



## **COMMISSION MEETING MINUTES**

**March 1, 2005**

The Commissioners of the Texas Alcoholic Beverage Commission met in Regular Session on Tuesday, March 1, 2005, at the Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Suite 185, Austin, Texas. Commissioner Madden served as the presiding officer in Chairman John Steen's absence.

**PRESIDING:** Gail Madden, Commissioner

**PRESENT:** Jose Cuevas, Jr., Commissioner

**STAFF PRESENT:** Alan Steen, Administrator

Glenda Baker, Assistant Chief of Enforcement  
Carolyn Beck, Public Information Officer,  
Executive  
Lou Bright, General Counsel, Executive  
Del Drake, Captain, Office of Professional  
Responsibility  
Jeannene Fox, Assistant Administrator,  
Executive  
Buck Fuller, Director, Compliance  
Amy Harrison, Director, Licensing  
Gary Henderson, Enterprise Operations Team  
Leader, Information Resources  
Linda Jackson, Administrative Assistant,  
Executive  
Renee Johnston, Executive Assistant, Executive  
Charlie Kerr, Director, Business Services  
Garry Sitz, Director, Information Resources  
James "Sam" Smelser, Chief of Enforcement

**GUESTS PRESENT:** Dewey Brackin, Attorney, Gardere Wynne Sewell  
Rick Donley, President, Beer Alliance of Texas  
Doug DuBois, Jr., Director of Membership and  
Education, Texas Petroleum Marketers and  
Convenience Store Association  
Greg Flores, Director of Legislative Affairs, H-E-B  
Kyle Frazier, Representing National Association  
of Beverage Importers  
Frances Kurio, Representing Anheuser-Busch  
Karen Latta, Policy Analyst, Sunset Advisory  
Commission  
Fred Marosko, Texas Package Stores  
Association  
M. Jack Martin, Attorney at Law  
Mignon McGarry, Block/Republic Beverage  
Charles E. McGrigg, Central States Counsel,  
Wine Institute  
Lindsay Meche, Block/Republic Beverage  
Michael Mims, Director of Licensing, H-E-B  
Patricia Shipton, Representing Coors Brewing  
Robert Sparks, Executive Director, Licensed  
Beverage Distributors, Inc.  
Keith Strama, Attorney, Wholesale Beer  
Distributors of Texas  
Ralph Townes, President, Glazers Texas  
Rick Wilson, President, Texas Association of  
Bars and Nightclubs  
Randy Yarbrough, Wholesale Beer Distributors of  
Texas

**CALL TO ORDER**

Commissioner Madden called the meeting of the Texas Alcoholic Beverage Commission (TABC) to order at 1:27 p.m.

**APPROVAL OF COMMISSION MEETING MINUTES OF JANUARY 24, 2005**

Commissioner Madden called for a motion to approve the TABC Commission meeting minutes of January 24, 2005. **Commissioner Cuevas stated that**

**there were no corrections or deletions and moved that the minutes of the January 24, 2005, meeting be approved. Commissioner Madden seconded the motion. The motion carried.**

### **ADMINISTRATOR'S REPORT**

Commissioner Madden called upon Administrator Alan Steen to provide the Administrator's Report.

Administrator Steen expressed Chairman Steen's appreciation to Commissioner Madden for filling in for the Chairman. Administrator Steen explained that the Chairman was ill and could not be at the meeting.

Administrator Steen stated that since the last Commission meeting, many of the agency's activities have revolved around the legislative session. He reported the following:

- Staff attended two Senate Finance Committee meetings, one on February 2 and one this morning, as well as two Senate Finance Committee Workgroup meetings on February 21 and 24.
- Staff attended two House Appropriations Committee meetings on February 8 and 24.
- Administrator Steen testified before the House Ways and Means Committee on excise taxes.
- Along with Assistant Administrator Jeannene Fox, Administrator Steen attended the Senate Nominations Confirmation hearing for Chairman Steen and Commissioner Cuevas on February 21.
- Several meetings were held with various legislators regarding TABC's Sunset bill. Representative Peggy Hamric will carry TABC's Sunset bill in the House, and Senator John Whitmire will carry TABC's bill in the Senate.
- Ms. Fox will testify at the House Investigating Ethics Committee on March 2. At the same time, Administrator Steen will be testifying at the House Licensing and Administrative Procedures Committee.

Administrator Steen discussed House Bill 1 and Senate Bill 1, which deal with TABC's budget. He explained that it was the legislature's intention to have both bills out of the committee by March 18, which is a much shorter timeframe than in the past.

The House version has TABC's base budget at \$55.3 million, which is what TABC had submitted; however, it does not contain the return-to-base, which is \$3.3 million that would not be appropriated under this particular recommendation. The House version contains the exceptional item that TABC submitted—and of which TABC was requested by the Sunset Commission to provide an enhanced budget—for public safety. TABC requested 119 FTEs (full time equivalents), and the House approved 48 FTEs for this exceptional item. Commissioner Madden asked if the FTEs were solely for enforcement; Administrator Steen stated that it would consist of enforcement, compliance, legal, and support staff FTEs. He added that the Compliance Officer Reclassification exceptional item for \$295,000 is contained in the House version. However, at this time, the Career Enhancement for Tenured Staff item is not included in the House version but is on the “wish list” that will be considered at a future House Appropriations Committee meeting. The Ports of Entry Automation Project for \$105,000 and the Excise Tax Automation Project for \$325,000 are also included in the House version.

Mr. Steen stated that the Senate version contains the same base budget as the House version and also includes the return-to-base. The Senate version includes 119 FTEs for \$12.9 million, the Compliance Officer Reclassification, the Ports of Entry Automation, and the Excise Tax Automation Project. The Career Enhancement for Tenured Staff is on the “wish list” for the Senate.

Administrator Steen commended Assistant Administrator Jeannene Fox for the tremendous job she was doing for TABC in this legislative session. He thanked her and thanked her staff.

**Administrator Steen stated that he would provide a copy of both versions to the Commissioners.**

Administrator Steen reported that he, Compliance Director Buck Fuller, and Ports of Entry Supervisor Santos Saldana went to the Valley yesterday. Administrator Steen treated the staff at the Progreso Port of Entry to lunch in recognition of their 100% participation in the State Employee Charitable Campaign. While they were at lunch, Messrs. Fuller and Saldana worked the port. Mr. Steen expressed appreciation to the staff of the Progreso Port of Entry and to Messrs. Fuller and Saldana.

Administrator Steen provided a brief update on the activities of the Information Resources Division (IRD). IRD staff will travel around the state to train TABC

staff on the Versa Project. He stated that **Garry Sitz, IRD Director, will provide an update at the March 28 Commission meeting.** The Versa system will be “live” beginning the first week of May. Mr. Steen added that the project is on time and within budget.

Administrator Steen discussed the agency’s activities in preparation for the Spring Break session, which begins March 10. Staff have developed a plan identifying who is in charge on any day along with pager and cell numbers of all involved in this effort. Staff have established partnerships with local law enforcement in South Padre Island, Corpus Christi, Galveston, and Brownsville and have begun educating retailers in those areas. Mr. Steen stated that much of the planning strategies for this year’s Spring Break session is a direct result of the assessment done by agents and other staff of the problems encountered during last year’s Spring Break. Mr. Steen stated that he was very pleased with the planning efforts and that he looked forward to reporting on this year’s successful Spring Break session.

Administrator Steen reported that the policy on immigration has been a bit delayed. Staff continue to work with Winston Krause as well as an immigration attorney. Mr. Steen stated that the policy is nearing completion and will be presented to the Commissioners in the near future.

Administrator Steen reported that Trainer Michael Hernandez, a new father-to-be with a family in Dallas, is leaving TABC to work in the private industry in the Dallas area. Mr. Steen expressed sorrow that he was leaving and wished him well. The job vacancy has been posted.

Commissioners Cuevas and Madden expressed their appreciation of staff’s efforts in this legislative session.

**APPROVAL TO PUBLISH PROPOSED AMENDMENT TO RULE 16 TEXAS ADMINISTRATIVE CODE §45.78 RELATING TO MALT BEVERAGE LABELS**

Commissioner Madden called upon Lou Bright, General Counsel, to discuss the proposed amendment relating to malt beverage labels (Attachment 1).

Mr. Bright discussed the proposed amendment to the rule that relates to what must be listed on the labels of malt beverages. TABC’s current rule requires the label to show both the name of the entity bottling the beverage and the location where the beverage is bottled. For various reasons relating to the complexities of malt beverage manufacturing and distribution, this rule is no

longer a practical requirement and has been one that TABC has not enforced for some time. Mr. Bright explained that the proposed amendment would remove an unnecessary impediment, allowing for the bottler's principle place of business to be shown on the label. In addition, the proposed amendment conforms to federal practice.

The proposed amendment was sent out informally to industry representatives for input. Some concerns were expressed over the words "packer" or "packed." Mr. Bright explained that "packer" has a specific definition in federal law but is not defined in state law. As a result, it was being recommended that the references to "packer" in Paragraph A be removed. Another recommended change would be to add a new Paragraph D, stating: "Notwithstanding the above, the Commission may refuse an application for label approval if the Commission believes there is any information included or excluded on the label that causes consumers to be confused or misled." Mr. Bright reminded the Commissioners that there is other law which states that labeling and advertising cannot be deceptive to consumers in any way. This creates a failsafe provision such that if a label facially meets the rule's requirements and yet is deceptive in some way, TABC has the authority to reject the label. Mr. Bright recommended the Commissioners' approval to publish the proposed amendment with the proposed amended language.

Commissioner Madden called upon Randy Yarbrough, who registered to provide public comment on the amendment. Mr. Yarbrough introduced himself, stating he was representing the Wholesale Beer Distributors of Texas. He stated that they concur with Mr. Bright's recommendation and support publishing the amendment with the proposed changes. Commissioner Cuevas asked if the word "packer" has two different meanings. Mr. Yarbrough responded that under state law, the word "packer" has no meaning. In federal law, there's specific language stating that if a conflict exists between a word or a concept in state law for malt beverages, state law prevails over federal law. He explained that there is no problem with that authority in the federal law; however, removing the reference to "packer" would eliminate any possible ambiguity.

Commissioner Madden asked if anyone wished to provide public comment on the proposed amendment. As there were no further comments, **Commissioner Cuevas moved that the Texas Alcoholic Beverage Commission approve the publishing of the proposed amendment to Rule 16 Texas Administrative Code, Section 45.78, relating to malt beverage labels, with the amended language as proposed by Mr.**

**Bright. Commissioner Madden seconded the motion. The motion carried.**

**APPROVAL TO PUBLISH PROPOSED AMENDMENT TO RULE 16 TEXAS ADMINISTRATIVE CODE §45.110 RELATING TO VOLUME DISCOUNT PRICING**

Commissioner Madden called upon Lou Bright to discuss the proposed amendment relating to volume discount pricing. Mr. Bright explained that staff recommended the proposed amendment (Attachment 2) be published in order to provoke public comment on volume discount pricing.

Mr. Bright provided the background, stating that the issue of volume discounts has been a problem for the agency, as the provisions of the Alcoholic Beverage Code do not explicitly regulate pricing. Historically, TABC's stance has been that the volume used to price the product must be the volume of sales to a specific location, rather than the volume of sales to multiple locations. Last year, industry members asked TABC to reconsider this interpretation. The more that this issue was discussed among staff and industry members, however, the more complicated the issue became. In November, TABC issued a letter offering tentative conclusions to the industry, recognizing that volume was a legitimate consideration in determining price and recognizing there could be ways in which this kind of pricing program could be used in an unlawful manner. The issue was presented at the December Commission meeting, and the Commissioners asked staff to explore the possibility of rule making.

Mr. Bright explained the proposed addition of a Paragraph E to Rule 45.110, which states that calculating the price of alcoholic beverages by reference to the volume of sales to multiple locations under common ownership does not constitute an unlawful inducement or excessive discount. The intention for publishing the proposed amendment was to provoke discussions as to whether the amendment is an accurate statement of law and whether references to other laws and practices should be added to the rule.

Commissioner Madden called upon Rick Donley, President of the Beer Alliance of Texas, who registered to provide public comment. Mr. Donley requested that the rule amendment not be published at this time, as he believed there were several problems with the language; thus, it would be premature to publish it. He recommended further discussions with different

parties within the industry to arrive at a better rule amendment before having it published. He stated that the language under Subsection 6 makes the practice discriminatory, as the very nature of the business practice results in a cumulative discount. At Commissioner Cuevas' request for clarification, Mr. Donley responded that the practice is discriminatory in that it is not offered to all retailers in the local market, and only a handful of people—through their mass purchasing power—could qualify for a volume discount. It thus becomes cumulative, because retailers are able to use the volume discount by mutual ownership. He stated that the nature of the Alcoholic Beverage Code is to establish a level playing field and that this practice would be a rapid departure from what the legislature intended. He clarified that he did not have a problem with this proposal being applied to distilled spirits and wine as long as the amendment exempted malt beverages from its provisions.

Commissioner Madden asked Mr. Donley if he had articulated his stance to TABC. He replied that he had discussed this issue “ad nauseam” with Mr. Steen. He expressed concern over the departure of current business practices and recommended more discussion on the front end, rather than the back end. He added that publishing the proposal would take people to a totally new direction without much previous thought given to the language.

Commissioner Cuevas stated that he appreciated Mr. Donley's comments, but his understanding was that publishing the rule amendment would cause discussion to take place among all interested parties. In this manner, all parties could be at the table at the same time to resolve the issue faster. Mr. Donley suggested that the discussions among interested parties could be done prior to the publishing as well. He stated he did not think there was much input or discussion in any sense of the consequences that could result from this major departure in business practices. Because it has never been done in the history of the state, Mr. Donley stated it would be wise to have more in-depth discussion before publishing the rule.

Commissioner Madden expressed surprise at the depth of Mr. Donley's adversity to the proposed amendment, since she had not heard it before and because of the time that had elapsed since the issue was last brought up at the December Commission meeting. Mr. Donley replied that it took the beer distributors some time to truly grasp the meaning of the language after seeing the actual language approximately a month ago, and today was the first time to publicly comment on the proposed amendment. Mr. Donley stated that he and the Beer Alliance are very concerned about the proposal because they

view this as a dramatic departure from anything that has ever been done in the state.

Commissioner Madden asked Mr. Bright to address Mr. Donley's statement that the proposed rule would be a dramatic departure. Mr. Bright explained that much discussion on this issue has been occurring for almost a year among staff and industry members. He stated that there are two items that he could offer that speak to the question of whether this is a dramatic departure from what has been done in the state before: The first is the business practice that the beer distributors choose to do in how they decide to run their businesses, which the law gives them the right to do; the second is what the law actually is. He stated that volume has always been a factor--one of many factors--that influence price. With regard to this being a discriminatory practice, Mr. Bright replied that the regulatory provision Mr. Donley referenced condemns practices that are not offered equally without legitimate business reasons present to justify the difference in treatment. In modern business, large purchasers can receive better treatment than small purchasers because there are legitimate business reasons to do so. Mr. Bright stated that TABC must be vigilant in ensuring that the interpretation and application of the rules do not restrict commercial liberty unless there is a regulatory wrong that TABC is preventing. Mr. Bright stated that Mr. Donley's comments were well taken and exemplified the complex discussions that will occur in the ensuing months. Mr. Bright recommended that those complex discussions be held in the formal context of a published rule.

Mr. Donley urged further discussions to improve the language of the rule amendment. He stated that he had only seen the language to the amendment recently. He added that information sometimes takes on a different connotation once it is seen in print. For that reason, he and the Beer Alliance of Texas recommend that TABC hold up on the publishing of the rule.

Commissioner Madden thanked Mr. Donley for his comments. She then called upon Greg Flores, Director of Legislative Affairs for H-E-B.

Mr. Flores expressed appreciation for the opportunity to speak with the Commissioners again on the discount pricing issue. He stated that H-E-B applauds TABC for taking the policy rule amendment under consideration for publishing and encouraged the Commissioners' approval to publish the proposed rule amendment. He explained that the proposed amendment would provide all retailers the opportunity to utilize economies of scale and

customary business practices in the purchase of alcoholic beverage products. He reiterated what he said at the December Commission meeting: When public safety and health are not at issue, over-regulation of private business relationships has very little place in state law. He added that there are legitimate business reasons to justify difference in treatment, and volume is a legitimate business reason. Mr. Flores stated that he and H-E-B looked forward to the opportunity to work with TABC to ensure the proper implementation of the proposed policy. Commissioner Cuevas asked Mr. Flores if, in his opinion, he believed that publishing the proposed amendment was the correct approach; Mr. Flores responded it would be the correct approach.

Commissioner Madden called Keith Strama of Wholesale Beer Distributors of Texas (WBDT). Mr. Strama commended Mr. Bright for working with the WBDT on both of the proposed rule amendments. With regard to the volume discount amendment, Mr. Strama stated he was on the middle ground of the debate. He stated that Mr. Donley raised an interesting question about whether volume discounts can be discriminatory in certain situations. His concern, however, dealt with the affect on the market price whenever an agency gets involved with a price issue. After the letter from Mr. Bright was published, retailers began calling WBDT distributors saying that they were entitled to volume discounts. He stated that the Alcoholic Beverage Code explicitly states that a distributor has exclusive rights to determine its price. Mr. Strama requested that the rule be clarified before it was published, because once published, it would impact the marketplace. He recommended adding two non-substantive sentences to the rule: "This subsection is only relevant to this rule, as other rules of law, including the exclusive territory restrictions in the distribution of beer, could affect the ability of a member of the manufacturing or wholesale tier to calculate the price of alcoholic beverages by reference to the volume of sales to multiple locations under common ownership. Nothing in this rule affects the ability of a member of the wholesale tier to independently establish its selling price." Mr. Strama explained this would clarify to the retail tier that this is not an authorization for wholesale volume discounts and that nothing is being proposed that would take away the distributor's ability to independently establish its price.

Mr. Bright replied that Mr. Strama's ideas deserve exploration and stated that this is precisely the type of many discussions he expects in the future. He stated that staff would need time to review Mr. Strama's recommendations and could not endorse the recommended language at this time. Mr. Strama said

that the sentence, “Nothing in this rule affects the ability of a member of the wholesale tier to independently establish its selling price” was critical and recommended its inclusion before the rule was published.

Commissioner Madden asked for any additional public comment on the issue; there was none. She addressed Mr. Donley, assuring him that she heard his concerns on the volume discount issue. She stated that her inclination was to approve the publishing of the proposed amendment, knowing that there was plenty of room to “tweak” it; she added that the rule was not a “done deal.” Also, she believed that everyone had time to focus on this particular issue, and she did not want to put this off, especially when concerns can still be addressed in the process.

Commissioner Cuevas asked Mr. Bright if he agreed with the additional language suggested by Mr. Strama for incorporation into the motion. Mr. Bright did not recommend it be added. Commissioner Cuevas agreed. He stated that there are two different approaches that can be done: 1) have discussion before publishing the rule; or 2) publish the rule and have discussion while everyone has the opportunity for input. He asked Mr. Bright if—after discussions and any changes—the Commissioners were required to adopt the new rule. Mr. Bright stated that the purpose of the publication was to get the debate and discussions started. He said that the Commissioners—with or without the recommendation of staff—may decide not to adopt any new law.

**Commissioner Cuevas moved that the Texas Alcoholic Beverage Commission approve the publishing of the proposed amendment to Rule 16, Texas Administrative Code, Section 45.110, relating to volume discount pricing. Commissioner Madden seconded. The motion carried.** Commissioner Madden stressed the importance for staff to encourage an open forum for hearing all public comments on this issue. Mr. Bright agreed.

### **PUBLIC COMMENT**

Commissioner Madden asked if anyone wished to provide public comment; there were none.

**NEXT MEETING: MONDAY, MARCH 28, 2005**

Commissioner Madden announced the next Commission meeting, scheduled for March 28. The Allan Shivers Employee of the Year Awards would be presented at that time. Prior to the meeting, there will be a reception for tenured employees.

### **ADJOURNMENT**

**Commissioner Madden called for a motion to adjourn. Commissioner Cuevas moved that the Texas Alcoholic Beverage Commission meeting be adjourned. Commissioner Madden seconded. The motion carried, and Commissioner Madden announced that the meeting was adjourned.**