
3 will be determined to be received by the executive director.
4 The added provisions are intended to add clarity to the process
5 of filing a document with the executive director. The rule does
6 not include the statement in the current §1.23 concerning a
7 contract claim regarding sanctions. That statement is omitted
8 because a contract claim case and a sanctions case are distinct
9 types of matters and because the restriction on when a sanctions
10 case may be referred to SOAH conflicts with the provision in 43
11 TAC §9.2(i).

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

19
20 New §1.26 describes the required content of a petition. The
21 rule is generally the same as current 43 TAC §1.24, but is
22 revised for clarity. Section 1.26(c) requires a petition
23 concerning a contract claim include a copy of the claim "and
24 detailed report, if such a report is required by statute or
25 commission rule, that provides the basis of the claim." The

1 requirement is reasonable because a claimant must explain the
2 basis of the claim in detail so that it can be evaluated. Also,
3 as described later concerning §1.31, a claimant may be entitled
4 to interest under the Prompt Payment Act (PPA), (Government
5 Code, Chapter 2251). The department can promptly pay a claim
6 only if the claim is explained. The requirement to submit a
7 detailed report is in current 43 TAC §1.24(c), but applies only
8 to claims under 43 TAC §9.2. The requirement is rephrased to
9 apply to all claims in which a statute or commission rule
10 requires a claim be accompanied by a detailed report. The
11 statute concerning claims on a purchase order, Government Code,
12 §2260.051(c), requires that a notice of claim "must state with
13 particularity" the basis of the claim. Also, it is anticipated
14 the rules relating to claims on purchase orders, 43 TAC §9.1,
15 will be amended in the future to require a detailed report.

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

1 §1.27(c) concerns a petition filed under a department rule that
2 does not expressly refer to 43 TAC Chapter 1, Subchapter E
3 concerning the filing of the request. This is relevant to
4 petitions filed under 43 TAC §21.149(f) concerning permanent
5 revocation or permanent suspension of an outdoor advertising
6 license, under 43 TAC §21.150(k) concerning cancellation of an
7 outdoor advertising permit along an interstate or primary
8 highway, under 43 TAC §21.572 concerning revocation of an
9 outdoor advertising permit on a rural road or imposition of
10 administrative penalties, and under 43 TAC §28.304 and §28.306
11 concerning an enforcement action related to oversize and
12 overweight vehicles and loads. The executive director shall
13 examine the request concerning whether it meets the requirements
14 of the rule under which the petition was filed and not 43 TAC
15 Chapter 1, Subchapter E. The executive director may, however,
16 require the petitioner to file an amended petition that also
17 satisfies the requirements of 43 TAC Chapter 1, Subchapter E.
18 The subsection is meant to avoid unfair surprise to petitioners
19 concerning the requirements to file a petition. It is
20 anticipated that the rules listed above concerning the filing of
21 a petition will be amended in the future to include an express
22 reference to 43 TAC Chapter 1, Subchapter E.

23

24 New §1.28 describes the executive director's initiation of a
25 contested case by referring the petition to SOAH. The

1 department may initiate a contested case on its own initiative.
2 The rule is generally the same as the current 43 TAC §1.26(a).
3 As described in the preceding paragraph, the executive director
4 may refer a case even if only to request a determination whether
5 the petition was timely. New §1.28 specifies that the executive
6 director's referral may request a summary disposition of the
7 case if the executive director believes the petition was not
8 timely filed or fails to meet other procedural requirements.
9 Section 1.28(c) specifies the department's office of general
10 counsel will transmit all requests for a contested case to SOAH.
11 The requirement will promote uniformity in the processing of
12 requests and facilitate the tracking of cases referred.

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

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

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

1 43 TAC 1.26(d) provides that a party seeking monetary damages or
2 penalties shall bear the burden of proof. In all other
3 instances, the party challenging a department decision or action
4 shall bear the burden of proof. The commission's current
5 proposal would not effect a change to the first sentence,
6 because department staff in an enforcement case, whether or not
7 they seek a monetary penalty, will have the burden of proof.
8 The commission believes it should change the standard set in the
9 second sentence. The department staff should have the burden of
10 proof in all enforcement cases, and concerning counter-claims
11 filed by the department in a contract claim case, because staff
12 has the greatest access to information concerning the basis for
13 the staff's actions.

14

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

1 Jones Brothers Dirt & Paving Contractors, Inc., 92 S.W.3d 477
2 (Tex. 2002). The subsection does not impose this standard of
3 review on other types of disputes that may be the subject of a
4 contested case hearing, as does the current 43 TAC §1.26(c).
5 The change in the rule is appropriate because the precedent set
6 in the Jones Brothers case related to interpreting an underlying
7 contract in which the parties agreed to delegate to a specific
8 person the role of resolving disputes. In the absence of a
9 contractual agreement, the standard of review in the Jones
10 Brothers case does not apply. Section 1.31(c) applies to a
11 contractor's claims for interest under the Prompt Payment Act.
12 The Austin Court of Appeals has determined that the PPA applies
13 to a contract claim. State of Texas v. Mid-South Pavers, Inc.,
14 246 S.W.3d 711 (Tex. App.-Austin 2007, pet. den'd.). The rule
15 tracks the recommendations of an administrative law judge, which
16 were later adopted by the executive director, in a contested
17 case in which the issue was how to implement the PPA to
18 calculate the interest due. Adding this to the commission's
19 rules will add certainty to the process of calculating interest
20 payments both in settlement negotiations and in contested cases.
21 Section 1.31(d) adds a new provision that a settlement offer
22 concerning a contract claim is an offer to compromise a disputed
23 claim, and its admission into evidence is controlled by Rule
24 408, Texas Rules of Evidence. The new provision would replace
25 the current 43 TAC §1.28 which states a settlement offer is not

1 admissible for any purpose, which oversimplifies the rule of
2 evidence.

3

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

7

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

21

22 New §1.36 concerns the filing of the proposal for decision, and
23 exceptions and replies to exceptions. The requirements are
24 generally the same as those in the current 43 TAC §§1.29 - 1.31,
25 but have been reorganized and clarified. The new section does

1 not include the provisions of the current 43 TAC §1.33
2 concerning the judge's extension of time for final order and
3 making a note of this in the proposal for decision. The
4 department believes that the rule has not been used by judges or
5 the department. The deadline for filing exceptions has been
6 changed from 20 days to 15 days after service of the proposal
7 for decision. SOAH's rule, 1 TAC §155.507, requires filing
8 within 15 days. To prevent confusion the new rule uses the same
9 deadline. The new rules specify that the judge, rather than the
10 executive director, would rule upon any request for shortening
11 or extending the deadlines for exceptions or replies to
12 exceptions. It is preferable that the judge continue to manage
13 the case at this point. Also, the change makes the commission's
14 rule consistent with SOAH's rule. Finally, the new rules
15 specify that if the judge submits an amended proposal for
16 decision after reviewing the exceptions and replies, the parties
17 do not have the opportunity to submit additional exceptions.
18 The case is ready for decision.

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

25

1 New §1.38 concerns motions for rehearing. The requirements are
2 generally the same as those in the current 43 TAC §1.32, but
3 have been reorganized and clarified. The deadline to file a
4 reply to a motion for rehearing has been changed from 15 days
5 after the filing of the motion to 30 days after the date the
6 party or party's authorized representative is notified of the
7 decision. The Administrative Procedure Act (APA) in Government
8 Code, §2001.146 requires filing 30 days after the date the party
9 or party's authorized representative is notified of the
10 decision. To prevent confusion the new rule uses the same
11 deadline. The new rules do not include the current prohibition
12 against a party requesting an extension of the deadline to file
13 a motion for rehearing. The APA allows a state agency to extend
14 the deadline, within certain limits, and so the change will make
15 the commission's rules more consistent with the APA.

16

17 COMMENTS

18 No comments on the proposed repeals and new sections were
19 received.

20

21 STATUTORY AUTHORITY

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

1 §201.112, which provides the commission with the authority to
2 establish rules governing procedures in certain contract claims,
3 and Government Code, §2001.004, which requires each agency to
4 adopt rules of practice stating the nature and requirements of
5 all available formal and informal 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.
- 3 §1.22. Definitions.
- 4 §1.23. Filing of Petition.
- 5 §1.24. Content of Petition.
- 6 §1.25. Examination by Executive Director.
- 7 §1.26. Initiation of Contested Cases, Service of Notice of
- 8 Hearing, Standard of Review, and Burden of Proof.
- 9 §1.27. Discovery.
- 10 §1.28. Evidence.
- 11 §1.29. Withdrawal or Amendment of Proposal for Decision.
- 12 §1.30. Filing of Exceptions and Replies.
- 13 §1.31. Form of Exceptions and Replies.
- 14 §1.32. Motions for Rehearing.
- 15 §1.33. Extension of Time for Final Order.