July 14, 2014

Rule Comments
Office of General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

Dear TxDOT General Counsel:

On behalf of the Scenic Texas Board of Directors and its members, I am writing to comment on the proposed rule changes for the regulation of outdoor advertising.

We support the agency’s stated explanation of the proposed rules, to consider rule changes that conform to the public purposes of the Texas Highway Beautification Act, Chapter 391 of the Transportation Code: (1) to promote the health, safety, welfare, morals, convenience, and enjoyment of the traveling public, and (2) to protect the public investment in the interstate and primary systems. Because the increased billboard height proposed in Section 21.189 will not conform to the public purposes set forth in Chapter 391, will create greater distractions for the traveling public, and will add to the contingent liability TxDOT already faces in condemnation, we object to this rule proposal in its entirety. Instead we recommend the billboard height be reduced to 30 feet, a recommendation that would conform to the public purposes of Chapter 391, would be safer to the traveling public, and would not add to TxDOT’s contingent liability at condemnation.

This letter is intended to be supplementary to the Scenic Texas testimony made at the June 24 public hearing (testimony attached as Ex. C).
Our specific comments:

1. Proposed Rule §21.189(a) to increase the current height from 42.5 feet to 65 feet and give the regulated industry the option to choose how to measure height. Scenic Texas Observations, Objections and Alternative Recommendation: The major reason articulated by TxDOT for the rule change is a request by the regulated industry stakeholders for increased visibility for their advertisements. Scenic Texas finds nothing in statute or case law that mandates such accommodation by TxDOT to the industry it regulates. The only public purpose articulated by TxDOT for this rule is to assist the traveling pubic to safely read commercial advertisements while traveling at high speeds. First Scenic Texas finds nothing in TxDOT’s mission or as part of the statutes it is charged with enforcing to suggest that it has a duty to provide the traveling public with readable commercial advertisements. Second, even if TxDOT believes that it has a duty to provide the traveling public with readable commercials, there seems to be no documented safety issue with the current height. According to TxDOT’s own records (in response to an open records request), TxDOT has no accident reports of traffic safety-related issues caused by the current height of 42.5 feet. Here are the Scenic Texas open records questions and TxDOT’s answers to me by a July 9, 2014, email:

"1. All reports taken or received by TxDOT of traffic accidents or injuries allegedly caused by the 42.5 foot height limit on outdoor advertising billboards. Answer: None Exist. 2. All complaints received by TxDOT from members of the non-regulated industry that 42.5-foot billboards are not visible enough. Answer: None."

If there are no reported safety problems with the current height, why is there a need to change the rule? Finally, if TxDOT could somehow convert no safety-related evidence into some safety-related evidence by use of the “safety” report TxDOT purports to rely on, that report has serious flaws (see Exhibit A attached) that TxDOT should consider. Exhibit A is a report from traffic safety and distracted driver expert Jerry Wachtel of the Veridian Group who concludes that,

“The proposed changes to the Texas Transportation Code that would permit billboard heights to be raised from 42.5 to 65 feet are unwise and unwarranted. It is based on flawed research, developed and peer reviewed by
the same individuals working on behalf of the same organizations. It conflicts with guidance in the MUTCD, and serves the purpose of making commercial advertising signs more important and more attention getting than official traffic control signs. And it is based on the unreasonable belief that advertising signs must be visible to drivers continuously (i.e. without loss of eye contact) which ensures that such drivers must have their eyes off the road continuously to be able to read these commercial signs.”

Given the fact that TxDOT has no evidence of accidents or safety-related issues with the current 42.5 foot height, and given the serious questions surrounding the credibility and reliability of TxDOT’s safety report, there appears to be no demonstrative evidence to indicate that signs standing at 65 feet are any safer than those standing at 42.5 feet, and, according to Mr. Wachtel, the 65-foot height may be more distracting and create highway safety issues that do not exist today.

**Scenic Texas Alternative recommendation:** In a second letter written to Scenic Texas, attached as Exhibit B, Mr. Wachtel supports our 30-foot height recommendation. Regarding the safety of the recommendation, he states that, “Since we cannot force advertisers to design their billboard messages to be short and simple, we should, at the very least, bring the billboards closer to eye level so that the total amount of time that a driver must take his or her eyes off the road to read a message is reduced to the extent possible.” And he concludes, “For these reasons, I believe that lowering billboard mounting heights to 30 feet will reduce the “eyes off road” time for drivers, while still permitting sufficient sight distance for properly designed billboards to be read.”

Therefore, if TxDOT believes there is a safety issue with the 42.5-foot height, it should adopt a 30-foot height. Not only would it be safer than the current height or the 65-foot proposed height, it would comply with the public purposes of Chapter 391, and it would not add to the value of signs that may need to be bought for future highway projects.

2. Scenic Texas provides two additional suggestions for TxDOT’s consideration that emanate from this rule change. TxDOT will create additional taxpayer burdens by adopting this rule. The proposed height changes to 21.189 will increase the visibility and thus the value of each billboard that is raised, adding to the existing taxpayer burden at condemnation. In fact, at least two prior TxDOT rules already added huge
taxpayer burdens – the biggest burden was created in 2007 when TxDOT chose to allow digital billboards in Texas, without performing a single economic analysis to determine the impact to future highway funding. TxDOT has not yet faced this in condemnation but the Minnesota DOT has and paid dearly---$4,321,000 for one digital billboard face plus the DOT allowed the relocation of the sign so it is still operating today. Just a couple of months ago, TxDOT adopted an unrestricted relocation rule that will further add value to billboards, again without engaging in an economic analysis.

TxDOT is adopting rules that increase the value of the assets it could be buying or condemning someday, and is doing so while litigating the issue at the Texas Supreme Court. The underlying issue is how a billboard is to be valued for takings purposes. If the State loses this case, the cost of billboards, and thus highway construction, will increase even with no additional rule changes. At the exact time the State is litigating the value of billboards to keep them manageable, TxDOT is considering adopting a third rule that will increase that value.

**Recommendation:** Scenic Texas recommends that TxDOT refrain from adopting this rule or any future changes to the outdoor advertising rules that will increase the cost of highway construction due to condemnations. In fact, we recommend that TxDOT reconsider the wisdom of adopting the 2007 digital billboard rules and the recent relocation rule. Notwithstanding this recommendation, we make two suggestions:

a. That TxDOT issue a conditional permit for each billboard that will automatically expire if and when the State needs the land for highway construction. Nothing in this recommendation would prevent the billboard owner from operating his sign for as long as it is legal to operate, but it would make it clear that the State’s need for highways would be superior to that of a permit holder.

b. That TxDOT support the repeal of the current sales tax exemption on the advertising income received by billboard companies and request that the funds be dedicated to the highway fund. With 30,000 to 40,000 billboards operating in Texas, this could easily add over $100
million each year to the State highway fund (amount must be confirmed by the State Comptroller).

Reasoning: All highway users should pay for their use of the public road. Billboards are unique in that they gain 100% of their value from the use of the public highway but pay nothing for that use. The annual permit and license fee covers the issuance of the permit/license and the enforcement of the law. But it does not cover the use of the public highway. Moreover, unlike newspapers and magazines (also types of exempt advertising), billboards gain all of their value from the publicly funded highway.

Thank you for the opportunity to comment on the proposed rules and make alternative recommendations.

Very truly yours,

[Signature]

Margaret Lloyd, Vice President
Board of Directors, Scenic Texas

cc: Members, Texas Transportation Commission
Ron Johnson, Right of Way Division

Attachments:
Exhibit A Veridian Review of TxDOT safety study
Exhibit B Veridian Report supporting 30-foot height
Exhibit C Scenic Texas public hearing testimony