

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review*; (2)

notices of *intention to review*, which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (<http://www.sos.state.tx.us/texreg>). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative Code* on the web site (<http://www.sos.state.tx.us/tac>).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas State Board of Plumbing Examiners

Title 22, Part 17

In accordance with Texas Government Code §2001.039, the Texas State Board of Plumbing Examiners (Board) files this notice of its intent to review Texas Administrative Code, Title 22, Part 17, Chapter 361, concerning Administration. An assessment will be made by the Board as to whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Board.

Any proposed amendments or repeal of a rule as a result of the review will be published in the Proposed Rules section of the *Texas Register* and will be open for a 30-day public comment period prior to final adoption or repeal.

Written comments regarding whether the reasons for adopting or readopting these rules continue to exist may be submitted by mail to Lisa Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; or by email to info@tsbpe.texas.gov with the subject line "Rule Review." All comments must be received by 5 p.m. on December 19, 2016.

TRD-201605852

Lisa Hill

Executive Director

Texas State Board of Plumbing Examiners

Filed: November 15, 2016



In accordance with Texas Government Code §2001.039, the Texas State Board of Plumbing Examiners (Board) files this notice of its intent to review Texas Administrative Code, Title 22, Part 17, Chapter 363 concerning Examination and Registration. An assessment will be made by the Board as to whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Board.

Any proposed amendments or repeal of a rule as a result of the review will be published in the Proposed Rules section of the *Texas Register* and will be open for a 30-day public comment period prior to final adoption or repeal.

Written comments regarding whether the reasons for adopting or readopting these rules continue to exist may be submitted by mail to Lisa

Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; or by email to info@tsbpe.texas.gov with the subject line "Rule Review." All comments must be received by 5 p.m. on December 19, 2016.

TRD-201605854

Lisa Hill

Executive Director

Texas State Board of Plumbing Examiners

Filed: November 15, 2016



In accordance with Texas Government Code §2001.039, the Texas State Board of Plumbing Examiners (Board) files this notice of its intent to review Texas Administrative Code, Title 22, Part 17, Chapter 365 concerning Licensing and Registration. An assessment will be made by the Board as to whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Board.

Any proposed amendments or repeal of a rule as a result of the review will be published in the Proposed Rules section of the *Texas Register* and will be open for a 30-day public comment period prior to final adoption or repeal.

Written comments regarding whether the reasons for adopting or readopting these rules continue to exist may be submitted by mail to Lisa Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; or by email to info@tsbpe.texas.gov with the subject line "Rule Review." All comments must be received by 5 p.m. on December 19, 2016.

TRD-201605853

Lisa Hill

Executive Director

Texas State Board of Plumbing Examiners

Filed: November 15, 2016



In accordance with Texas Government Code §2001.039, the Texas State Board of Plumbing Examiners (Board) files this notice of its intent to review Texas Administrative Code, Title 22, Part 17, Chapter 367 concerning Enforcement. An assessment will be made by the Board as to whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Board.

Any proposed amendments or repeal of a rule as a result of the review will be published in the Proposed Rules section of the *Texas Register* and will be open for a 30-day public comment period prior to final adoption or repeal.

Written comments regarding whether the reasons for adopting or re-adopting these rules continue to exist may be submitted by mail to Lisa Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; or by email to info@tsbpe.texas.gov with the subject line "Rule Review." All comments must be received by 5 p.m. on December 19, 2016.

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Lisa Hill

Executive Director

Texas State Board of Plumbing Examiners

Filed: November 15, 2016

Adopted Rule Reviews

Public Utility Commission of Texas

Title 16, Part 2

The Public Utility Commission of Texas (commission) has completed the review of Texas Administrative Code, Title 16, Part 2, Chapter 22, Procedural Rules, as required by the Texas Government Code §2001.039, *Agency Review of Existing Rules*, as noticed in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3530). The text of the rules may be found in the Texas Administrative Code, Title 16, Economic Regulation, Part 2, or through the commission's website at www.puc.texas.gov. Project No. 45856, *Rule Review of Chapter 22, Procedural Rules, Pursuant to Texas Government Code §2001.039*, is assigned to this rule review project.

Texas Government Code §2001.039 requires that each state agency review and re-adopt, re-adopt with amendments, or repeal the rules adopted by that agency under Texas Government Code, chapter 2001, subchapter B, Rulemaking. As required by §2001.039(e), this review is to assess whether the reasons for adopting or re-adopting the commission's chapter 22, Procedural Rules, continue to exist. The commission requested specific comments from interested persons on whether the reasons for adopting each section in chapter 22 continue to exist. In addition, the commission welcomed comments on any modifications that would improve the rules.

The commission's chapter 22 rules govern the initiation, conduct, and determination of proceedings required or permitted by law, including proceedings referred to the State Office of Administrative Hearings, whether instituted by order of the commission or by the filing of an application, including a complaint, petition, or any other pleading.

The commission finds that the reasons for adopting chapter 22, Procedural Rules, continue to exist and re-adopts these rules without amendments. These procedural rules provide a written system of procedures for practice before the commission, furthering the just and efficient disposition of proceedings, as well as public participation in the decision-making process.

The commission received initial comments on the notice of intention to review from Southwestern Bell Telephone Company d/b/a AT&T Texas (AT&T); AEP Texas Central Company, AEP Texas North Company, CenterPoint Energy Houston Electric, LLC, El Paso Electric Company, Electric Transmission Texas, LLC, and Sharyland Utilities, L.P. (collectively, the "Joint Utilities"); Central Telephone Company of Texas, Inc. d/b/a CenturyLink, United Telephone Company of Texas, Inc. d/b/a CenturyLink, CenturyTel of San Marcos, Inc. d/b/a

CenturyLink, CenturyTel of Lake Dallas, Inc. d/b/a CenturyLink, CenturyTel of Port Aransas, Inc. d/b/a CenturyLink, and CenturyTel of Northwest Louisiana, Inc. d/b/a CenturyLink (collectively, "CenturyLink"); and the Texas Telephone Association (TTA). The commission received reply comments from the City of Houston (Houston). While there were some suggestions for modifications to specific chapter 22 rules, no party questioned the continued need for the rules. The parties' comments are summarized by commenter and the commission response addressing these comments is set forth at the end of the summaries.

Summary of comments

AT&T recommended that the rules contained in chapter 22 be re-adopted. AT&T also requested that the commission initiate separate rule-making proceedings to amend chapter 22 consistent with AT&T's proposed modifications.

AT&T urged the commission to reconsider modifications to §22.101(a) to ensure that non-attorneys do not engage in the practice of law as defined by the Texas Government Code. AT&T argued that the need to modify §22.101(a) to require an authorized representative in contested cases to be a licensed attorney has been an issue since at least 2008 and that modification is further supported by Texas Attorney General Opinion No. GA-0936.

AT&T stated that, under current commission rules, anybody--not just a pro se individual or an attorney--can appear before the commission to represent a party in any proceeding. AT&T contended that this rule conflicts with restrictions on the unauthorized practice of law in contested case proceedings. AT&T argued that §22.101(a) conflicts with §81.102(a) of the Texas Government Code and that the rule is therefore subject to invalidation and should be modified to conform to Texas law.

AT&T recommended modifying the rule so that contested case proceedings would require representation by an attorney authorized to practice law in Texas. AT&T's recommended language would include an exception for individuals who choose to represent themselves pro se in contested case proceedings. Under AT&T's recommendation, the current rule would remain in effect for all proceedings not involving a contested case.

AT&T recommended that a clause be added to §22.3(a) prohibiting a person appearing in an administrative hearing before the commission from *knowingly making false, misleading, or abusive statements in pleadings or commission proceedings or using threatening, obscene, or vulgar language in pleadings or communications between or among the parties*. AT&T argued that this modification is necessary because non-lawyers appearing before the commission are not bound by the Texas Disciplinary Rules of Professional Conduct but are bound by the general standards of conduct imposed by the commission's Procedural Rules.

To promote efficiency and lessen the administrative burden on parties and the commission, AT&T proposed that the commission provide an option for parties to comply with filing requirements by filing a complete original electronic copy of pleadings rather than filing multiple paper copies. Alternatively, AT&T requested that the commission reduce, to the extent possible, the number of paper copies required under §22.71(c).

AT&T recommended that §22.72(e) be modified to include a requirement that the person signing the pleading or document also provide his or her e-mail address, since, as AT&T argued, the overwhelming majority of today's communication between parties is done electronically. AT&T stated that this would be consistent with what is already required by §21.33(e).

AT&T recommended that §22.74(b) be amended to permit service by email as a method of service. AT&T stated that this change would be consistent with the SOAH procedural rules and would bring the commission's rules in line with the parties' current practice of agreeing to service of filings through electronic means. AT&T also proposed that these rules be modified to accept email sent messages or an email delivery certificate as *prima facie* evidence of the facts shown thereon related to service.

AT&T requested that a sentence be added to §22.77(c) to prohibit the presiding officer from ruling on a motion before the expiration of the time for response allotted unless the motion states that it is unopposed or an emergency situation exists.

AT&T requested that §22.123(a)(2) be clarified to provide that the date of issuance of the order is the date that the presiding officer signs it. AT&T stated that there have been occasions where an order was signed on one day and filed on another, which can possibly lead to confusion. AT&T further requested that these rules be modified to permit a motion for clarification or reconsideration and an appeal of a presiding officer's interim order or appealable oral ruling to be served on all parties by email.

AT&T requested that §22.144(b)(2) be modified to permit requests for information to be served on all parties by email.

AT&T requested that §22.144 be modified to eliminate the requirement to file responses to discovery requests. AT&T noted that this change would be consistent with SOAH's procedural rules, which require that discovery responses be served on the requesting party but not filed. AT&T further requested that §22.144(c)(2)(F) be modified to require that the responding party--not the authorized representative or attorney--make and sign responses to requests for information, but not responses to requests for production or requests for admission.

AT&T recommended that the time period for objections be changed from its current length of 10 calendar days to 20 calendar days to coincide with the time period for responding to requests for information. AT&T argued that such a change would make the commission's time period for objections mirror that established in the Texas Rules of Civil Procedure (TRCP). AT&T also argued that this change would not elongate the discovery process, as it would not affect the deadline for responding to discovery requests. AT&T also argued that this change could substantially reduce discovery disputes and objections by eliminating the need for parties to make precautionary objections to discovery requests when the 10 day deadline to object does not provide sufficient time for a party to determine what its answer to the request will be, and thus whether an objection is merited. AT&T also argued that this change would provide parties additional time to resolve discovery disputes, thereby reducing the need for the presiding officer to resolve discovery disputes.

AT&T requested that §22.144, specifically those provisions having to do with privilege logs, be modified to mirror the rule for asserting a privilege in Texas' district courts, TRCP Rule 193.3. AT&T stated that, unlike the commission's rule, TRCP Rule 193.3 does not require parties to automatically file an index of documents alleged to be privileged in each and every instance. Instead, parties asserting a privilege in state court are simply required to indicate in their response or in a separate document that information or documents have been withheld and what privilege is being asserted. AT&T argued that parties in commission proceedings already routinely agree to waive the index requirement and rarely bring disputes over privileged documents to the commission's attention.

If the commission were to adopt AT&T's recommendation to lengthen the time period for objections to discovery requests, AT&T further recommended that the current requirement to file motions to compel

within five working days of the receipt of the objection be changed to 10 calendar days from the receipt of the objection. AT&T argued that this modification would allow the parties needed additional time to review objections and responses to discovery requests given that objections and responses would be received simultaneously under AT&T's proposed revisions.

AT&T recommended that the list of sanctionable conduct set forth in §22.161(b) also include a failure to comport with the standards of conduct for parties set forth in §22.3(a).

The Joint Utilities requested that the commission amend its procedural rules to promote and provide opportunity for early settlement and use of alternative dispute resolution procedures in contested cases. Specifically, the Joint Utilities requested that the chapter 22 rules be modified to require at least one settlement conference and to require that an initial settlement conference be conducted as soon as feasible, but not later than after the applicant files its direct testimony and before the deadline for any other intervening party to file its direct case. The Joint Utilities stated that promoting settlement early in a case can significantly reduce the time and cost of litigation and potentially clarify the issues in the case and reduce the number of issues in dispute.

The Joint Utilities further requested that the chapter 22 rules be modified to state that any party originally noticed in a case who chose not to intervene is not entitled to re-notice and an additional opportunity to intervene simply because a settlement results in an outcome different from what was originally proposed. The Joint Utilities stated that it is reasonable to expect persons who receive notice of a proceeding to understand that the proceeding may result in an outcome that differs materially from what the application initially proposed. The Joint Utilities requested that the commission open a rulemaking project to develop safe harbor language a utility could include in its notice of filing to avoid the possibility of having to re-notice later in the proceeding.

The Joint Utilities also requested that the commission modify its rules to make alternative dispute resolution (ADR) procedures available to parties in all contested cases before the commission. The Joint Utilities commented that the commission could model the ADR procedures after those provided for appeals of Electric Reliability Council of Texas (ERCOT) actions under §22.251(n) or after those available to parties to proceedings pending before the Federal Energy Regulatory Commission (FERC). The Joint Utilities indicated that many of the commission's contested cases would benefit from the application of ADR procedures, resulting in significant savings to all parties involved, including the commission.

The Joint Utilities commented that the commission should make its electronic filing system and electronic filing notification system the default methods of filing and notice, respectively. The Joint Utilities argued that making this transition would likely save substantial resources, time, and money, and that the commission's goal should be to make electronic filing and notification systems the default even if an interim transition period is necessary.

The Joint Utilities commented that the process for administrative review in §22.32 should be consolidated with the process for informal disposition in §22.35, and that the criteria governing which proceedings are eligible for administrative review or informal disposition should be revised to eliminate uncertainty and ambiguity. The Joint Utilities stated that the consolidation should result in a single process that applies to all proceedings, including rate proceedings that satisfy applicable criteria. The Joint Utilities argued that it is unclear why there are two separate rules that have similar, but slightly differing, sets of criteria governing essentially the same process. The Joint Utilities also commented that there appears to be an inconsistency between §22.32(a) and §22.243, stating that §22.32(a) does not allow the use of the admin-

istrative review process for rate proceedings while §22.243 expressly allows administrative review under §22.32 in rate proceedings if no interventions are filed.

The Joint Utilities further commented that the presence of the term *unprotested case* in the definitions section of chapter 22 creates further ambiguity because the term is not used in chapter 22, despite the fact that the term would seem to describe both administrative reviews and informal dispositions. The Joint Utilities further stated that it is unclear why otherwise contested cases that are fully and unanimously settled are not deemed unprotested cases or treated under the administrative review or informal disposition processes. The Joint Utilities also argued that §22.33 is ambiguous throughout regarding the meaning and application of the concept of an undocketed application.

The Joint Utilities commented that the timeframe for filing statements of position established by §22.124 should be modified to treat statements of position the same as any other pleading, including responsive pleadings and prefiled testimony to the extent a statement of position is filed in lieu of a responsive pleading or prefiled testimony. The Joint Utilities argued that allowing statements of position to be filed on a different timeframe than responsive pleadings and prefiled testimony, especially a timeframe that allows statements of position to be filed so close to the date of a hearing, tends to burden other parties to a proceeding without producing any gains in fairness or efficiency.

The Joint Utilities commented that §22.144 should be modified to make the due date for discovery objections the same as the due date for responses to discovery requests, regardless of whether the discovery timeframe is set by rule or by the presiding officer. The Joint Utilities argued that placing objections on a shorter timeframe than responses is inefficient because parties may not be able to determine if an objection is warranted before the response deadline, especially if the discovery request at issue calls for the production of voluminous documents. The Joint Utilities stated that the issue becomes more acute in cases where the presiding officer sets shorter discovery deadlines than those allowed by the rule, as the presiding officer typically follows the pattern established by the rule and sets a shorter timeframe for objections than for responses.

The Joint Utilities commented that §22.52 should be modified to allow applicants to notify landowners of the commission's final order in a proceeding when it is issued. The Joint Utilities argued that the current requirement that the notice be provided only once the final order becomes appealable is problematic in cases where time is of the essence for completing the project, such as the Houston Import Project, as a final order might not become appealable until up to 100 days after it is issued if a timely motion for rehearing is filed. The Joint Utilities proposed that the applicant be required to re-notify landowners when the order becomes appealable only if the final order is materially modified as a result of a timely motion for rehearing.

CenturyLink commented that the reasons for adopting chapter 22 continue to exist and the rules should be readopted. CenturyLink commented that amendments should be made to the rules in this project under §2001.039 of the Texas Government Code, as affected parties would already be on notice of the scope of the project. CenturyLink stated that it supported the changes to chapter 22 that AT&T proposed in Project No. 40337, and would continue to support those changes if AT&T were to file them in this project, consistent with CenturyLink's comments in this project.

CenturyLink commented that the commission's rules, particularly §21.5(a) and §22.101(a), should be amended to clarify that non-attorneys may not engage in the unlicensed practice of law. CenturyLink proposed that, at a minimum, commission staff's recommendation in Project No. 41618 be adopted.

CenturyLink recommended that §21.31 and §22.71 be amended to allow a document to be considered filed when received electronically in the commission's Interchange system. CenturyLink stated that regardless of whether the commission adopts some form of electronic filing, the commission should reduce the number of paper copies of documents that are required to be filed.

CenturyLink also commented that §§21.35, 21.95, 22.74, and 22.144 should be amended to explicitly allow email service as an acceptable form of service. CenturyLink stated that email service is commonly agreed to by parties, but that there have been occasions where a party has been unable to contact other parties to obtain their consent to email service prior to making a filing.

The TTA commented that its position on the issue of legal representation during proceedings before the commission has not changed since it filed comments in Project No. 41618, and it recommended that the commission resume its work in that project.

Specifically, the TTA stated that non-attorneys should not be allowed to engage in the unauthorized practice of law in contested cases before the commission. The TTA argued that uncontested matters, such as workshops prior to the issuance of a strawman, would suffer a decline in effectiveness if affected customers and non-attorney personnel from affected companies were not allowed to participate. The TTA stated that requiring legal representation in such proceedings would add a financial burden to participation, which would reduce the benefit of participation and might cause parties not to participate at all. The TTA argued that retaining legal representation will often be necessary for parties participating in proceedings before the commission, but requiring parties to always retain legal representation would be costly and burdensome, and might prevent knowledgeable representatives from participating in proceedings before the commission.

Houston replied that it supports AT&T's and CenturyLink's comments and proposals regarding electronic filing and electronic service in commission proceedings. Houston stated that electronic filing would be more efficient for both the commission and parties to commission proceedings. Houston argued that while all parties would benefit from electronic filing, those not located in Austin need an electronic filing option the most, as those parties often must either use an overnight delivery service or engage a person or company located in Austin in order to ensure the requisite number of copies are filed on the filing deadline. Houston argued that permitting electronic filing while eliminating the requirement to file multiple copies of an item when electronic filing is used would save all parties resources.

Houston also agreed with AT&T and CenturyLink's comments regarding electronic service. Houston noted that in most cases, parties agree to electronic service, and stated that allowing electronic service would conserve resources and promote efficiency.

Houston voiced strong disagreement with AT&T's and CenturyLink's recommendation that the deadline for filing objections to requests for information be extended from 10 days to 20 days. Houston argued that this modification would lengthen the time that parties propounding discovery have to wait to obtain needed information about a utility's application. Houston argued that this would effectively restrict the amount of discovery parties are able to obtain in what is often, especially in the case of rate proceedings, already a compressed procedural schedule. Houston also urged that the TRCP are not an appropriate model in this instance, as civil cases, unlike rate proceedings, do not generally require that discovery be complete within 60-90 days. Houston noted that such discovery limitations are virtually nonexistent in complex litigation.

Houston stated that, due to compressed procedural schedules, discovery deadlines in rate cases are often shortened either by agreement of

the parties or by the administrative law judge in order to allow for sufficient discovery. Houston argued that extending the deadline for discovery objections, as proposed by AT&T and CenturyLink, would benefit applicants while materially burdening intervenors and commission staff, and would not improve the discovery process. Houston stated that under the current deadlines, a party propounding discovery might have to wait as long as 35-40 days to receive a response if a discovery dispute arises. Houston argued that extending the deadline to file objections to discovery requests could result in a wait of 45-50 days or longer, leaving little time for follow-up or clarifying discovery requests.

Houston also disagreed with the Joint Utilities' recommendations regarding the deadline for filing statements of position. Houston argued that the current deadline is equitable and practical, as it allows parties to review the positions of all other parties in the proceeding prior to filing a statement of position, thereby allowing those filing statements of position to indicate on the record the positions they support or oppose. Houston argued that this aids the parties and the administrative law judges in cases, as otherwise Intervenor and staff would in many instances be unable to indicate their positions regarding other parties' testimony and positions until the filing of post-hearing briefs.

Commission response

As described in the notice of publication, the amendment of any particular section of chapter 22 may be initiated under a separate proceeding.

The commission appreciates the thoughtful comments on this chapter, but declines to make any changes to chapter 22 in this rule review at this time. Some of the amendments suggested in the comments might improve the commission's procedural rules, but would require further consideration, including additional notice and public input, before adoption. The commission also notes that there is some overlap between the suggestions commenters made in this project and the rule modifications the commission proposed in Project No. 45116. Further-

more, several of the suggested amendments would affect rules similar to those in 16 TAC chapter 21, Interconnection Agreements for Telecommunications Service Providers. In order to maintain uniformity of practice before the commission, it may be appropriate to amend both sets of rules at the same time, in a separate rulemaking proceeding (or proceedings).

The commission has completed the review of 16 TAC chapter 22 as required by Texas Government Code §2001.039 and has determined that the reasons for initially adopting the rules in chapter 22 continue to exist. Therefore, the commission re-adopts chapter 22, Procedural Rules, in its entirety, under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2016) (PURA) which requires the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §14.052, which requires the commission to adopt and enforce rules governing practice and procedure before the commission; the Texas Water Code §13.041(b) (West 2008 and Supp. 2016) (TWC), which requires the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission; and Texas Government Code §2001.039 (West 2016), which requires each state agency to review and re-adopt its rules every four years.

Cross Reference to Statutes: PURA §14.002 and §14.052; TWC §13.041(b); and Texas Government Code §2001.039.

TRD-201605788

Adriana Gonzales

Rules Coordinator

Public Utility Commission of Texas

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