

The Public Utility Commission of Texas (commission) proposes new Subchapter C, relating to Negotiation and Mediation of Certain Contract Disputes, in new Chapter 27, Rules for Administrative Services. The proposed new rules are necessary to comply with Texas Government Code, §2260.052, which requires the commission to develop rules to govern the negotiation and mediation of certain contract claims against the state. Project Number 23026 has been assigned to this proceeding.

Susan K. Durso, General Counsel, has determined that for each year of the first five-year period the proposed sections are in effect there will be no new fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Durso has determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated as a result of enforcing the sections will be the efficient resolution of contract disputes between contractors and the commission pursuant to the Texas Government Code, Chapter 2260. There will be no effect on small businesses or micro-businesses as a result of enforcing these sections. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Ms. Durso has also determined that for each year of the first five years the proposed sections are in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the proposed new rules (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the sections. All comments should refer to Project Number 23026.

These new sections are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2000) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and under Texas Government Code, Chapter 2260, regarding Resolution of Certain Contract Claims with the State; and specifically §2260.052(c) which requires each unit of state government with rulemaking authority to develop rules to govern the negotiation and mediation of a claim under this section.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002; Civil Practice & Remedies Code, Chapters 107 and 152 and §§154.023, 154.053, and 154.055; Texas Government Code, Chapters 552, 2001, 2009, 2260, and §2166.001; and Transportation Code §201.112.

**SUBCHAPTER C. Negotiation and Mediation of Certain Contract Disputes.**

**Division 1. General.**

**§27.61. Purpose.**

The purpose of this Subchapter is to establish rules for the efficient resolution of contract disputes between contractors and the commission pursuant to the Texas Government Code, Chapter 2260.

**§27.63. Applicability.**

- (a) This subchapter does not apply to an action of the commission for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute.
- (b) This subchapter does not apply to a contract action proposed or taken by the commission for which a contractor receiving Medicaid funds under that contract is entitled by state statute or rule to a hearing conducted in accordance with Texas Government Code, Chapter 2001.
- (c) This subchapter does not apply to contracts:
  - (1) between the commission and the federal government or its agencies, another state or another nation;

- (2) between the commission and another unit of state government;
- (3) between the commission and a local governmental body, or a political subdivision of another state;
- (4) between a subcontractor and a contractor;
- (5) subject to the Transportation Code §201.112;
- (6) within the exclusive jurisdiction of state or local regulatory bodies;
- (7) within the exclusive jurisdiction of federal courts or regulatory bodies; or
- (8) that are solely and entirely funded by federal grant monies other than for a project defined in §27.65(10) of this title (relating to Definitions).

**§27.65. Definitions.**

The following words and terms, when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise:

- (1) **Chief administrative officer** — The executive director of the commission or his/her designee.
- (2) **Claim** — A demand for damages by the contractor based upon the commission's alleged breach of the contract.
- (3) **Contract** — A written contract between the commission and a contractor by the terms of which the contractor agrees either:
  - (A) to provide goods or services, by sale or lease, to or for the commission; or
  - (B) to perform a project as defined by Texas Government Code, §2166.001.

- (4) **Contractor** — Independent contractor who has entered into a contract directly with the commission. The term does not include:
- (A) the contractor's subcontractor, officer, employee, agent or other person furnishing goods or services to a contractor;
  - (B) an employee of the commission; or
  - (C) a student at an institution of higher education.
- (5) **Counterclaim** — A demand by the commission based upon the contractor's claim.
- (6) **Day** — A calendar day. If an act is required to occur on a day falling on a Saturday, Sunday, or holiday, the first working day which is not one of these days should be counted as the required day for purpose of this subchapter.
- (7) **Event** — An act or omission or a series of acts or omissions giving rise to a claim. The following list contains illustrative examples of events, subject to the specific terms of the contract:
- (A) Examples of events in the context of a contract for goods or services:
    - (i) the failure of the commission to timely pay for goods and services;
    - (ii) the failure of the commission to pay the balance due and owing on the contract price, including orders for additional work, after deducting any amount owed the commission for work not performed under the contract or in substantial compliance with the contract terms;
    - (iii) the suspension, cancellation, or termination of the contract;

- (iv) final rejection of the goods or services tendered by the contractor, in whole or in part;
- (v) repudiation of the entire contract prior to or at the outset of performance by the contractor; or
- (vi) withholding liquidated damages from final payment to the contractor.

(B) Examples of events in the context of a project:

- (i) the failure to timely pay the unpaid balance of the contract price following final acceptance of the project;
- (ii) the failure to make timely progress payments required by the contract;
- (iii) the failure to pay the balance due and owing on the contract price, including orders for additional work, after deducting any amount owed the commission for work not performed under the contract or in substantial compliance with the contract terms;
- (iv) the failure to grant time extensions to which the contractor is entitled under the terms of the contract;
- (v) the failure to compensate the contractor for occurrences for which the contract provides a remedy;
- (vi) suspension, cancellation or termination of the contract, other than by the terms provided for in the contract;
- (vii) rejection by the commission, in whole or in part, of the "work", as defined by the contract, tendered by the contractor;

- (viii) repudiation of the entire contract prior to or at the outset of performance by the contractor;
  - (ix) withholding liquidated damages from final payment to the contractor; or
  - (x) refusal, in whole or in part, of a written request made by the contractor in strict accordance with the contract to adjust the contract price, the contract time, or the scope of work.
- (C) The lists in subparagraphs (A) and (B) of this paragraph should not be considered exhaustive but are merely illustrative in nature.
- (8) **Goods** — Supplies, materials or equipment.
- (9) **Parties** — The contractor and the commission that have entered into a contract in connection with which a claim of breach of contract has been filed under this subchapter.
- (10) **Project** — As defined in Texas Government Code §2166.001, a building construction project that is financed wholly or partly by a specific appropriation, bond issue or federal money, including the construction of:
  - (A) a building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishing;  
and
  - (B) an addition to, or alteration, modification, rehabilitation or repair of an existing building, structure, or appurtenant facility or utility.

- (11) **Services** — The furnishing of skilled or unskilled labor or consulting or professional work, or a combination thereof, excluding the labor of an employee of the commission.
- (12) **Unit of state government or unit** — The state or an agency, department, commission (including the Public Utility Commission), bureau, board, office, council, court, or other state entity that is in any branch of state government that is created by the Texas Constitution, or statute of this state, including a university system or institution of higher education. The term does not include:
- (A) a county;
  - (B) municipality;
  - (C) court of a county or municipality;
  - (D) special purpose district; or
  - (E) other political subdivision of the state.

**§27.67. Prerequisites to Suit.**

The procedures contained in this subchapter are exclusive and required prerequisites to suit under the Civil Practice & Remedies Code, Chapter 107, and the Texas Government Code, Chapter 2260.

**§27.69. Sovereign Immunity.**

This subchapter does not waive the commission's sovereign immunity to suit or liability.



**Division 2. Negotiation of Contract Disputes**

**§27.81. Notice of Claim of Breach of Contract.**

- (a) A contractor asserting a claim of breach of contract under the Texas Government Code, Chapter 2260, shall file notice of the claim as provided by this section.
  
- (b) The notice of claim shall:
  - (1) be in writing and signed by the contractor or the contractor's authorized representative;
  - (2) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service, to the officer of the commission designated in the contract to receive a notice of claim of breach of contract under the Texas Government Code, Chapter 2260; if no person is designated in the contract, the notice shall be delivered to the commission's chief administrative officer, and
  - (3) state in detail:
    - (A) the nature of the alleged breach of contract, including the date of the event that the contractor asserts as the basis of the claim and each contractual provision allegedly breached;
    - (B) a description of damages that resulted from the alleged breach, including the amount and method used to calculate those damages; and

- (C) the legal theory of recovery, *i.e.*, breach of contract, including the causal relationship between the alleged breach and the damages claimed.
  
- (c) In addition to the mandatory contents of the notice of claim as required by subsection (b) of this section, the contractor may submit supporting documentation or other tangible evidence to facilitate the commission's evaluation of the contractor's claim.
  
- (d) The notice of claim shall be delivered no later than 180 days after the date of the event that the contractor asserts as the basis of the claim; provided, however, that a contractor shall deliver notice of a claim that was pending before the commission on August 30, 1999, to the commission no later than February 26, 2000.

**§27.83. Agency Counterclaim.**

- (a) The commission asserting a counterclaim under the Texas Government Code, Chapter 2260, shall file notice of the counterclaim as provided by this section.
  
- (b) The notice of counterclaim shall:
  - (1) be in writing;
  - (2) be delivered by hand, certified mail return receipt requested or other verifiable delivery service to the contractor or representative of the contractor who signed the notice of claim of breach of contract; and
  - (3) state in detail:

- (A) the nature of the counterclaim;
  - (B) a description of damages or offsets sought, including the amount and method used to calculate those damages or offsets; and
  - (C) the legal theory supporting the counterclaim.
- (c) In addition to the mandatory contents of the notice of counterclaim required by subsection (b) of this section, the commission may submit supporting documentation or other tangible evidence to facilitate the contractor's evaluation of the commission's counterclaim.
- (d) The notice of counterclaim shall be delivered to the contractor no later than 90 days after the commission's receipt of the contractor's notice of claim.
- (e) Nothing herein precludes the commission from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

**§27.85. Request for Voluntary Disclosure of Additional Information.**

- (a) Upon the filing of a claim or counterclaim, parties may request to review and copy information in the possession or custody or subject to the control of the other party that pertains to the contract claimed to have been breached, including, without limitation:
- (1) accounting records;

- (2) correspondence, including, without limitation, correspondence between the commission and outside consultants it utilized in preparing its bid solicitation or any part thereof or in administering the contract, and correspondence between the contractor and its subcontractors, materialmen, and vendors;
  - (3) schedules;
  - (4) the parties' internal memoranda;
  - (5) documents created by the contractor in preparing its offer to the commission and documents created by the commission in analyzing the offers it received in response to a solicitation.
- (b) Subsection (a) of this section applies to all information in the parties' possession regardless of the manner in which it is recorded, including, without limitation, paper and electronic media.
- (c) The contractor and the commission may seek additional information directly from third parties, including, without limitation, the commission's third party consultants and the contractor's subcontractors.
- (d) Nothing in this section requires any party to disclose the requested information or any matter that is privileged under Texas law.

- (e) Material submitted pursuant to this subsection and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act, Texas Government Code, Chapter 552.

**§27.87. Duty to Negotiate.**

The parties shall negotiate in accordance with the timetable set forth in §27.89 of this title (relating to Timetable) to attempt to resolve all claims and counterclaims. No party is obligated to settle with the other party as a result of the negotiation.

**§27.89. Timetable.**

- (a) Following receipt of a contractor's notice of claim, the chief administrative officer of the commission or other designated representative shall review the contractor's claim(s) and the commission's counterclaim(s), if any, and initiate negotiations with the contractor to attempt to resolve the claim(s) and counterclaim(s).
- (b) Subject to subsection (c) of this section, the parties shall begin negotiations within a reasonable period of time, not to exceed 60 days following the later of:
  - (1) the date of termination of the contract;
  - (2) the completion date, or substantial completion date in the case of construction projects, in the original contract; or
  - (3) the date the commission receives the contractor's notice of claim.

- (c) The commission may delay negotiations until after the 180th day after the date of the event giving rise to the claim of breach of contract by:
  - (1) delivering written notice to the contractor that the commencement of negotiations will be delayed; and
  - (2) delivering written notice to the contractor when the commission is ready to begin negotiations.
  
- (d) The parties may conduct negotiations according to an agreed schedule as long as they begin negotiations no later than the deadlines set forth in subsections (b) or (c) of this section, whichever is applicable.
  
- (e) Subject to subsection (f) of this section, the parties shall complete the negotiations that are required by this chapter as a prerequisite to a contractor's request for contested case hearing no later than 270 days after the commission receives the contractor's notice of claim.
  
- (f) The parties may agree in writing to extend the time for negotiations on or before the 270th day after the commission receives the contractor's notice of claim. The agreement shall be signed by representatives of the parties with authority to bind each respective party and shall provide for the extension of the statutory negotiation period until a date certain. The parties may enter into a series of written extension agreements that comply with the requirements of this section.

- (g) The contractor may request a contested case hearing before the State Office of Administrative Hearings (SOAH) pursuant to §27.99 of this title (relating to Request for Contested Case Hearing) after the 270th day after the commission receives the contractor's notice of claim, or the expiration of any extension agreed to under subsection (f) of this section.
- (h) The parties may agree to mediate the dispute at any time before the 270th day after the commission receives the contractor's notice of claim or before the expiration of any extension agreed to by the parties pursuant to subsection (f) of this section. The mediation shall be governed by Division 3 of this subchapter (relating to Mediation of Contract Disputes).
- (i) Nothing in this section is intended to prevent the parties from agreeing to commence negotiations earlier than the deadlines established in subsections (b) and (c) of this section, or from continuing or resuming negotiations after the contractor requests a contested case hearing before SOAH.

**§27.91. Conduct of Negotiation.**

- (a) Negotiation is a consensual bargaining process in which the parties attempt to resolve a claim and counterclaim. A negotiation under this subchapter may be conducted by any method, technique, or procedure authorized under the contract or agreed upon by the

- parties, including, without limitation, negotiation in person, by telephone, by correspondence, by video conference, or by any other method that permits the parties to identify their respective positions, discuss their respective differences, confer with their respective advisers, exchange offers of settlement, and settle.
- (b) The parties may conduct negotiations with the assistance of one or more neutral third parties. If the parties choose to mediate their dispute, the mediation shall be conducted in accordance with Division 3 of this subchapter (relating to Mediation of Contract Disputes). Parties may choose an assisted negotiation process other than mediation, including without limitation, processes such as those described in Division 4 of this subchapter (relating to Assisted Negotiation Processes).
- (c) To facilitate the meaningful evaluation and negotiation of the claim(s) and any counterclaim(s), the parties may exchange relevant documents that support their respective claims, defenses, counterclaims or positions.
- (d) Material submitted pursuant to this subsection and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act, Texas Government Code, Chapter 552.



**§27.93. Settlement Approval Procedures.**

The parties' settlement approval procedures shall be disclosed prior to, or at the beginning of, negotiations. To the extent possible, the parties shall select negotiators who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

**§27.95. Settlement Agreement.**

- (a) A settlement agreement may resolve an entire claim or any designated and severable portion of a claim.
- (b) To be enforceable, a settlement agreement must be in writing and signed by representatives of the contractor and the commission who have authority to bind each respective party.
- (c) A partial settlement does not waive a party's rights under the Texas Government Code, Chapter 2260, as to the parts of the claims or counterclaims that are not resolved.

**§27.97. Costs of Negotiation.**

Unless the parties agree otherwise, each party shall be responsible for its own costs incurred in connection with a negotiation, including, without limitation, the costs of attorney's fees, consultant's fees and expert's fees.

**§27.99. Request for Contested Case Hearing.**

- (a) If a claim for breach of contract is not resolved in its entirety through negotiation, mediation or other assisted negotiation process in accordance with this subchapter on or before the 270th day after the commission receives the notice of claim, or after the expiration of any extension agreed to by the parties pursuant to §27.89(f) of this title (relating to Timetable), the contractor may file a request with the commission for a contested case hearing before the State Office of Administrative Hearings (SOAH).
- (b) A request for a contested case hearing shall state the legal and factual basis for the claim, and shall be delivered to the chief administrative officer of the commission or other officer designated in the contract to receive notice within a reasonable time after the 270th day or the expiration of any written extension agreed to pursuant to §27.89(f) of this title.

- (c) The commission shall forward the contractor's request for contested case hearing to SOAH within a reasonable period of time, not to exceed thirty days, after receipt of the request.
- (d) The parties may agree to submit the case to SOAH before the 270th day after the notice of claim is received by the commission if they have achieved a partial resolution of the claim or if an impasse has been reached in the negotiations and proceeding to a contested case hearing would serve the interests of justice.

**Division 3. Mediation of Contract Disputes.**

**§27.111. Mediation Timetable.**

- (a) The contractor and commission may agree to mediate the dispute at any time before the 270th day after the commission receives a notice of claim of breach of contract, or before the expiration of any extension agreed to by the parties in writing.
- (b) A contractor and the commission may mediate the dispute even after the case has been referred to the State Office of Administrative Hearings (SOAH) for a contested case. SOAH may also refer a contested case for mediation pursuant to its own rules and guidelines, whether or not the parties have previously attempted mediation.

**§27.113. Conduct of Mediation.**

- (a) Mediation is a consensual process in which an impartial third party, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding among them. A mediator may not impose his/her own judgment on the issues for that of the parties. The mediator must be acceptable to both parties.
- (b) The mediation is subject to the provisions of the Governmental Dispute Resolution Act, Texas Government Code, Chapter 2009. For purposes of this subchapter, "mediation" is assigned the meaning set forth in the Civil Practice and Remedies Code, §154.023.
- (c) To facilitate a meaningful opportunity for settlement, the parties shall, to the extent possible, select representatives who are knowledgeable about the dispute, who are in a position to reach agreement, or who can credibly recommend approval of an agreement.

**§27.115. Agreement to Mediate.**

- (a) Parties may agree to use mediation as an option to resolve a breach of contract claim at the time they enter into the contract and include a contractual provision to do so. The parties may mediate a breach of contract claim even absent a contractual provision to do so if both parties agree.
- (b) Any agreement to mediate should include consideration of the following factors:

- (1) The source of the mediator. Potential sources of mediators include governmental officers or employees who are qualified as mediators under Civil Practice and Remedies Code, §154.052, private mediators, the State Office of Administrative Hearings (SOAH), the Center for Public Policy Dispute Resolution at The University of Texas School of Law, an alternative dispute resolution system created under Civil Practice and Remedies Code, Chapter 152, or another state or federal agency or through a pooling agreement with several state agencies. Before naming a mediator source in a contract, the parties will contact the mediator source to be sure that it is willing to serve in that capacity. In selecting a mediator, the parties will use the qualifications set forth in subsection §27.117 of this title (relating to Qualifications and Immunity of the Mediator).
- (2) The time period for the mediation. The parties will allow enough time in which to make arrangements with the mediator and attending parties to schedule the mediation, to attend and participate in the mediation, and to complete any settlement approval procedures necessary to achieve final settlement. While this time frame can vary according to the needs and schedules of the mediator and parties, it is important that the parties allow adequate time for the process.
- (3) The location of the mediation.
- (4) Allocation of costs of the mediator.
- (5) The identification of representatives who will attend the mediation on behalf of the parties, if possible, by name or position within the commission or contracting entity.

- (6) The settlement approval process in the event the parties reach agreement at the mediation.

**§27.117. Qualifications and Immunity of the Mediator.**

- (a) The mediator shall possess the qualifications required under Civil Practice and Remedies Code, §154.052, be subject to the standards and duties prescribed by Civil Practice and Remedies Code, §154.053, and have the qualified immunity prescribed by Civil Practice and Remedies Code, §154.055, if applicable.
- (b) The parties will decide whether, and to what extent, knowledge of the subject matter and experience in mediation would be advisable for the mediator.
- (c) The parties will obtain from the prospective mediator the ethical standards that will govern the mediation.

**§27.119. Confidentiality of Mediation and Final Settlement Agreement.**

- (a) A mediation conducted under Division 3 of this subchapter is confidential in accordance with Texas Government Code, §2009.054.

- (b) The confidentiality of a final settlement agreement to which the commission is a signatory that is reached as a result of the mediation is governed by Texas Government Code, Chapter 552.

**§27.121. Costs of Mediation.**

Unless the contractor and the commission agree otherwise, each party shall be responsible for its own costs incurred in connection with the mediation, including costs of document reproduction for documents requested by such party, attorney's fees, and consultant or expert fees. The costs of the mediation process itself shall be divided equally between the parties.

**§27.123. Settlement Approval Procedures.**

The parties prior to the mediation shall disclose the parties' settlement approval procedures. To the extent possible, the parties shall select representatives who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

**§27.125. Initial Settlement Agreement.**

Any settlement agreement reached during the mediation shall be signed by the representatives of the contractor and the commission, and shall describe any procedures required to be followed by the parties in connection with final approval of the agreement.

**§27.127. Final Settlement Agreement.**

- (a) A final settlement agreement reached during, or as a result of mediation, that resolves an entire claim or any designated and severable portion of a claim shall be in writing and signed by representatives of the contractor and the commission who have authority to bind each respective party.
- (b) If the settlement agreement does not resolve all issues raised by the claim and counterclaim, the agreement shall identify the issues that are not resolved.
- (c) A partial settlement does not waive a contractor's rights under the Texas Government Code, Chapter 2260, as to the parts of the claim that are not resolved.

**§27.129. Referral to the State Office of Administrative Hearings (SOAH).**

If mediation does not resolve all issues raised by the claim, the contractor may request that the claim be referred to SOAH by the commission. Nothing in these rules prohibits the contractor and commission from mediating their dispute after the case has been referred for contested case hearing, subject to the rules of SOAH.



**Division 4. Assisted Negotiation Processes.**

**§27.141. Assisted Negotiation Processes.**

Parties to a contract dispute under Texas Government Code, Chapter 2260, may agree, either contractually or when a dispute arises, to use assisted negotiation (alternative dispute resolution) processes in addition to negotiation and mediation to resolve their dispute.

**§27.143. Factors Supporting the Use of Assisted Negotiation Processes.**

The following factors may help parties decide whether one or more assisted negotiation processes could help resolve their dispute:

- (1) The parties recognize the benefits of an agreed resolution of the dispute.
- (2) The expense of proceeding to contested case hearing at the State Office of Administrative Hearings (SOAH) is substantial and might outweigh any potential recovery.
- (3) The parties want an expedited resolution.
- (4) The ultimate outcome is uncertain.
- (5) There exists factual or technical complexity or uncertainty that would benefit from expertise of a third-party expert for technical assistance or fact-finding.
- (6) The parties are having substantial difficulty communicating effectively.
- (7) A mediator third party could facilitate the parties' realistic evaluation of their respective cases.

- (8) There is an on-going relationship that exists between parties.
- (9) The parties want to retain control over the outcome.
- (10) There is a need to develop creative alternatives to resolve the dispute.
- (11) There is a need for flexibility in shaping relief.
- (12) The other side has an unrealistic view of the merits of their case.
- (13) The parties (or aggrieved persons) need to hear an evaluation of the case from someone other than their lawyers.

**§27.145. Use of Assisted Negotiation Processes.**

Any of the following methods, or a combination of these methods, or any assisted negotiation process agreed to by the parties, may be used in seeking resolution of disputes or other controversy arising under Texas Government Code, Chapter 2260. If the parties agree to use an assisted negotiation procedure, they should agree in writing to a detailed description of the process prior to engaging in the process.

- (1) Mediation. (See Division 3 in this subchapter (relating to Mediation of Contract Disputes).
- (2) Early evaluation by a third-party neutral.
  - (A) This is a confidential conference where the parties and their counsel present the factual and legal bases of their claim and receive a non-binding assessment by an experienced neutral with subject-matter expertise or with significant experience in the substantive area of law involved in the dispute.

- (B) After summary presentations, the third-party neutral identifies areas of agreement for possible stipulations, assesses the strengths and weaknesses of each party's position, and estimates, if possible, the likelihood of liability and the dollar range of damages that appear reasonable to him or her.
- (C) This is a less complicated procedure than the mini-trial, described in paragraph (4) of this section. It may be appropriate for only some issues in dispute, for example, where there are clear-cut differences over the appropriate amount of damages. This process may be particularly helpful when:
  - (i) The parties agree that the dispute can be settled;
  - (ii) The dispute involves specific legal issues;
  - (iii) The parties disagree on the amount of damages;
  - (iv) The opposition has an unrealistic view of the dispute; and
  - (v) The neutral is a recognized expert in the subject area or area of law involved.
- (3) Neutral fact-finding by an expert.
  - (A) In this process, a neutral third-party expert studies a particular issue and reports findings on that issue. The process usually occurs after most discovery in the dispute has been completed and the significance of particular technical or scientific issues is apparent.
  - (B) The parties may agree in writing that the fact-finding will be binding on them in later proceedings (and entered into as a stipulation in the dispute if

the matter proceeds to contested case hearing), or that it will be advisory in nature, to be used only in further settlement discussions between representatives of the parties. This process may be particularly helpful when:

- (i) Factual issues requiring expert testimony may be dispositive of liability or damage issues;
- (ii) The use of a neutral is cost effective;
- (iii) The neutral's findings could narrow factual issues for contested case hearing.

(4) Mini-trial.

- (A) A mini-trial is generally a summary proceeding before a representative of upper management from each party, with authority to settle, and a third-party neutral selected by agreement of the parties. A mini-trial is usually divided into three phases: a limited information exchange phase, the actual hearing, and post-hearing settlement discussions. No written or oral statement made in the proceeding may be used as evidence or an admission in any other proceeding.
- (B) The information exchange stage should be brief but it must be sufficient for each party to understand and appreciate the key issues involved in the case. At a minimum, parties should exchange key exhibits, introductory statements, and a summary of witness's testimony.
- (C) At the hearing, representatives of the parties present a summary of the anticipated evidence and any legal issues that must be decided before the

case can be resolved. The third-party neutral presides over the presentation and may question witnesses and counsel, as well as comment on the arguments and evidence. Each party may agree to put on abbreviated direct and cross-examination testimony. The hearing generally takes no longer than one - two days.

- (D) Settlement discussions, facilitated by the third-party neutral, take place after the hearing. The parties may ask the neutral to formally evaluate the evidence and arguments and give an advisory opinion as to the issues in the case. If the parties cannot reach an agreed resolution to the dispute, either side may declare the mini-trial terminated and proceed to resolve the dispute by other means.
- (E) Mini-trials may be appropriate when:
  - (i) The dispute is at a stage where substantial costs can be saved by a resolution based on limited information gathering;
  - (ii) The matter justifies the senior executive time required to complete the process;
  - (iii) The issues involved include highly technical mixed questions of law and fact;
  - (iv) The matter involves trade secrets or other confidential or proprietary information; or
  - (v) The parties seek to narrow the large number of issues in dispute.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

**ISSUED IN AUSTIN, TEXAS ON THE 3rd DAY OF NOVEMBER 2000 BY THE  
PUBLIC UTILITY COMMISSION OF TEXAS  
RHONDA G. DEMPSEY**