

TEXAS ALCOHOLIC BEVERAGE COMMISSION
COMMISSION MEETING
MONDAY, JULY 24, 2000

The Texas Alcoholic Beverage Commission met on this date in Room 185 at 5806 Mesa Drive, Austin, Travis County, Texas. Members present: Allan Shivers, Jr., Chairman and Gail Madden, Member. Staff present: Doyne Bailey, Administrator; Randy Yarbrough, Assistant Administrator; Lou Bright, General Counsel; Jeannene Fox, Director of License & Compliance, Greg Hamilton, Chief of Enforcement; Denise Hudson, Director of Resource Management; Charlie Kerr, Director of Fiscal Services and Don Engleking, Grants Coordinator. Comment was received from: Wade Spilman, Wholesale Beer Distributors of Texas; Steve Shaw, Choice Master; Jim Greaves, Choice Master; Laura Dean-Mooney, MADD; Ellen Ward, Texans Standing Tall and Rick Donley, Beer Alliance of Texas.

The agenda follows:

1:30 p.m. - Call to order.

1. Approval of minutes of June 26, 2000 meeting; discussion, comment, possible vote.
2. Administrator's report:
 - a. discussion of staff reports;
 - b. recognitions of achievement; and
 - c. discussion of management controls.
3. Fiscal stewardship of agency; discussion, comment, possible vote.
4. Consider Legislative Appropriations Request for 2002-2003 biennium; discussion, comment, possible vote.
5. Agency internal auditor position; discussion, comment, possible vote.
6. Consider publication of proposed repeal of 16 TAC §41.22; discussion, comment, possible vote. (Package Store Sales Over Three Gallons)
7. Consider publication of proposed repeal of 16 TAC §45.103 and publication of proposed new rule; discussion, comment, possible vote. (Happy Hour)
8. Consider amendment to 16 TAC §45.106 as published in 25 TexReg 4269 on May 12, 2000; discussion, comment, possible vote. (Sweepstakes and Games of Chance)
9. Consider publication of proposed amendments to 16 TAC §45.110 and §45.117; discussion, comment, possible vote. (Electronic Advertising)
10. Public comment.

Announcement of executive session:

11. Executive session:
 - a. the commission may go into executive session to consult with legal counsel regarding items 6, 7, 8 or 9 of this agenda pursuant to Texas Government Code, §551.071.

Continue open meeting.

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

The meeting was called to order at 1:30 p.m. by Chairman Shivers.

MR. SHIVERS: I call this meeting of the Texas Alcoholic Beverage Commission to order. It is one thirty on Monday, July 24, 2000.

The first order of business is approval of the minutes of the last meeting. They were mailed to the commissioners. Any changes, Ms. Madden?

MS. MADDEN: No.

MR. SHIVERS: Do you have a motion to approve the minutes?

MS. MADDEN: I so move.

MR. SHIVERS: Second. All in favor?

MS. MADDEN: Aye.

MR. SHIVERS: Aye. Opposed?

Administrator's report?

MR. BAILEY: Mr. Chairman and Ms. Madden, other than any questions you have in regards to the monthly report, I would introduce you to Terri Asendorf. Terri is a new part-time employee that is helping us try to catch up on our self-imposed obligation to publish an internal and external newsletter. Terri has graciously agreed to do that. She's a student, and she's working part of each day, and she wanted to come in and see you at your best. That's all I have.

MR. SHIVERS: Glad to have you. Thank you for doing that.

Any questions on the monthly reports?

MS. MADDEN: No.

MR. SHIVERS: Fiscal stewardship? Mr. Bailey, is that you, again?

MR. BAILEY: Mr. Kerr will give you a quick comment and answer any questions you have.

MR. KERR: Good afternoon. I think you have in your packet about 14 pages of fiscal stewardship graphs and charts. The bottom line is we met our performance measures for the third quarter. We are under all our caps. These are the two areas that are pretty much covered in this report.

The only measure that I saw that we are a little bit under-projected will be the number of inspections made, and those are just slightly under the projected amounts and will probably be made up in the fourth quarter.

If you have any questions on these reports or these graphs, I would be happy to try to answer them for you.

MR. SHIVERS: Is there a particular reason why inspections are down the first three quarters?

MR. BAILEY: I can give you a historical perspective. As you recall, during the school year, a lot of our agents get involved in Project SAVE and Shattered Dreams, and so forth. During the summer months, which would be the fourth quarter, a lot of those people are released from those educational responsibilities and can help us catch up in the inspection area.

MR. KERR: One of the caps that we are under is the travel cap. A big reason we are so much under the travel cap is because we actually weren't able to fund the travel cap this year, and we will probably run into the same problem in 2001. It's just simply a matter of having to use money for operating expenses and cut back on needed travel. We've had some people that have cut back on travel that's actually part of their job. I know compliance officers have had to really cut back on their travel, because we just didn't have enough money to fund that particular expense.

MR. SHIVERS: Okay. Questions?

MS. MADDEN: On the federal grant, what's your method of finding out which grants we can apply for?

MR. KERR: We usually go after those grants and, sometimes, we are approached by different agencies that have available money. I think Don Engleking knows a little more about this than I do, so I am going to let him answer your question.

MR. ENGLEKING: Traditionally, we've received grants from two places, either from the Department of Transportation or from the Governor's Office. Both of those organizations have grant periods where they open up a certain period of time for you to apply for grants for that year. We apply, basically, a year in advance, normally. We also monitor some sites on the internet that oftentimes have grants available to see if there is something there to apply for. Sometimes it's just word of mouth. When we hear that an organization may have funds, then we will address them at that time.

MS. MADDEN: You read in the paper sometimes that some of these federal grants are just left lying on the table, so I think it's great that we partake of them when we can.

MR. ENGLEKING: Sure. What we find, lots of times, is that a lot of these grants are tied to personnel and, with the FTE caps, we are not eligible to apply for some of those because we have all the employees we can hire, anyway. That's what a lot of people find, and that's why there's sometimes money left around.

MR. SHIVERS: Thank you, Don.

Legislative appropriations request for 2002-2003 biennium. Charlie?

MR. KERR: I gave you just a very brief summary of the 2002-2003 biennium budget. It's broken down by strategy. This is pretty much how the LAR will look, except it will distribute all these funds in different areas, but the bottom line is we are asking for the same amount of funding we had in 2000-2001 and, as we mentioned, we might have some of that extra MLPP money that we talked about that might be available. Hopefully, they will let us keep that in our budget in 2002-2003.

The exceptional items are on the third page of this report. These are the items that we are submitting as beyond baseline. They are some of the projects that are needed in this agency, and they are prioritized on the page. As you can see, the re-engineering of the IBM mainframe system is our number one priority item and, obviously, it's the most expensive, also. We will be presenting this to the LBB and governor's office for approvals.

MR. SHIVERS: Questions?

MS. MADDEN: How do your exceptional items that we are requesting this time around, how does that compare to, say, the last biennium - the amount, the eight million?

MR. KERR: Denise, do you remember what we submitted in the last biennium for exceptional items?

MS. HUDSON: I think it was along the lines of about five million.

MR. KERR: So, it's a little more than it was the last biennium. Part of the reason is because of the re-engineering. That's a four million-dollar project, in

itself.

MS. HUDSON: It was about the same number. I believe we had seven or eight items last time.

MS. MADDEN: I believe you said the database we have now is almost 20 years old. I know you have tweaked it some and gotten it down as much as you can, and I think you are to be commended for that.

MR. KERR: We've done everything we can with that database. I don't know how much farther we can go with it.

MS. MADDEN: I understand.

MR. SHIVERS: It's a museum piece in today's standards. Any other comments or questions on the budget?

MS. MADDEN: No.

MR. SHIVERS: Is there a motion to approve it?

MS. MADDEN: I so move.

MR. SHIVERS: Second. All in favor?

MS. MADDEN: Aye.

MR. SHIVERS: Aye. We will submit this to the legislature.

Number six - agency internal auditor position.

MR. BAILEY: Mr. Chairman, in the last commission meeting you asked that we do a little bit more work on considering hiring a firm to do the internal audit function for us. We have contacted 12 other state agencies that are currently using that system, and we found, of course, that they were all significantly smaller than the Texas Alcoholic Beverage Commission, with pure FTE's and significantly smaller budgets.

We did find that the contract amounts for the internal audit function range anywhere from 13 thousand to 46 thousand dollars a year, and that depends, primarily, based on what the agency, itself, identifies as the work they want done by that firm.

I am led to believe that if we were to choose to employ an outside person to do our internal audit function, the best steps would be for us to draft a request for proposal. We would distribute that to all interested parties and see what we got back as proposals for how much they would charge us to do that work.

The reaction of all the other people that we talked to in the other state agencies was one of general satisfaction with this arrangement. Only in one case had the state agency chosen to change firms to do their internal audit function, and that was strictly because they got a bid for a lower fee, so they made the decision to change auditors.

I have no recommendation for you. I certainly see no reason for us not to pursue this. It has some good potential for us, I think. On the other hand, one of the comments that was frequently made by the other agencies was they didn't feel like the contract auditors went as deep in their audits as an

internal auditor would. That was the only thing that was ever mentioned that indicated any concern at all.

I present that to you. With your direction, we will either post to hire a full-time employee or we will start the process of drafting an RFP and putting that out there and bringing you some companies to consider for that function.

MR. SHIVERS: Ms. Madden, do you have any questions?

MS. MADDEN: When we first got into this, I have to say that I had some concerns about contracting this out with a consulting firm, because I didn't see how we could get the coverage that we were getting with Mr. Kerr. I had shared this with Mr. Bailey, but I had gone to orientation for new board members, and Albert Hawkins addressed this particular subject. I asked him how he felt about hiring outside help for agencies. He said he thought it was great for middle size and small agencies. Also, I think it impacts the budget, so I would be of a mind to be for going outside the agency and hiring outside help.

MR. SHIVERS: Let me ask Mr. Kerr a question since you've had this role. How important is the knowledge of the culture of the organization to the duties of an internal auditor?

MR. KERR: I think it definitely gives you a big advantage in your ability to identify areas of risk, let's say. On the other hand, you have that independence factor that you are always having to address. Whether or not you are being paid by the agency that you are auditing, and whether you can truly be independent in that role, is the downside of having the internal auditor being paid through the agency. There is no question that your knowledge is going to be better if you are familiar with the agency and, depending on how long this particular individual was to be contracted, it would probably take two, three or four years before they really were familiar with the agency. I don't think you are going to run a risk by doing that. In other words, you will lose some coverage, I think, some in-depth coverage. On the other hand, you will probably get the coverage that is required by the State Auditor's Office and other oversight agencies.

MR. BAILEY: Mr. Chairman, I forgot one little part of the research that we did. You have in your notebook a piece that the State Auditor's Office distributes, and in it, it covers some of the possibilities of hiring internal auditors. One of the areas that it talked about are the pros and cons for outsourcing.

I modified some of the language, but they listed advantages of outsourcing as that allows you, the commissioners, to stay focused on your key strategies. In other words, you are not pulled away from really running the business of the agency by spending a lot of time dealing with the internal auditor. You get some economies of scale as a result of this, in the sense that it can reduce your cost because outside firms can send new or inexperienced people to do some of the real basic work and that provides you some savings. It gives you more flexibility in staffing. In other words, it will give you an opportunity to choose and pick who would be in that position. The outside auditors normally will have more access to leading practices, trends in the profession, and so forth. You get better access to specialized skills. If we run up against a need where it would require, for instance, a very intense examination of information resources, there may be somebody in that firm that they would send to do that specific study. It allows you to choose from a menu of services in dealing with the firm. In other words, you can say to them, "We want a heavy

examination of management controls,” and they will have people supposedly that can give you a report on management controls.

The advantages for in-house are there is some indication that when using outside people that sometimes an agency or organization can become dependent on that. A common practice seems to be that once the contract is awarded, you notice a gradual, but consistent, increase in cost, and oftentimes it gets to and exceeds what you were spending otherwise. It provides unbudgeted...a lot of times, for instance, you will enter a contract and then you will find, after the contract is signed, that there was some basic service that you wanted that’s not in the contract, so you have to go back and pick that up. There is always the problem of lack of familiarity with the agency. It would be a loss of a career development position. In our case, for instance, Charlie was our internal auditor. Another position came open inside the agency that he was well suited for as a result of being the internal auditor, so you lose that. Of course, the loss of institutional knowledge, and an outside auditor may become an additional burden on the accounting staff. One of the things that comes up from time-to-time with all these other agencies is that the outside auditor deals primarily with the accounting staff, so they spend a lot of their time making the outside auditor familiar with their practices and their particular needs, and it actually can be a burden, to some extent, on that staff.

Those are the pros and cons. There again, I don’t think it necessarily weighs one way more than the other.

MS. MADDEN: We can write the contract, though...we don’t have to sign up for a year, do we? Can we write the contract where we have 30 days notice or 60 days notice if we wanted to give them...

MR. BAILEY: I’m sure that could be accomplished with...

MR. KERR: Sure, you can write the contract any way you want to write it.

MR. SHIVERS: The only sizable agency on this list is the Health and Human Services Commission.

MR. BAILEY: I didn’t actually talk to Health and Human Services. Andrea talked to them. I suspect that is for part of their agency because, obviously, they are much larger than what’s reflected on that sheet.

MR. KERR: I think the Department of Information Resources also contracts their internal audit function, and they are a pretty large agency.

But, I do think that it probably is more suited for a small to mid-size agency than it would be for a large agency. I’m kind of surprised some of the large agencies do contract, because I would think that would be very expensive.

MR. SHIVERS: Doyme may be right. The Health and Human Services may just be contracting part of their audit function, using the outside auditor as a supplement to their internal audit staff.

Do you feel an urgency to have an internal auditor on board?

MR. BAILEY: No, sir.

MR. SHIVERS: Any feelings that we need one immediately? Charlie?

MR. KERR: Personally, I think our controls are pretty good right now. I was getting to the point that my findings were getting to be fairly trivial. For a while, I think we are in pretty good shape.

MR. SHIVERS: I think we can probably take perhaps until the end of the year to make a decision on this. Perhaps in the next 90 days, anyway, we ought to have enough information to think about coming up with some requirements we would put in an RFP.

MR. BAILEY: As a staff, we are anxious to follow your lead on this.

MR. SHIVERS: I'm not convinced that an outside auditor is the way to go on this. I kind of like the security of having our own person, but I'm conscious of the budgetary implication. It would probably be healthy to go through the exercise of coming up with the requirements we would put in an RFP, really thinking about it, and maybe even going to the point of taking it out for bids, and if we decide the price isn't a significant cost savings for us, then we will start advertising.

MR. KERR: I suspect the cost savings won't be that much. In fact, it may not be a cost savings. Just a preliminary conversation I had with one of the contracted auditors that is doing several of the agencies, it would probably be close to what the budget was for having one auditor internal.

MR. SHIVERS: Including the overhead?

MR. KERR: Probably a little bit less if you include all the overhead and everything like that. It just depends on the coverage. That was just a ballpark figure.

MR. SHIVERS: I think it's worthwhile going through the exercise, anyhow. It's healthy for us to go through it and give it a good close look.

MR. BAILEY: Would you like for us to go ahead and start drafting some RFP language?

MR. SHIVERS: Yes. Is that alright with you, Ms. Madden?

MS. MADDEN: Sure.

MR. SHIVERS: Do you need a vote on that?

MR. BAILEY: No, sir.

MR. SHIVERS: Number six - consider publication of proposed repeal to 16 TAC §41.22. Package store sales over three gallons. Mr. Bright, are you doing this one?

MR. BRIGHT: Mr. Chairman and Ms. Madden, I believe that Ms. Fox will speak to you on this issue with eloquence, elegance and erudition.

MS. FOX: I think I'll just pass. The Texas Package Stores Association has requested a rule change to rule 41.22 to eliminate some recordkeeping requirements that were found in that rule. Once the staff looked at that rule, we found that the original rule was passed in 1937, and it was aimed at bootleggers. It basically required the sale of distilled spirits over three gallons to be recorded. It's been modified, I think, two times since that time, but the last time it was modified was in 1942. Once we looked at this rule and how buying patterns have changed, our regulations have changed, bootlegger operations have changed, we would recommend repeal of the entire rule, as we find it no longer serves its purpose. Rather than just

modify some recordkeeping, I don't feel that any part of the rule is required, so we would request permission to publish the repeal of this rule in its entirety.

MR. SHIVERS: No one seems to have signed up to comment on this? Ms. Madden?

MS. MADDEN: It seems antiquated to me.

MR. SHIVERS: Should I take that as a motion to publish this proposed repeal?

MS. MADDEN: Yes.

MR. SHIVERS: Second. All in favor?

MS. MADDEN: Aye.

MR. SHIVERS: Aye. We will publish the proposed repeal.

Number seven - consider publication of proposed repeal of 16 TAC §45.103 and publication of proposed new rule. This is the happy hour rule.

MR. BRIGHT: Mr. Chairman and Ms. Madden, this is indeed the happy hour. We are asking you to do two things here. We are asking you to publish as a proposal the repeal of our current happy hour rule and simultaneously publish a proposed new happy hour rule.

You may remember that we are in the midst in our rule review project of reviewing those rules in Chapter 45. The happy hour rule is one of the most important of the rules in that chapter. We've had it in place for some time. It has done some good work. We, I think, are possessed of the experience that it can be made better. It is a rule, as you might imagine, that has stimulated a good bit of confusion, differing levels and kinds of enforcement around the state.

What we did to begin this project was to assemble a staff committee of experienced field people. They discussed it among themselves and with their colleagues out in the field. We met, had at least two meetings, with our friends in the community who are interested in this and our friends in the industry. We came up and prepared a draft that we think is pretty close.

I should point out to you that the draft that we sent out to our friends in the community and our friends in the industry differs in three ways from what we are asking you to publish. Two of those ways are what I'll call typographical errors. In the first paragraph, paragraph (a), there was originally a citation to 61.42 of the Alcoholic Beverage Code. That was wrong. The citation should be to 61.71(a)(17).

In the text of (c)(10) of our proposed rule, there was a typographical error. It read "of" rather than "or."

The third change is more substantive, and that change involved the language contained in paragraph (e). We had contumaciously neglected to affirmatively mention that, despite the other restrictions, Texans should still be able to enjoy their God given right to drink beer and wine out of containers like pitchers and carafes, things like that. We have amended the rule, added two paragraphs to it, to make sure that that right is clear, so long as those multi-serving containers are served to more than two

people at one time.

We recommend that you allow us to publish these rules. I can say, as a final note, that it is pretty clear that even post-publication, we are not through talking about this rule. The staff in the agency, at least, continues to talk about how the rule can be made better, how perhaps other things should be added or taken out or reworded. I'm sure that the interested members of the industry and the community will continue to think about it and provide comment, as well.

MR. SHIVERS: Ms. Madden?

MS. MADDEN: I think you've done a masterful job in clarifying the rule. I do have one question. I don't see it in my notebook but, originally, we had something that talked about Option A and Option B. Is that still a part of this?

MR. BRIGHT: I think Option A and Option B...

MR. SHIVERS: Cover charges and volume regulation?

MR. BRIGHT: Yes. That is something that I submitted to the staff in the course of determining what we would recommend to you. I cannot remember immediately what they talked about. We did deal, in our staff discussions and our discussion with people outside the agency, with a couple of troubling ideas. Troubling because they are difficult to do. The first of them is whether or not we should regulate the price of drinks in some way. The second general idea is should we regulate the size of drinks in some way. We prepared some draft rules to consider those kinds of things. If we were to do that, here's what the rule might look like. For various reasons, the staff determined not to make that recommendation to you. I can go into those reasons ad nauseam if you would like.

MS. MADDEN: No, that's alright. I was just curious. I had looked at my notebook to see if you had included them, and it dawned on me you had not, and I was wondering about that.

MR. BRIGHT: As I look at my memo here, Option A, in fact, deals with something completely different, and that is cover charges, which I believe is part of the proposed rule. (c)(6), I believe, relates to cover charges. We currently do regulate, but not ban, the use of cover charges, and this rule would continue to do that with some revised language. The issue there is whether or not retailers ought to be able to recover losses they have incurred from low price drinks by imposing a cover charge. Our rule, as proposed, would not allow them to do so. The thinking being that if they cannot recoup those losses through the most common means available to them, which is cover charges, it makes it less likely economically that retailers would use drink prices as a loss leader. That is that they will price drinks at 15 cents a shot or something like that.

MR. SHIVERS: How on earth are you going to determine whether they are using cover charges to recoup the losses from low price drinks?

MR. BRIGHT: Through superior investigative techniques. Some of the time, I'm informed by those folks out in the field, that if you ask the club owner, "Why are you charging a 10-dollar cover charge," he or she will say to you, "Because I'm taking a beating on 15 cent shots, and I want to get all those folks in here." Sometimes you can prove it circumstantially. That has become a difficult area of regulation because it is so hard to prove. The answers as to why they charge cover charges legitimately are,

“Because I need to pay for the band. I need to pay for the food,” and sometimes the answer is, “On Friday night in this town, in this economy, I can get 20 bucks a head, and that’s the only reason I’m doing it.” It would probably be incumbent upon us in trying to prove that to disprove those other kinds of things. That’s my thoughts on that subject, Mr. Chairman.

MR. SHIVERS: I don’t buy it.

MR. BRIGHT: It is a matter of some debate. This was one of the topics that the staff committee argued back and forth and up and down. One of the most confusing parts of our current rule is the one that purports to regulate cover charges.

Let me invite you to look at paragraph (c)(6) which goes on for 11 lines and a word. I can read it to you if you want, but you would really hate it if I did that.

MR. SHIVERS: Okay.

MR. BRIGHT: Do you see my point?

MR. SHIVERS: Yes.

MR. BRIGHT: We recommend that you publish this. I’m sure there are folks here to speak to you about this interesting issue.

MR. SHIVERS: We have two people who signed up for on-premise consumption. I assume they are talking about this same rule since they don’t have a number here.

Mr. Spilman, you signed for this one, I believe, so we will take you first.

MR. SPILMAN: My name is Wade Spilman. I’m an attorney here in Austin. I represent the Wholesale Beer Distributors of Texas.

I’m pleased that counsel has made these three changes that he testified about. They are ones that he and I discussed. Our interest is simply to permit retailers to continue to sell beer as they have in the past, subject to the restraints that are in the law clear with reference to not being able to sell to people who are drunk or minors and that sort of thing.

We do suggest to you that the way this is handled in this new approach, it is quite different than the happy hour rule in this respect. The authority to sell wine by the bottle and beer by the pitcher was clear and unequivocal. None of the other prohibitions in the happy hour rule dealt with it in any respect. They had the right to do it. The retailer’s responsibility was to make sure it was monitoring the people that they sold and served alcoholic beverages to did not become intoxicated and were not minors. That remains the law.

What is injected here is a new concept that says, even under this new approach that was put out there today with these changes in it - which we are thankful for and appreciate - still the retailer is subject to whether or not anything in this rule or not in the rule, whatever it might be, any kind of practice, including those things in the rule, whether it is reasonably calculated to induce consumers to drink alcoholic beverages to excess.

I suggest to you that is a very, very difficult responsibility to fulfill. How in the world any agent is able to say that something is reasonably

calculated to induce consumers to drink alcoholic beverages to excess, including the things in this rule, which we just said, “Okay, we are going to recognize that you can sell wine by the bottle, Mr. Retailer, to an individual. You can sell any alcoholic beverages in pitchers or carafes if there are two or more persons, but you are still subject to the admonition that if you engage in any practice, including those things listed in this rule that are reasonably calculated to induce consumers to drink alcoholic beverages to excess, then that is a violation.”

It seems to me that you saying they can do it with one hand, but somebody can come in and say, “Yes, but you can’t do it because it’s reasonably calculated to induce somebody to drink to excess.” Do you see my point? It seems to me that the happy hour rule, when it excluded the application of the other provisions in the rule and simply outright said you can sell wine by the bottle or carafe and you can sell alcoholic beverages by the pitcher and these other containers that you mentioned, period, you can do it. That’s legal. The responsibility of the retailer ought to be and remain that that is in the law clearly and unequivocally, and that is it’s his duty to see that nobody is sold or served who is intoxicated or is a minor. So, this is a new concept that I think you should look at pretty seriously.

Of course, as I say, additionally, the only thing excluded from the application of the other provisions of this rule are (c)(1) through (7) and (8), itself, says you are not permitted to “sell, serve or offer to sell or serve more than two drinks to a single consumer at one time.” I guess my concern is this. What is the responsibility of that retailer? I think of it in the context of his being able to serve pitchers of beer to two or more persons, as they now have picked up and put back in the rule as of today for publication. If that’s in there, they can still be charged, it seems to me. Under (c)(11), is it a practice that somebody can say is reasonably calculated to induce consumers to drink alcoholic beverages to excess?

I just think that if we are going to say...let’s be precise and say if a retailer can sell wine by the bottle and any alcoholic beverages to two or more persons in pitchers or carafes, then they ought to be permitted to do it, and their responsibility is and remains the same as it’s always been under the law, and that is they cannot sell to the intoxicated person and they cannot sell to a minor. That’s the only point I have left to make.

MR. SHIVERS: Your objection is to 11, primarily?

MR. SPILMAN: First of all, I think that 11 ought to read, “engage in any practice not listed in this rule that is reasonably calculated....” Of course, if you engage in any practice, whether listed in this rule or not, could some agent say when you sell...

MR. SHIVERS: When you sell two drinks to one person at one time...

MR. SPILMAN: That’s right, even though it’s otherwise authorized. Incidentally, I’ve been a guilty person, along with others, who go out to a restaurant and order a pitcher of beer for fish or barbeque or whatever. Sometimes more than one pitcher is involved before the meal is through. I think the test ought to be not some esoteric thing that is reasonably calculated to induce somebody to drink to excess. That’s a new concept that we are putting into this rule. I just would suggest that we, as a minimum, amend (11) to say, “engage in any practice not listed in this rule that is reasonably calculated....” This is certainty. This rule tells us what they can do, and they ought to be able to do it without the fear that somebody would say, “Wait a minute, what you are doing is reasonably calculated to induce

consumers to drink alcoholic beverages to excess.” If there is something else somewhere else that we don’t know about, that’s fine with me, but to say that what you are authorizing in this rule could be the basis for somebody asserting that it’s reasonably calculated to induce consumers to drink to excess, I guess...that would not be too difficult to hurdle. Somebody says, “You mean you are selling it to two or more...two folks out there and you serve them a pitcher of beer.” Pretty soon, you came back and served them another pitcher of beer. The point ought to be...

MR. SHIVERS: I understand the point you are making. I am led to Section 1.03 of the code, which I am sure you are familiar with.

MR. SPILMAN: I’m sorry?

MR. SHIVERS: Section 1.03 of the code which has the public policy heading.

MR. SPILMAN: Yes, sir.

MR. SHIVERS: “This code is an exercise of the police power of the state for the protection of the welfare, health, peace, temperance, and safety of the people of the state.” The word, “temperance,” I think, underlies the main purposes of this code and this commission’s authority and responsibility, and that is to try, to the extent we are able, to prohibit intoxication or limit the conduct that would encourage public intoxication.

MR. SPILMAN: Absolutely, and I’m all for that. But, when you specify with particularity what can be done, I don’t think you ought to leave open the opportunity to say even that conduct we’ve authorized is subject to this kind of complaint. You see my point?

MR. SHIVERS: I take your point. I can imagine some circumstances in certain retail establishments that promote drinking in a way that encourages particularly the younger adult drinker to drink to excess while still complying technically with the provisions of this rule.

MR. SPILMAN: I guess that’s a possibility.

MR. SHIVERS: We’ve all seen them and can imagine others. Mr. Yarbrough?

MR. YARBROUGH: Mr. Chairman, this tweaks the language somewhat, but it doesn’t vary much from what has been in the current rule in (h)(6), which is, “any promotion in which the purpose is to encourage customers to drink to excess,” and cites some examples. That really is the crux of the happy hour rule. We phrased it as a promotional rule and, obviously, it has caught some attention. That was buried back at the end of the other rule and we said it ought to be up front because we thought that was the important aspect. In fact, if it could be boiled down to the very simplest of rules, that would be what it is, but we heard from many people in the industry that said “We’d like some examples. We’d like some things to clarify what’s good and what’s bad, to leave that kind of language in.” I think the staff generally thought that was the crux of it. We are trying to send a message to retailers that any kind of promotion that would lead to excessive consumption, you ought to be aware of and that ought to be a red flag that goes up, like fireworks on the fourth of July.

MR. SHIVERS: Our personal preference would be to leave the retailer the greatest possible latitude with just an overall admonition that you do not do anything that encourages intoxication. I would love to leave it at that but, apparently, the industry would like a little more precision in our guidance.

MR. SPILMAN: This may be intellectually an argument that the industry doesn't worry about. Maybe it's just me, a lawyer sitting down there looking at this thing trying to figure out why when you say that you can sell it by the pitcher or carafe, but then you say, however, if this can be determined to be reasonably calculated to induce consumers to drink to excess, it's not permissible.

MR. YARBROUGH: I can give a real good example right at Mr. Spilman's feet. If two people come in and order about the third pitcher and, at that point, they are not intoxicated, somebody might need to say, "You know, if they drink that third or fourth pitcher, they might become, and we ought to cut them off." That would be the thing, saying where a pitcher could be served to more than two people...that isn't a safe harbor to say that, "Until we see them falling down, we can keep serving them."

MR. SPILMAN: That's a burden that they face.

MR. YARBROUGH: And, we want to make them aware of that burden.

MR. SHIVERS: I think that is a burden that any retailer faces, and I don't find that an onerous requirement of the rule. I take your point. I think it's an interesting intellectual argument, but I'm not sure it puts a practical burden on the retailer that they don't already face.

MR. SPILMAN: It's not one that's going to keep our retailers from purchasing beer from the wholesalers I represent. I understand that.

MR. SHIVERS: No, I don't think so. Thank you. Any questions?

MS. MADDEN: Mr. Spilman, were you aware of (h)(6)?

MR. SPILMAN: Pardon?

MS. MADDEN: Were you aware of the rule that Mr. Yarbrough was referring to, (h)(6)?

MR. SPILMAN: Yes.

MS. MADDEN: But you still think that this other one is a little bit too restrictive?

MR. SPILMAN: I was aware of it, and it does have the same kind of issue here, but the examples they gave all had to do with price. It also says, "Any of the practices listed in subsection (e) of this section are not promotions in which the specific purpose is to encourage consumers to drink to excess," which is where our authority to sell pitchers of beer was. So, it is new as to the sale of pitchers of beer. You see what I'm saying? If you will read the last paragraph of (h)(6) in which it says, "Any of the practices listed in subsection (e)...", and that's where the authority to sell pitchers of beer is, (e)(6).

MS. MADDEN: (e)(6)?

MR. SPILMAN: If you will look at the last paragraph of that rule, it says, "Any of the practices listed in subsection (e) of this section are not promotions in which the specific purpose is to encourage customers to drink to excess." There is an affirmative statement that the sale of beer by pitchers could never be a promotion for which the purpose is to encourage customers to drink to excess. You see, it excludes. You see what I'm saying? I was aware of it, but he didn't read the last paragraph.

MR. YARBROUGH: I think we might argue semantics all afternoon, because we'd probably just charge them with selling to an intoxicated person and don't worry with the happy hour rule, but we wanted to send an indication, as we said, it's important that we don't get to that point.

MR. SPILMAN: Finally, all I'd say is maybe it's esoteric on my part. I think if you say they can do something, they ought to be able to do it, subject to selling to somebody who is intoxicated or a minor. And, that certainly is the message every retailer knows and understands, and there's not much explanation that anybody has to attach to that.

MR. SHIVERS: Thank you. Laura Dean-Mooney?

MS. DEAN-MOONEY: Thank you, Chairman Shivers and Ms. Madden. I'm speaking on behalf of Mothers Against Drunk Driving. I'm the new state chairperson. I was sent by Karen Housewright who couldn't be here today.

MADD appreciates the opportunity to comment on this proposed rule change and offer comments to that effect. Of course, what we want to do is help TABC and their officers do their jobs a lot easier and a lot more effective, as best we can help in that regard.

Overall, we agree with this proposed rule change. We understand that the language needs to be made simpler in order to allow the agents in the field to do their work easier, as I said. One concern we have, though, is maybe by making it a little more simpler, it may have taken some of the teeth out of the proposed rule in some respects. Specifically, a concern we had is deleting that language in section (h) which lays out the specific practices that are not allowed. We feel that maybe some establishments might think it acceptable to go ahead and run those promotions, such as ladies night or two for one or doubles for singles instead of not allowing those things. It just looks like that was taken out from the current rule as it stands now, and those specific promotions were deleted. We would like to see if those were put back in, if that would make the rule a little bit stronger.

We wanted to let you know that we are pleased to see (c)(7), where reduced drink prices are not allowed after 11:00 p.m. Basically, that's all the comments that MADD had.

MR. SHIVERS: Thank you. Do you have any questions?

MS. MADDEN: No.

MR. SHIVERS: Thank you, very much.

Ellen Ward?

MS. WARD: Thank you, Chairman Shivers and Commissioner Madden. First, I wanted to thank TABC for their input and support of the recent Texans Standing Tall Policy Summit on Underage Drinking that focused on reducing risk and liability for the entire community. Especially, I wanted to thank Commissioner Steen for his presentation on the recent changes in the TABC rules on responsible alcohol sales and server training. That was very helpful.

The second item is concerning this particular rule. The coalition members have requested more time to look at these revisions before a vote is taken. We wanted to compare it with some other state policies. Thank you.

MR. SHIVERS: I'm sure everyone is aware this is simply a vote to publish repeal of one rule and publish a new rule. We are not going to have rule adoption today on this particular issue.

Any other questions, comments?

MS. MADDEN: Mr. Bright, having heard all these comments, what would be your take on this? Would you still stick by the new wording?

MR. BRIGHT: You bet, Ms. Commissioner, I'll stand fast on it, subject to my virtual promise to you that what we end up adopting will not be this in exactitude. There is still much to discuss, both inside the agency and outside the agency, and I anticipate further changes.

I believe that the provisions of paragraph (h) are in large measure covered and made unlawful by other provisions in paragraph (c). I can go over that with you if you would like. The question of ladies nights is something that is, at least, currently under debate and discussion among the members of the staff. It may well be possible that the staff committee comes back to you to say, "We think that provision ought to go back in." That is probably something within the next week or so that I will specifically kind of comment to and provide comments to the folks like MADD and Texans Standing Tall and our industry friends to see what they think about it. There are things to argue pro and con about whether or not we ought to ban ladies nights or any other kind of specific promotions for identifiable members in the population.

Let me say one further thing, and it is something that underlies this rule and it is different. It may or may not be important for me to say this. It is true that service to a drunk or an intoxicated person and service to a minor is a violation of the law, and it's the retailer's obligation to avoid that violation. It is also true, however, that it is the retailer's obligation to not conduct their business in a manner that is injurious to the public health, peace, safety and welfare. That is the genesis and the statutory basis of this rule. It strikes us that that implies broader obligations on the retailer than, "Are you drunk?" or "Are you under 21 years of age?" It's those kinds of obligations that our server training courses are designed to help them meet. This rule speaks to that.

MR. SHIVERS: Do we have a motion to repeal 16 TAC §45.103 and publish the new rule?

MS. MADDEN: I so move.

MR. SHIVERS: Second. Any further discussion? All in favor?

MS. MADDEN: Aye.

MR. SHIVERS: Aye. Opposed?

Number eight - consider amendment to 16 TAC §45.106 as published in 25 TexReg 4269 on May 12, 2000. This is sweepstakes and games of chance.

MR. BRIGHT: Mr. Chairman and Ms. Commissioner, this is amendments to our current sweepstakes rule that we are asking you at this stage to adopt. We have entered into some discussion with the relevant members of the industry and responded back and forth about various ideas about this rule. We, in fact, asked you to defer your action last month so that we could consider more things. We are ready, I believe, to recommend that you adopt this

rule.

What this does, as you will remember, is alters, to some degree, the definition of sweepstakes. Our code says that upper tier members of the alcoholic beverage industry may offer prizes to consumers if they are done through the agency of a nationally conducted sweepstakes simultaneously conducted in 30 or more states, and there are other conditions and limitations placed on that. Our rule replicates those conditions and limitations.

What this amendment would do is include, within the definition of the word, "sweepstakes," the notion of a contest, and that is, of course, in paragraph (b) of the rule in how we would define a sweepstakes. We are recommending that you amend the rule in one way that is different from the way we initially published the rule, if my memory serves. That is, since publication, we have added the last sentence that currently appears in paragraph (j) of the rule, which is the final paragraph. That last sentence says, "Sweepstakes sponsors may, with the retailer's permission, place sweepstakes entry forms on retail premises." We recommend that you adopt this rule.

MR. SHIVERS: Mr. Spilman?

MR. SPILMAN: We have no objection. I signed up before I read what we were finally going to look at.

MR. SHIVERS: Alright. Any questions?

MS. MADDEN: I think we incorporated some of your concerns from the last time we discussed it.

MR. SPILMAN: Yes, ma'am.

MS. MADDEN: I don't have a problem with this at all.

MR. SHIVERS: Motion to approve it?

MS. MADDEN: I so move.

MR. SHIVERS: Second. All in favor, say aye.

MS. MADDEN: Aye.

MR. SHIVERS: Aye. The rule is adopted.

Number nine - consider publication of proposed amendments to 16 TAC §45.110 and §45.117. This is electronic advertising.

MR. BRIGHT: This is perhaps the most interesting and challenging issue that faces you today. This issue is presented by the request to use in Texas commerce the Choice Master Kiosk. You've had a presentation from Mr. Greaves in the past about this, and I'm sure you remember a great deal about it.

Essentially, subject to Mr. Greaves' and his counsel, Mr. Shaw's correction of my characterization, the Choice Master Kiosk is a computer terminal that would sit in the wine section of a grocery store or something. Consumers may inquire about the wines for sale in that store off that computer terminal, and it would give them information. In some cases, perhaps in all cases, the advertising materials about the specific brand of

wine would be paid for - the right to have that advertising there - would be paid for by the wine's manufacturer. That makes, under the current construction of our code, that would make the owner and operator of the kiosk an agent of that manufacturing tier member and, of course, that provokes all of our statutory and regulatory concerns about the flow of goods and services and advertising specialties from the upper tier down to the retail tier.

Mr. Greaves made a presentation. We resolved to pursue this further. What is in front of you now is two proposed rule amendments that would operate to make - if adopted - would operate to make the Choice Master Kiosk lawful in this state and, perhaps, those amendments deserve some discussion.

Our first objection to the use of this machine in Texas was that it constituted what we call cooperative advertisement, and that is some kind of advertising effort by an upper tier member that doesn't benefit retailers as a class, but benefits a specific retailer. We are concerned about that because that's a way in which that tied-house relationship can be established. The proscription for cooperative advertisement is primarily in rule 45.110. One of the paragraphs there bans cooperative advertisement. That would be paragraph (c)(3). To make this lawful, and our objection to this, sprang from the fact that the wines for which there was information available would be specifically tailored to the wine inventory of that particular store, as opposed to other particular stores. We have drafted amendment to that rule, (c)(3), that would say, "Advertising does not benefit a specific retailer if it is designed so as to be capable of use by more than one retailer."

The particular problem with the Choice Master Kiosk is, however, this idea of advertising specialties. Our statute, 102.07, says that while upper tier members may not generally give things of value or equipment or stuff like that for their use and benefit, they may, however, give them advertising specialties. We have to some degree defined the word, "advertising specialty" in rule 45.117. We've defined it as broadly as we think we reasonably can to allow industry members as much latitude in defining new ways to promote their product as possible. It's essentially a thing that advertises a brand. It may have a utilitarian function.

The problem faced by the Choice Master Kiosk is that there is a monetary limit on what advertising specialties can be offered. It is 87 dollars per brand, per year, and I think the kiosk is worth more than 87 dollars per brand per year, so we have value problems there. It is possible in the law, as you have heard me say enough times that you are probably sick of hearing me say it, for you to define terms, so long as your definitions have some rational basis and they comport with the principles of the Alcoholic Beverage Code when considered as a whole.

The words, "advertising specialty" don't mean anything particular, which allows you, to some degree, great variation in how you can define it. We could not, and we tinkered as a staff, with various notions of defining the word, "advertising specialty" in such a way that it did not include the Choice Master Kiosk. We eventually decided that we couldn't make any of those recommendations to you because there's no way to define advertising specialty in that way, so as to exclude the kiosk without making the words meaningless in the context of what we are trying to establish.

Our rules apply to the kiosk and its owners and promoters because they

act, in at least this regard, as the agent of upper tier members of the alcoholic beverage industry. The word, “agent” is equally subject to agreement, to definition, to various meanings in various contexts. We have stolen an idea from Section 22.15 of the Alcoholic Beverage Code in our proposed amendment to rule 45.117, and that idea, out of the package store act, is that you are not necessarily the agent of a permittee if you are an independent contractor, you are not otherwise engaged in the alcoholic beverage industry and you are in the business of providing this service to members of the general public.

What our proposal amounts to is that you could, in rule 45.117 say, for purposes of the code that says manufacturing tier members nor their agents, servants or employees may not do all of these things, you could say in the rule for purposes of that provision, the word, “agent” does not mean someone who acts as an independent contractor, who is not otherwise engaged through ownership or otherwise in the alcoholic beverage industry and who is in the business of providing a service to the public generally. That is a feasible and plausible way to approach this.

Of course, I have beat around the bush for a long time before I now tell you that the staff is opposed to that approach. The reason the staff is opposed to that approach is, regardless of how plausible it might be, we think the foreseeable consequence of that, and expectable consequence, would then be for members of the manufacturing tier to create or allow the creation of this other body of commerce of these independent contractors. There is nothing wrong with more commerce. What’s wrong with this would be that it would allow, through this third party agency, under our rule, manufacturing tier members to do things that are clearly banned by our code. That is, we would have then done a clever semantic soft shoe to invalidate some of the more significant provisions of our code.

We lay that before you with a recommendation that you not publish it. I’m sure many people are here to talk to you about this today.

MR. SHIVERS: Mr. Spilman?

MR. SPILMAN: Sorry to have to come up so much.

MR. SHIVERS: We are delighted to hear from you.

MR. SPILMAN: We concur with the staffs’ final judgment that this would open Pandora’s box. Somebody who is an independent third party, not an agent in the usual sense of the manufacturer, and take money from the manufacturer and provide services to a retailer that the manufacturer could not do directly or through an agent or employee or officer and the usual circumstances, is something that should not be permitted. We totally agree with the staffs’ bottom line judgment that this would, in fact, open Pandora’s box. It would then simply say that through this legal fiction, and I call it that, of saying, “We are going to pay you to do something for this guy, but you are not our agent when you do it. You are an independent contractor because you perform these same services for other people. So, we are going to pay you to provide their accounting services, their advertising services, whatever other services we conclude we ought to do to try to get their business.”

We say that it’s directly and unquestionably directly and indirectly prohibited for suppliers to do that for retailers under the law. While this is a very thoughtful exercise the counsel has gone through to come up with this theory, I still say it’s one we certainly concur and agree

wholeheartedly with their bottom line judgment. That it would be a sad mistake to permit it to be conducted in that fashion when the manufacturers can pay for it. When they couldn't do it directly, to let them do it indirectly through this creature we have created by a rule, and say you are not an agent when you do this for the manufacturer, and by his payment to you to do it for the retailer, you are really an independent contractor, so that makes it okay. That's our objection to it. We concur wholeheartedly with the staffs' final judgment that it would be a bad practice to permit in this fashion. Also, in their judgment that this is a good thing, it will promote the sale of products, the retailers are the ones that engage in it in its own behalf because it is the modern day way to do business. You can't object to that. It's just that the prohibitions in the Alcoholic Beverage Code are such that the manufacturer or supplier cannot do it for them. Any questions?

MR. SHIVERS: Ms. Madden, do you have any questions for Mr. Spilman?

MS. MADDEN: No.

MR. SHIVERS: We have no one else signed up for it, although, I see Mr. Greaves in the audience who may wish to speak on it. I see Mr. Donley would also like to say something about this. I will take Mr. Greaves and his counsel first and then Mr. Donley.

MR. SHAW: Mr. Chairman, just briefly, if I might? I've been here before and I'm sure you recall that Mr. Greaves demonstrated the device called the Choice Master. We appreciate the opportunity to appear before you. Just briefly, before I let Mr. Greaves answer your particular questions on the device...

MR. SHIVERS: For the record, you are Stephen Shaw?

MR. SHAW: I am Steven Shaw, your honor. I am counsel for Choice Master.

What I've heard so far from the industry and the staff is not anything to do with whether we should do it, it's whether we can do this. They are telling you that you cannot do this. In the 27 years I have practiced before the commission, I have seen the commission's rules and regulations and code honeycombed about 1,000 times. I can assure you that it can be done.

What we have asked is to allow it to be done...

MR. SHIVERS: We are not arguing about whether it can be honeycombed. We are arguing about whether it ought to be honeycombed.

MR. SHAW: That's why I want you to consider whether it should be done. I've heard no one speak about whether this benefits the consumer. As you have correctly informed the staff and the persons here before you, that the commission's job is to benefit the general public, and it's very well defined in 1.03, and that's what we are asking you to do.

We believe that this device, it may be the first step in allowing e-commerce into Texas, but somebody is going to take it. Commerce is not going to go around Texas. It may bypass it momentarily because of the barriers that are put in the code now, but it will be here. It seems to us to be somewhat silly to say that a man may not bring in his laptop computer and access the exact same information in Joe's Liquor Store that he could on the Choice Master. Here shortly, he'll be able to satellite uplink with his palm pilot and receive the exact same information, and we are telling him that he cannot go into the store and use this device that is of no cost to the retailer.

If I hear Mr. Spilman, he's saying shift the cost to the retailer and it would be okay. I don't think we need to do that. I believe that the device is usable in its form. Mr. Greaves can address you on how he does it in other states. He has yet to be turned down in any other states in which he practices. I believe this is a good thing for Texas. I believe the marketing rules we have, such as the 87-dollar rule are - pardon me - asinine, and I believe if we would address this directly and allow e-commerce to come into Texas, it would be much better served for not only the industry but for the public.

I appreciate the reluctance of the staff. I realize it will re-write part of their code. I agree with Lou that it cannot be done as currently written, and that's why we are here. Mr. Greaves came to ask your permission to come into this state, rather than coming in and fighting you in court. He's asking your permission for what I think is something of great benefit to the public in Texas. I'll let him take over and answer your specific questions on Lou's objections and the operation of the device.

MR. SHIVERS: Do you want to see this? I have seen this machine work. Would you like to see it?

MS. MADDEN: Sure.

MR. GREAVES: I'm Jim Greaves. I'm president of Beverage Marketing Technologies. We are the developer of what we call the Choice Master system. We have these in probably 20 to 25 states and hundreds of retail outlets across the country.

We were approached by a retailer in this state. Actually, we've been approached by several retailers in this state, but HEB grocery asked us to put these things in, but before they got in hot water, they asked us to come down and show it to you. We've been doing this the better part of the year, now.

At this time, the Choice Master was demonstrated for Ms. Madden.

MR. GREAVES: Actually, since we've seen you, we've taken this concept and moved it to other areas, not just wine, liquor and beer, the home improvement stores. Any place where there's a confused marketplace, we are now taking this concept. Kiosks are coming, and I don't see any reason that this state and particular venue should not be the recipient of this kind of technology. It's all about getting information to the consumer right when they are trying to make a buying decision.

I've heard some objections and I've read Mr. Bright's letter, of course. I will make just a couple of comments on the letter. One is that all store signs are, of course, store specific and product specific. That's by definition. All the shelf talkers and those little signs that they put up near the bottles, of course, are store specific and product specific. They are in place right now. All we are doing is the same thing. We are just doing it electronically and, obviously, making it much more user friendly and more specific.

There is one point I'm not sure that everyone understands and that is the retailer does not own that kiosk. That's Beverage Marketing Technologies kiosk. We would like to put it in and rent it to them. That's not to say that we don't try to do that but, commerce being what it is, sometimes we can

rent it, sometimes we give it to them. It depends on the size of the store, quite frankly. It is not their kiosk. It is Beverage Marketing Technologies kiosk.

We then do a listing space on it, much like you would in a phone book, so that people can find information about that particular product. As far as agency relationship goes, and the whole concept of tied-house, I understand the concern on that. However, we don't even know what's in that store. It's done automatically. There is no relation between Beverage Marketing Technologies and the upper tier in advance. If they change products, the machine picks it up and it shows the new product. We do not influence the purchasers, the retailers. We don't tell them, "Well, go out and buy that product because it's in the machine." The machine is neutral to that. The machine looks to what's in inventory in the store system and then features the information about that particular product. So, we are not a tied-house issue in any sense. There are hundreds and hundreds of retailers, and I couldn't possibly talk to them all every time they are going to make a buying decision.

MR. SHIVERS: Does the retailer program the kiosk depending on what his inventory is?

MR. GREAVES: Correct. It reads the inventory out of their store system.

MR. SHIVERS: So, it's tied to the store's inventory system?

MR. GREAVES: That's correct. There's a scanner there and it's based on UPC fields. The retailer has the UPC field - 888 or whatever - it matches it up.

As I said, store signs are currently allowed now. All we are doing is doing it electronically. While I realize Mr. Bright has drafting issues, I don't know why that would affect the commerce-side of this business. Mr. Bright said the fact that the retailer doesn't pay, that's a commerce-side sort of decision in my opinion. I don't think regulations should be in the way of that commerce-side decision.

This is really about the consumer. The information super highway is out there, and this is just one way to get that information. You can't stand still there. This kind of information is available. It's available by the internet. All we are doing is offering the consumer an opportunity to find that information. If the customer doesn't want to use this machine, they simply bypass the machine.

What should I have with my chicken tarragon tonight? You want to provide them that kind of answer. I think this is strictly for the benefit of the consumer. As I said, there is no tied-house relationship involved.

That is basically where we stand on it. It's a mystery to me why people would object. We've heard some objections from some of the other side here, and if they don't want to feature their product in the machine, they are free not to do that. As a matter of fact, we've spoken to most of the major manufacturers, and they think this is a great way to inform the consumer at the point of sale, so we've signed up over 1,000 products, up to this point, including all the major producers across the country, all the major liquor companies, beer companies and wine companies.

MR. SHIVERS: So, it's more than wine? It's also beer and distilled spirits?

MR. GREAVES: Yes. It does wine, beer and liquor. It has food recipes in there so you can match the right food with wine. Basically, almost any way you are going

to make a decision, it will help you make that decision.

MR. SHIVERS: If I said I was having prime rib tonight, it would give me a choice between a nice Bordeaux, a good heavy beer or a bottle of bourbon, right?

MR. GREAVES: The last two, it would steer clear of. It would go with the wine, because you come in at the wine section.

MR. SHIVERS: That's going to disappoint the other tiers.

MR. GREAVES: Actually the beer manufacturers have asked us to do the similar thing, matching beer with food, and we will do that, and the products always change.

With that, I guess I can turn this back to Steve who knows more about this regulatory issue kind of environment than I do.

MR. SHAW: Certainly, we believe there is a way to write this rule. I had given a suggestion to Lou that they decided not to pursue. I believe the device is so different that since it is consumer activated, that we could write an exception in the advertising specialties rule, since this is not a beer sign that everybody sees. This is not, "Drink Blatz Beer." This has to be activated by the consumer, and I think an exception can be written in that direction that would allow this device to be placed into the stores.

You will recall the testimony of HEB who said it helped them in their retailer division, that they did not have to train their stock boys to know the differences in wine, and I think that again goes to the consumer's benefit. I ask you to recall their testimony and consider the change to the rule that allows us to place this in Texas. Thank you.

MR. GREAVES: Just as one point. You were mentioning before about server training and things like that. We would love to be able to put that on the kiosk and show it to the retailers and their staff as part of just what we do. We are trying to get information out to the consumers about these products and proper use of it and everything else. If you have that stuff on video, we'd love to put it in there. It's just public service. That was a little pitch there. Sorry, I couldn't help it. Any questions?

MR. SHIVERS: Thank you. Any questions? Mr. Donley?

MR. DONLEY: Thank you, Mr. Chairman. My name is Rick Donley with Beer Alliance of Texas. Commissioner Madden.

At first, I was going to get up and just talk about some of Mr. Bright's drafting, but first I want to make a few comments that I feel compelled to make. First of all, to say that this is not a tied-house provision is somewhat disingenuous. Any time you have money flowing from one tier in the three-tier system that benefits another tier, I think you are certainly dancing all over the tied-house provision. Those prohibitions are deep-rooted in not only state law, but also in federal law. I can't address what circumstances gave other states to adopt this program, but I think the staffs' analysis that it's a tied-house problem is exactly 100 percent correct.

Mr. Spilman was also very correct in his observation of that tied-house prohibition, and I think I would be remiss if I didn't address that shortly.

Let me also say that I don't think anyone in the beer industry or any other

segment of this industry is necessarily opposed to high technology. It's something we use in every single transaction in our day-to-day business. This is not a high tech information highway issue. This is having to do with the regulatory scheme of this state that's deep-rooted and which is also, in almost every instance, statutory in nature and the rules simply compliment those statutory prohibitions. I somewhat have some argument that the proponents of this measure have raised and that is this is a rule problem. I think they've got a lot deeper statutory problem than they do a rule problem.

With respect to 45.110, as it was drafted, and I'm sure...Mr. Bright and I haven't had a chance to visit about this because, quite frankly, it just dawned on me of one of the things that we are authorizing, if you will go down to where the first change in that rule that he recommends is, "Advertising does not benefit a specific retailer if it is designed so as to be capable of use by more than one retailer." We don't license companies. We license premises. If you are authorizing something in the code that says you can have an electronic device, which I submit that under some interpretation could include a neon sign, you possibly could be authorizing a manufacturer, through a third party, to distribute tailor-made signs for entire chains. For instance, Bennigan's, Steak & Ale, whoever. I certainly think we are opening up something along those lines that certainly maybe the staff didn't contemplate when they even recommended this to you.

I think we need to be extremely cautious as we proceed, and I would caution you that maybe this thing isn't quite as cut and dried as the proponents would say, and I think the staff has done their usual good homework in their recommendation that you not adopt these rules. I'd be glad to answer any questions you may have.

MR. SHIVERS: Ms. Madden?

MS. MADDEN: No.

MR. SHIVERS: Thank you. Yes, Ms. Ward?

MS. WARD: I'd like to comment, if I may? On a laptop or a palm pilot, your e-commerce is private. On a video in a grocery store, your e-commerce is very public. Kids love buttons. They are much better at surfing the internet than their parents are. I would just ask the question, how would, in a grocery store, a device like this be restricted from underage use?

MR. SHIVERS: Thank you. Ms. Madden?

MS. MADDEN: This is one of those ideas that's very intriguing, and I have to compliment Mr. Greaves on his entrepreneurship, because the machine, as I said, is very intriguing, and it does have some wonderful consumer enhancers. But, the torturous route that we had to get to to make it fly, I think kind of tells us that perhaps we are not ready for this. I have to say, in all honesty, that if our staff feels so uncomfortable with a rule such as this, a change of a rule such as this, I have to really look hard at it. I have studied this, actually, very carefully. The first time that I came here was in April, and I had studied a lot of the past minutes, so I feel like I'm pretty well read up on this. I also want to say, on behalf of the citizens of the State of Texas, that we certainly do not want e-commerce to pass us by. We certainly have a great attitude about e-commerce, but I don't think this is where it should be.

MR. SHIVERS: As you have attended these meetings in the past, you know my comments about e-commerce and technology and my previous comments about this machine and my questions to the staff about its difference from advertising specialties that we already allow in our rule and in the code. The difference with this one is, of course, that it is specific to the retailer because it is tied to the retailer's inventory system and payments are made by the manufacturing tier to Mr. Greaves for providing this service to retailers. As I listen to the presentation, it occurs to me, particularly for large retailers like HEB, while they may deny it to me personally, they would love nothing better - and I'm sure Anheuser-Busch and Coors and the other manufacturers in the beer industry - would like nothing better than to deal directly with HEB or Safeway or Kroger or any other large retailers, rather than having to go through the wholesaler in terms of purchasing. The use of this technology certainly would give the manufacturing tier the knowledge of which retailer is selling how much of which product and that would influence pricing, thus encourage a tied-house relationship.

I appreciate the staffs' effort at drafting a proposed rule for publication. They did so, I think, at my request and the other commissioners and did a great job of trying to but, in so doing, they have twisted the language and the effort in pretzel-like form, which I believe does violence not only to our other rules, but to the code. Therefore, I cannot support publication of this proposed rule change.

Having no motion to publish this, we move on to public comment. Hearing none, do we have a motion to adjourn?

MS. MADDEN: I so move.

MR. SHIVERS: Second. We are adjourned. Thank you all very much.

The meeting adjourned at 3:05 p.m.

TEXAS ALCOHOLIC BEVERAGE COMMISSION

Allan Shivers, Jr., Chairman

Gail Madden, Member