

TEXAS ALCOHOLIC BEVERAGE COMMISSION  
COMMISSION MEETING  
MONDAY, JANUARY 13, 2003

The Texas Alcoholic Beverage Commission met on this date at 5806 Mesa Drive, Suite 185, Austin, Texas. Members present: John T. Steen, Jr., Chairman; Gail Madden and Kel Seliger, Members. Staff present: Rolando Garza, Administrator; Jeannene Fox, Acting Assistant Administrator; Lou Bright, General Counsel; Greg Hamilton, Chief of Enforcement; Denise Hudson, Director of Resource Management; Brian Guenther, Director of Licensing; Gene Bowman, Director of General Services and Brad Bearden. Visitors included: Viola Marie Ketha; Rick Donley, Beer Alliance of Texas; Doug DuBois, Texas Petroleum Marketers and Convenience Store Association; Robert Sparks, Licensed Beverage Distributors, Inc.; Alan Gray, Licensed Beverage Distributors, Inc.; Randy Cain, Hilgers and Watkins; Jay Howard, HillCo Partners; J. McCartt, HillCo Partners; Glen Garey, Texas Restaurant Association; Fred Marosko, Texas Package Stores Association and Charles McGrigg, Wine Institute.

The agenda follows:

1:30 p.m.

1. Adoption of resolution in honor of Viola Marie Ketha; discussion, comment, possible vote.
2. Approval of minutes of December 17, 2002 meeting; discussion, comment, possible vote.
3. Administrator's report:
  - a. discussion of staff reports;
  - b. recognitions of achievement;
  - c. discussion of management controls; and
  - d. licensing department activities update.
4. Fiscal stewardship of agency; discussion, comment, possible vote.
5. Consider publication of proposed amendment to 16 TAC §41.52 relating to scanning electronic data on driver's licenses by private club permittees; discussion, comment, possible vote. (Private Clubs-In General)
6. Public comment.

Announcement of executive session:

7. The commission will meet in executive session to consult with legal counsel pursuant to Texas Government Code, §551.071, regarding:
  - a. pending and anticipated litigation against the agency and personnel complaint investigation; and
  - b. will meet pursuant to Government Code, §551.074, regarding personnel complaint investigation and evaluation of the administrator.

Continue open meeting

8. Take action, including a vote if appropriate on topics listed for discussion under executive session.
9. Adjourn.

The meeting was called to order at 1:45 p.m by Chairman Steen.

MR. STEEN: I'm going to call this meeting to order of the Texas Alcoholic Beverage Commission and begin with the adoption of a resolution in honor of Viola Marie Ketha, and I would ask Ms. Madden if she would read it, please? Ms. Ketha, would you come forward, please?

MS. MADDEN: "WHEREAS, Mrs. Viola Maria Ketha of Bastrop County retired on October 30, 2002, having continuously held numerous licenses and permits issued by the Texas Alcoholic Beverage Commission since 1967; and

"WHEREAS, Mrs. Ketha, during her thirty-five years in the alcoholic beverage business, worked closely and diligently with the commission and in the community to prevent violations of the Alcoholic Beverage Code; and

"WHEREAS, Mrs. Ketha was tirelessly diligent in her efforts to prevent the sale of alcoholic beverages to minors and intoxicated persons and, through these efforts, contributed to the well being of her community; and

"WHEREAS, through her endeavors, never once were her businesses cited for a health, safety and welfare violation of the Alcoholic Beverage Code.

"NOW, THEREFORE, BE IT RESOLVED by the Texas Alcoholic Beverage Commission that Mrs. Viola Maria Ketha be recognized for her outstanding performance as a license and permit holder, as well as her dedicated service to the community and state; and that her contributions and accomplishments be memorialized by this resolution in the permanent minutes of the commission; and that sincere appreciation and congratulations be hereby extended to Mrs. Viola Marie Ketha."

I move that we accept this resolution.

MR. SELIGER: Second.

MR. STEEN: Any discussion? All in favor, say aye.

MS. MADDEN: Aye.

MR. SELIGER: Aye.

MR. STEEN: Aye. Congratulations. We commend you. Would you like to say anything or introduce who you are with today?

MS. KETHA: My daughter. She has taken over the business.

MR. STEEN: Would you stand up and we will recognize you, too.

MS. KETHA: And Ron, our TABC agent.

MR. STEEN: Good. Why don't you come forward and we will take a picture of you.

MS. KETHA: I couldn't have done this without Ron. Thank you.

COMMISSIONERS: Thank you.

MR. STEEN: We will move to the approval of the minutes of the December 17, 2002 meeting.

MR. SELIGER: Mr. Chairman, I move the minutes of the previous meeting be approved as presented.

MS. MADDEN: Second.

MR. STEEN: Any discussion? All in favor, say aye.

MR. SELIGER: Aye.

MS. MADDEN: Aye.

MR. STEEN: Aye. Motion carries.

We move to the administrator's report. Mr. Garza?

MR. GARZA: Mr. Chairman and Members, I've got a couple of quick updates for you before we get to a presentation that Mr. Guenthner will be bringing you on the activities within the licensing department.

First of all, we have received a preliminary draft of the audit work by our internal auditor, Mr. Gregorczyk, and his team of two other auditors. It is about a 21-page report with 20 somewhat recommendations. Staff is in the process of going through that report, and we are getting ready for a meeting with Mr. Gregorczyk and his auditors within the next couple of weeks. I anticipate that we will have the full report back on the agenda to you in February. Mr. Seliger, I think you probably will get a copy of that report and will be invited to participate in any of those meetings leading up to the February commission meeting.

Last month, I reported to you on the hiring of 22 new agent trainees. The academy for those individuals started last week. It's a six-week excursion which will culminate here with graduation ceremonies on the 14<sup>th</sup> of February. I will make sure that we send out invitations to each of you commissioners if you are available to come attend that graduation ceremony.

The last item I would bring to your attention centers on the fact that sometimes through the virtue of CNN reports and media reports, we hear about the very real fear of an impending war and sometimes that seems very remote. It comes home when we get calls like I did this morning from two of our enforcement commissioned peace officers who have been activated for duty. Lieutenant Randy Motz out of Abilene has been called up. He will be going to Fort Worth on Wednesday and then expects to be deployed to Saudi Arabia. He's been told that will be about a year commitment. Agent Paul Sanchez out of Dallas has been called in also and told he will be activated for about a 17-day training period to be followed by his ultimate destination. I wanted to bring that to your attention and know that our thoughts go with those employees and their families, and I'm sure there will be others who may be called into service.

MS. MADDEN: Are we going to write them a letter?

MR. GARZA: The primary thing, obviously, as I talked with Lieutenant Motz, is we want him to be assured that any assistance he or his family needs from us, that human resources and our field staff will be provided, and we will make every effort to make sure that we stay in touch with these folks. I am sure this is an emotional time for them and their family.

That's all I have, Mr. Chairman. We have a presentation by Mr. Gene Bowman. We have a member of our staff who has been with the agency for nearly 15 years heading our fleet operations and warehouse. He has received an offer he could not pass up and is going over to the Texas Department of Public Safety, but we wanted to recognize the gentleman and give him a very small token of our appreciation for his years of service to the agency. I will turn it over to Mr. Bowman.

MR. BOWMAN: Brad Bearden, you don't see very often, but he manages our warehouse operation which includes fleet, radio shop and our dry storage warehouse facility. Brad has been with the agency for a little over 14 years, and we are going to be at a loss, quite frankly, without him. He is going, thankfully, to a sister agency, the Department of Public Safety, and will be serving on their interoperability radio task force that is being formed over there. We still will have a lot of dealings with him in the future and,

hopefully, he can be an asset there in the long range from our ability to work with DPS in trying to get on some of their radio towers in the future.

Let me briefly read this service commendation:

“Today, the Texas Alcoholic Beverage Commission, takes great pride in honoring Brad Bearden for his hard work and dedication to the agency during his fourteen plus years of service. Special appreciation and thanks are extended by the Enforcement Division for Brad’s leadership in the field of wireless radio communications during his tenure, and for his insight and direction in keeping the agency abreast of the ever changing wireless radio industry. Even though we regret his departure, we extend our best wishes to Brad for his continued success in his new work endeavor with our sister agency, the Department of Public Safety. Brad leaves the agency in good condition with up-to-date equipment and insight into the continuing problems faced by all public safety authorities in working toward a solution(s) to the problem of interoperability of existing wireless radio communication systems.

“In recognition of his past work and leadership, it is with great pride that the agency presents this plaque as a small token of appreciation for his contributions. Best of luck to Brad for his future success.”

MR. BEARDEN: Thank you.

COMMISSIONERS: Thank you.

MR. STEEN: Mr. Bearden, do you want to say anything?

MR. BEARDEN: I would just like to say that I feel truly blessed to have been able to serve the commissioners and Mr. Garza and this great state agency. I’ve been here over 14 years. It was a very tough decision to make the choice to move over there, but I do feel very strongly about radio interoperability problems that law enforcement and all emergency responders have in the State of Texas. There is no statewide system at this point, and other states are working toward it. Funding is going to be a big problem. Like I say, I do have a passion for that and, like Mr. Garza said, I didn’t feel like I could pass up the opportunity. I just want to thank you.

MR. STEEN: Mr. Bearden, could you tell us about your new job?

MR. BEARDEN: It’s a new unit at DPS that somewhat came out of the last legislative session to develop a new unit that would focus just on interoperability for all state agencies, all counties, all cities - mostly law enforcement, but first

responders included, public safety of all kind. They hired an engineer over there to head up this RF unit. They call it the Radio Frequency Unit, and I will be assisting him in designing, hopefully, a statewide system. Like I say, the funding will be the big problem over the next five or ten years.

MR. STEEN: We just want to thank you for all you have done for the TABC, and we wish you the best of luck in your new job and we hope to be seeing you in that new capacity.

MR. BEARDEN: I'll be around. Thank you very much.

COMMISSIONERS: Thank you.

MR. GARZA: The last item I have under this section would be a report by Mr. Guenthner on our licensing activities, and we will make use of some of the power point technology that we have.

At this time, Brian Guenthner gave a presentation on the licensing department entitled *A Vision of Progress*. The presentation included: Licenses & Permits Issued; Original Applications Processed Within 14 Days; Average Cost Per Permit/License Issued; Security Held by Licensing; Licensing Employee Longevity; Licensing Employees With Less Than 5 Years of Service; Clients Satisfied with Licensing Process; Number of Licenses/Permits by Tier; Beer Distribution; Ale/Malt Liquor Distribution; Distilled Spirits Distribution; Wine Distribution; New Laws/New Responsibilities; Automation Enhancements and Paperwork Reduction and Hurdles, including Budget, Legislative Needs and Limited Technical Resources.

MR. STEEN: Mr. Garza, does that conclude the administrator's report?

MR. GARZA: Yes, sir.

MR. STEEN: Next is fiscal stewardship of the agency. Ms. Hudson?

MS. HUDSON: This month, we provided you some information on the workforce. You can see from the charts that were provided by Ms. Rowe that we've had a nice decrease in our turnover rate. That's gone down about 12 percent. I think the raises and some of the things that were done - you will notice that the average salary of our Schedule C employees has increased. I think we are seeing the results of some of those actions.

With regard to the performance measures, we are doing very good in that area. We do have three performance measures that we are kind of watching. Two of them relate to the vacancies that we've had in enforcement, so with the new agents coming in, getting them trained and

out in the field, we hope to see a change in those measures.

MR. STEEN: Any questions?

MR. SELIGER: No.

MS. MADDEN: No. Thank you.

MR. STEEN: Thank you, Ms. Hudson.

We will now consider publication of proposed amendment to 16 TAC Section 41.52 relating to scanning electronic data on driver's licenses by private club permittees. Is that you, Mr. Bright?

MR. BRIGHT: That would be me, Mr. Chairman.

We are, as the notice says, asking you to authorize us to publish a proposed amendment to our rule 41.52. That rule establishes the kinds of records about membership and other things that private clubs are expected to keep in their operation. The proposed amendment would allow them to scan the magnetic strip on driver's licenses to verify the information that they are collecting through various data collection, high-tech things that they do.

As you might remember from other conversations, the question of scanning driver's licenses has been a subject of some discussion and debate in this state over the last few years. The Transportation Code was amended a few years ago to say that nobody gets to do that except cops and law enforcement people.

Representative Haggerty subsequently added 109.61 to the Texas Alcoholic Beverage Code and that said that permittees may scan driver's licenses for the purposes of complying with the code or obeying rules and that kind of thing. That provoked two attorney general's opinions, the first of which our attorney general said it is certainly all right to scan driver's licenses to verify the age of an alcoholic beverage purchaser. In the second one, the attorney general says it is not certainly all right to scan driver's licenses for the purposes of creating or maintaining private club records because the TABC rules do not authorize and require you to do so.

Adding to this complication was the passage a few years ago of the federal Driver's Privacy Protection Act which our attorney general has described as difficult and complex, and I couldn't agree more. Generally, it says that the Department of Public Safety may not release the information on

driver's licenses for public release except for 13 or 14 obscurely worded exceptions. The question, of course, is what those exceptions mean and what they don't mean. The Department of Public Safety may be subject to sanctions by the federal government if they have a practice of substantial noncompliance. Individual citizens may sue other individual citizens under that act if the defendant individual citizens misused driver's information.

All of this provoked a rule request, a request that we adopt a rule, and we are proposing this rule for discussion. We have asked the members of the private club industry their informal opinion about this. To date, we have received 201 responses to that request in favor, including one from Representative Haggerty who is in favor of this rule proposal. We have received one response that is not in favor of it.

Despite that kind of overwhelming voice of "Yes, we want to do this," the staff is not yet clear what we think our recommendation to you ought to be. I have made private contact with several of the people who are most engaged and involved in this area, and we have made ourselves a promise that if, indeed, you agree to publish this rule and proceed with this project, we will meet together in the coming weeks and have some fairly intensive conversations about what the law does and does not say, how these systems that we would be regulating work and don't work, so that we may come back to you at some point in the future and make intelligent and sensible recommendations for your decision. In sum, we suggest that you authorize us to publish this as a proposal.

MS. MADDEN: When the magnetic strip is scanned is the information the same that's on the front of the driver's license or is there additional information?

MR. BRIGHT: No, ma'am. By virtue of that Transportation Code provision that I mentioned that first started these discussions, that law says a couple of things. First, it says that DPS may not put any information on that magnetic strip that does not already appear on the front of the driver's license. Secondly, it may only be used for governmental purposes.

MS. MADDEN: Okay.

MR. STEEN: Any further questions?

MR. SELIGER: I have no questions.

MS. MADDEN: You are asking us to publish this for the purpose of a dialog?

MR. BRIGHT: Yes, ma'am. The effect of what you would do today - unless you say no, and if you say no today, you don't want to do this, that would end this project and I would explain to the requestor why we are not going to engage in rulemaking procedures. If you say yes, the most we can do then is publish our proposed rule in the *Texas Register* and it would say to anyone in the world, "We are thinking about doing this and we really want to know what you think. Send those cards and letters to Lou Bright." We will collect those comments. I suppose the topic under discussion then is twofold. Should we do this at all and, if we should do this, is the language that we have proposed the best way to do it? If that is published, we, of course, collect the comments. The staff educates itself about the law and all that and at some point we come back and we ask you for a decision one way or the other, at which time you could say, "No, we are not going to do this," or "Yes, we are going to do it in the way the staff or other people recommend," or "We are going to do some related rule, but we are going to change it at our discretion from a different way than you recommend," or you can simply do nothing. If you never act on this, within six months, the *Texas Register* will remove that as an active proposal and it will just go the way of other bureaucratic paper and we will go on about our business.

MS. MADDEN: I have some concerns, and you mentioned it in your letter to us when you said there are implication issues of personal privacy, and I just have some concerns here. If we move to publish, that does open the dialog. I understand that side of it. But, it also maybe puts us one step down the road - maybe - of embracing this.

MR. BRIGHT: It is indeed a step closer towards adoption. I have couched my comments today in terms of kind of the law. Obviously, one of my big concerns is getting to the bottom of what the federal Privacy Protection Act says and what it does not say. One of the things I will be discussing with the various counsel for interested parties is what we think that law says. There are other implications as well and they are indeed implications of privacy. Recognize that one of the concerns, as I understand it, driving the restrictions on scanning driver's licenses is the commercial use of that data. We scan your driver's license and we have essentially your name and your address, and we can sell that list to someone else who will call you because they want to sell you all the kinds of things that you didn't know you needed until they called you and told you you needed these things. That, of course, is forbidden by 109.61. It would continue to be forbidden. Any retention for longer than necessary to verify the accuracy would be forbidden by our rule and by implication by the law, 109.61. Marketing the data so accessed in any way is a Class A misdemeanor under our statute. It would be a violation of our rule. Whether that

sufficiently addresses the privacy concerns or not is a question to be answered in the sequel I suggest. I don't know the answer to that question now.

MS. MADDEN: I think we live in a society where privacy issues are kind of the boogeyman. I really do understand why these people want to do this. It would make their job easier and, yet, it seems like we incrementally just keep moving towards more and more invasion of privacy. Not that there's that much on the driver's license, perhaps, but then perhaps there is because they've got your name and your address and your date of birth, if I recall. I just have a little bit of concern. How do you all feel?

MR. SELIGER: I think the concerns are good ones. I think the dialogue, itself, is probably not so harmful to see what the benefits are in its aid to enforcement. If this is something that cannot be forged, then maybe we want everybody to scan the strip and any ID presented to establish the age of a purchaser - you know, it could go the other way where even greater use of this magnetized strip, if it's laid down along carefully prescribed lines by law, it may be an advantage to enforcement and not a detriment. I don't know that that's the case, but I think that's the sort of thing that a discussion would bring out.

MR. STEEN: Do we need a motion?

MR. SELIGER: I move that we publish the notice of proposed rulemaking.

MS. MADDEN: I am not going to second it.

MR. STEEN: Second. Any further discussion? All in favor, say aye.

MR. SELIGER: Aye.

MR. STEEN: Aye. Opposed?

MS. MADDEN: No.

MR. STEEN: Anything else, Mr. Bright?

MR. BRIGHT: Nothing from me, sir.

MR. STEEN: Public comment. I have no cards up here. Do we have anybody from the public that wants to comment? Hearing none, the commission will now go into executive session to consult with legal counsel pursuant to Texas Government Code, Section 551.071, regarding pending and anticipated

litigation against the agency and personnel complaint investigation and will meet pursuant to Government Code, Section 551.074, regarding personnel complaint investigation and evaluation of the administrator.

The commission convened in executive session at 2:31 p.m. and reconvened in open meeting at 3:59 p.m.

MR. STEEN: The commission meeting of January 13, 2003 is now back in open session. During executive session no votes were taken, no final decisions were made. There are no matters requiring commission action at this time.

Do I hear a motion to adjourn?

MS. MADDEN: I so move.

MR. SELIGER: Second.

MR. STEEN: All in favor, say aye.

MS. MADDEN: Aye.

MR. SELIGER: Aye.

MR. STEEN: Aye. The meeting is adjourned.

The meeting adjourned at 4:00 p.m.