

TEXAS DEPARTMENT OF MOTOR VEHICLES  
CONTESTED CASE RULES SUBCOMMITTEE  
MEETING

OPEN MEETING VIA TELEPHONE CONFERENCE CALL  
PURSUANT TO GOVERNOR'S MARCH 16, 2020  
TEMPORARY SUSPENSION OF CERTAIN OPEN MEETING PROVISIONS  
Austin, Texas

Tuesday,  
January 19, 2021  
1:00 p.m.

SUBCOMMITTEE MEMBERS:

Charles Bacarisse, Chairman  
Stacey Gillman  
John Prewitt (absent)  
Shelley Washburn

I N D E X

<u>AGENDA ITEM</u>	<u>PAGE</u>
1. Roll Call and Establishment of Quorum	5
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CLOSED SESSION	
4. The Committee may enter into closed session under one or more of the following provisions of the Open Meetings Act, Government Code Chapter 551: Section 551.071 Section 551.074 Section 551.076 Section 551.089	none
5. Action Items from Closed Session	--
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P R O C E E D I N G S

1  
2 MR. BACARISSE: Good afternoon. My name is  
3 Charles Bacarisse. As chairman of the subcommittee, I am  
4 pleased to open the Contested Case Rule Subcommittee  
5 meeting of the Board of the Texas Department of Motor  
6 Vehicles.

7 Will all board members please make sure that  
8 their video is turned on throughout the meeting and use  
9 their unmute button prior to speaking.

10 It is a little after 1:00 p.m., and I am now  
11 calling the Contested Case Rules Subcommittee to order for  
12 January 19, 2021. I want to note for the record that the  
13 public notice of this meeting, containing all items on the  
14 agenda, was filed with the Office of Secretary of State on  
15 January 11, 2021.

16 Before we begin today's meeting, please place  
17 all cell phones and other communication devices in the  
18 silent mode, and please, as a courtesy to others, do not  
19 carry on side conversations or other activities during the  
20 conference call. If you're not speaking, please mute your  
21 Webex device that you're using to be on this call.

22 This meeting is being held by telephone  
23 conference call in accordance with Texas Government Code,  
24 Chapter 551, as temporarily modified under Governor Greg  
25 Abbott's authority to suspend certain statutes due to

1 COVID-19. Governor Abbott suspended various provisions of  
2 the Texas Open Meetings Act that require government  
3 officials and members of the public to be physically  
4 present at specified meeting locations.

5 Under that suspension, the public will not be  
6 able to physically attend this meeting in person.  
7 Instead, the public may attend this meeting by using the  
8 link or by calling the toll-free telephone number, which  
9 are both posted in our agenda which was filed with the  
10 Office of Secretary of State on January 11, 2021.

11 All committee members, including myself, will  
12 be participating remotely via Webex. I'm asking our Webex  
13 meeting host to make sure all participants' phones are  
14 muted and their videos turned off except for those  
15 committee members and those who are presenting. Callers  
16 will be removed for any disruption, including background  
17 noise.

18 And I would like to remind all participants  
19 that this is a telephone conference call meeting. Because  
20 this meeting is being held by telephone conference call,  
21 there are a few things that will assist in making the  
22 meeting run smoother and assist the court reporter in  
23 getting an accurate record.

24 First, department staff and any commenters  
25 should identify themselves before speaking. Secondly,

1 speak clearly and remember that here may be a slight delay  
2 to the telephone conference call meeting, so please wait a  
3 little bit longer than usual before responding to  
4 participants. Board members, please be mindful not to  
5 speak over others, and be sure to ask me, the committee  
6 chair, for permission to speak before speaking.

7           If you wish to address the committee or speak  
8 on an agenda item during today's meeting, please send an  
9 email to GCO [General@TxDMV.gov](mailto:GCO_General@TxDMV.gov); once again,  
10 GCO\_General@TxDMV.gov. Please identify in your email the  
11 specific item you're interested in commenting on, your  
12 name and address, and whether you are representing anyone  
13 or speaking for yourself. If your comment does not  
14 pertain to a specific agenda item, we'll take your comment  
15 during the general public comment portion of the meeting.

16           In accordance with department administrative  
17 rule, comments to the board will be limited to three  
18 minutes, then your line may be muted by the meeting host  
19 when your time is up. Comments should be pertinent to the  
20 issues stated in your email. When addressing the board,  
21 please state your name and affiliation for the record.

22           And now I'd like to have a roll call of the  
23 committee members. I'd like to say that Committee Member  
24 John Prewitt is not able to be with us today. He has a  
25 continuing health challenge that prevented him from

1 participating today, so our thoughts and prayers remain  
2 with Member Prewitt.

3 Please respond verbally when I call your name.

4 Member Gillman, are you present? Can you say present for  
5 the record?

6 MS. GILLMAN: Present.

7 MR. BACARISSE: There you are. Thank you,  
8 thank you.

9 Member Washburn?

10 MS. WASHBURN: I'm here.

11 MR. BACARISSE: Thank you.

12 And let the record reflect that I, Member  
13 Bacarisse, am here too, so we have a quorum.

14 The posted agenda stated that a quorum of the  
15 board may be present at this meeting; however, board  
16 members who are not members of the Contested Case Rule  
17 Subcommittee will not vote on any committee agenda items  
18 today, nor will any full board action be taken. I do  
19 understand that Members McRae and Graham as well as  
20 Chairman Treviño are watching this meeting this afternoon.

21 So let's now move to agenda item number 2,  
22 which is pledges of allegiance to the U.S. and Texas  
23 flags. Before we begin, I ask that the board and other  
24 panelists please turn off their audio and video, and I  
25 will also turn off my video as I lead you all in the

1 pledges. We will pause to give the presenters and board  
2 members a moment to turn off their audio and video.  
3 Please all stand and honor our country and our state with  
4 the pledges of allegiance.

5 (The Pledges of Allegiance, U.S. and Texas,  
6 were recited.)

7 MR. BACARISSE: Thank you. Members, please get  
8 comfortable and turn back on your video. I'll give  
9 everybody a moment to do that.

10 We'll now move to item 3, contested case rules.

11 First we'll hear from our executive director, Whitney  
12 Brewster, to give us an update regarding the recent Sunset  
13 Commission hearing on January 13, 2021 regarding  
14 specifically the contested case rule proposal.

15 Ms. Brewster, you have the floor.

16 MS. BREWSTER: Thank you and good afternoon,  
17 Chairman Bacarisse and Members Gillman and Washburn. For  
18 the record, my name is Whitney Brewster, executive  
19 director of the Texas Department of Motor Vehicles.

20 Board members, I am going to give you an  
21 overview of the recent Sunset hearing, and then General  
22 Counsel Beaver will go more into the direction that the  
23 Sunset Advisory Commission gave as it applies specifically  
24 to the contested case rules.

25 So the Sunset Advisory Commission met January

1 13, just last week, to consider recommendations to those  
2 agencies that are undergoing Sunset right now during the  
3 87th Legislature, and then they also reviewed the  
4 implementation efforts of agencies who underwent Sunset in  
5 2019, and that is the capacity that TxDMV was invited to  
6 provide testimony during this hearing, and General Counsel  
7 Tracey Beaver and I represented TxDMV at the Sunset  
8 hearing.

9 Just to give you a summary of what was  
10 discussed, really during the discussion of the  
11 implementation efforts, Vice Chair Dawn Buckingham asked  
12 about the status of TxDMV's items that were in progress  
13 related to the contested case rules.

14 And in particular, Senator Buckingham expressed  
15 concerns with anti-competitive behavior by agencies and  
16 wanting to ensure compliance with Sunset recommendations  
17 that were adopted in 2019. And just a reminder to the  
18 board that Vice Chair Buckingham was the sponsor -- is the  
19 sponsor of SB 604, which is our Sunset Bill.

20 I explained that the board did consider but did  
21 not adopt the rules at the December 2020 meeting, and I  
22 also helped explain that in order to help ensure  
23 compliance with the Sunset recommendation that Chairman  
24 Treviño established this Contested Case Rule Subcommittee,  
25 led by you, Chairman Bacarisse, a public-appointed member



1 of the board, and that you planned to meet to conduct an  
2 open meeting today on January 19 so staff could do a  
3 further in-depth presentation regarding the board's rule  
4 in hearing contested cases and certainly the  
5 recommendations from Sunset relating to the contested case  
6 rules.

7 And like I said, Counsel Beaver will go more  
8 into the specific items as they apply to the rule, but I  
9 just wanted to let the board know some of the things that  
10 she did inquire about.

11 She asked specific questions regarding the  
12 rules presented for adoption in December, that specific  
13 version, and she specifically asked about the allowance of  
14 oral arguments from those who are not parties to the case,  
15 also asked about the introduction of new evidence to the  
16 board, such as presentation aids, even if the evidence  
17 wasn't in the SOAH record, and if the rule would allow for  
18 oral arguments and rebuttals from each side, similar to a  
19 trial structure.

20 Counsel Beaver explained the rules, that they  
21 would be reevaluated in detail by this subcommittee to  
22 ensure compliance, both with the Administrative Procedure  
23 Act as well as the Sunset recommendations, and that these  
24 components would be a part of the in-depth review that the  
25 board's role in these cases comply with APA and Sunset as

1 well.

2 And she did a really wonderful job explaining  
3 that the subcommittee intends to make a recommendation to  
4 the full board for adoption of the rules and with any  
5 needed modifications at the February 4 public meeting.

6 Just a couple of quick just quotes from Vice  
7 Chair Buckingham to help you understand kind of the tone  
8 of the meeting. She expressed concern, stating, "We worry  
9 a lot about anti-competitive behavior among our state  
10 agencies that regulate various industries, and DMV was one  
11 of those agencies that really had, I would say, a tough  
12 Sunset process. Recently we've seen some rulemaking that  
13 seems consistent with past behavior and not consistent  
14 with our future anti-competitive behavior."

15 She was very thankful for the update that was  
16 provided by TxDMV but noted that the Sunset Advisory  
17 Commission would be watching closely as to what happens  
18 with these rules, and she mentioned the agency should not  
19 be operating in paths that would "make life painful for  
20 them."

21 And so my response was that I was confident  
22 that the next time that the Sunset Advisory Committee  
23 received an update regarding TxDMV that all of the Sunset  
24 items would be complete and in compliance with the Sunset  
25 Advisory Commission's recommendation.

1           So that completes just the overview of the  
2 Sunset hearing, and Mr. Chairman, if there aren't any  
3 questions, I'll turn the time over to Tracey Beaver to go  
4 into more of the specifics of the Sunset recommendations  
5 and the contested case rules.

6           MR. BACARISSE: Thank you.

7           Members, do you have questions for Ms. Brewster  
8 at this time?

9           (No response.)

10          MR. BACARISSE: Seeing and hearing none, I  
11 would like to ask our general counsel, Tracey Beaver, to  
12 brief us and introduce the next item.

13          Thank you, Whitney.

14          MS. BREWSTER: Thank you, Mr. Chairman.

15          MS. BEAVER: And Chairman, members, Ms.  
16 Brewster, good afternoon. For the record, I'm Tracey  
17 Beaver, general counsel.

18          Today I'm presenting an updated staff  
19 recommendation regarding the contested case rules to  
20 implement Senate Bill 604 and the Sunset Advisory  
21 Commission recommendations that require the board to  
22 establish rules for conduct and handling of contested  
23 cases coming before you for final decision.

24          The recommendation from staff is listed on our  
25 agenda as item 3, and it may be found starting on page 6

1 of your board book, but before we go into the details of  
2 the staff recommendations today, I want to first start  
3 with the timeline of the board's consideration of these  
4 contested case rules so that you have some of that  
5 historical context of where we've been that led up to  
6 today.

7 I'll then give an overview of the Sunset  
8 Commission recommendations regarding the board's role in  
9 hearing contested cases, go over some of the statutory  
10 requirements, legislative mandates regarding the board  
11 hearing contested cases, and finally, I'll give an  
12 overview of the process at SOAH, the State Office of  
13 Administrative Hearings.

14 So if you'll bear with me, I'm just going to  
15 give this overview and context and then, of course, get  
16 into some more detail about the actual staff  
17 recommendation and then welcome any questions.

18 So first the contested case rule timeline. It  
19 was back in April of 2020, April 3, when we did have an  
20 informal draft of these proposed amendments and new  
21 sections that were posted to the department's website for  
22 public comment.

23 Staff recommended that parties should not  
24 submit documents and left discretion to the chairman on  
25 oral presentation. The department received six written

1 informal comments and made changes to the rule text based  
2 on that informal comment period, that feedback we got back  
3 from stakeholders.

4 Then on August 6 of 2020 in an open meeting the  
5 board approved publishing the rule proposal in the *Texas*  
6 *Register* for additional public comment and made some  
7 modifications to the staff proposal.

8 The proposal gave parties 20 minutes of oral  
9 presentation time, allowed parties to submit proposed  
10 final orders to the board within the presentation aids  
11 that were up to four pages for initial presentation and  
12 two pages for rebuttal. And then, of course, the rule  
13 proposal was published in the *Texas Register* on August 21  
14 of 2020 for that public comment period that closed  
15 September 21 of 2020.

16 Then at the December board meeting, just last  
17 month, the board tabled the vote on the adoption of those  
18 amendments to the rule so that we could have further  
19 discussion, and so that's what led to this subcommittee  
20 meeting today to discuss those contested case rules.

21 The Sunset Commission subsequently issued a  
22 compliance report to the department, and it was based on  
23 the recommendations from 2019 to give a status report.  
24 The Sunset Commission found that the rules that the board  
25 proposed back in August were not in compliance with Sunset

1 recommendations.

2           The TxDMV portion of that Sunset compliance  
3 report can be found on page 303 of your board book. I'll  
4 just give a really brief quote from that compliance report  
5 as it relates to the contested case rules. It states, in  
6 part, that "the proposed rules insufficiently address the  
7 problems identified in the Sunset report and do not ensure  
8 current and future board members and stakeholders  
9 appropriately limit discussions regarding contested  
10 cases."

11           And Executive Director Brewster just gave you  
12 an update on the Sunset Commission hearing from last week  
13 that occurred after that compliance report came out, so to  
14 level set, that's where we are with the contested case  
15 rules as it relates to compliance with the Sunset  
16 Commission recommendations.

17           So with that context, I'd like to next revisit  
18 portions of Senate Bill 604, our Sunset Bill, as well as  
19 the Sunset Commission's report on TxDMV from 2019.

20           Sunset Bill 604, in part, amended the  
21 Occupations Code by adding a section that requires the  
22 board to establish standards and rules and policies for  
23 reviewing contested cases, so that's in part what these  
24 rules are about, is to implement Senate Bill 604 and  
25 ensuring that we have standards and rules for reviewing

1 contested cases that come before the board.

2 The final Sunset Advisory Commission staff  
3 report from 2019 emphasized that the board has an  
4 important but limited role as the final decision-maker on  
5 all protest cases. And that Sunset Advisory Commission  
6 staff report that I'll be referencing can be found on page  
7 280 of your board books.

8 So this report stated, in part, that the board  
9 should not re-litigate contested cases by considering new  
10 information or testimony presented in a board meeting that  
11 was not presented in the formal SOAH proceeding. This is  
12 a very important part, because I think is the crux of much  
13 of the overview of the Sunset Commission report that I'll  
14 be giving today.

15 The Sunset Commission went on to explain that  
16 re-litigating contested cases could also include actions  
17 such as allowing extensive oral argument for each party  
18 during a board meeting that would then turn into hours of  
19 discussion of information that was not presented at SOAH.

20 SOAH proceedings provide the parties to a  
21 contested case an opportunity to make arguments and  
22 produce evidence in accordance with standard processes  
23 under the APA, which is the Administrative Procedure Act  
24 in the Government Code that the board is subject to, in  
25 hearing these contested cases. The board must base their

1 final decisions on evidence from SOAH and must not  
2 consider new issues or evidence.

3 The Sunset Commission report also stated that  
4 protest cases can cause difficulty for industry members of  
5 the board to separate the interests of their business  
6 sector from their role of deciding these cases in an  
7 unbiased manner.

8 And finally, when the board members attempt to  
9 affect the market in which they participate they risk, at  
10 a minimum, the appearance of being anti-competitive, which  
11 not only puts the department at risk of costly litigation  
12 but also jeopardizes the reputation of the board as a  
13 policy-making body and the integrity of the regulatory  
14 process.

15 I know this is the same information that you've  
16 gotten during your board training, and we've also gone  
17 over the Sunset report a few times, but I thought it would  
18 be helpful just to go over this in the context of  
19 considering these contested case rules for this committee  
20 today.

21 Next I'll go over a refresher of some of the  
22 legislative mandates regarding the board's role in hearing  
23 a contested case. The overarching role of the board, such  
24 as the TxDMV Board, with final order and decision-making  
25 authority on contested cases, is that they must base their



1 final decisions on evidence contained solely within the  
2 administrative record from SOAH. As I mentioned, that's  
3 going to be an ongoing theme.

4 The board has strict guidelines it has to  
5 adhere to in reviewing a SOAH proposal for decision, and  
6 those guidelines are outlined in the APA which is in  
7 Government Code Chapter 2001 -- that's the Administrative  
8 Procedure Act -- Occupations Code Chapter 2301, and of  
9 course, Transportation Code Chapter 1001. These are also  
10 all in your board books.

11 Occupations Code Section 2301.709 provides that  
12 the board in adopting rules governing their review of a  
13 contested case must, in part: specify the role of  
14 division personnel in managing cases before the board,  
15 including advising on procedural matters; specify  
16 appropriate conduct and discussion by the board or persons  
17 delegated from the board regarding proposals for decision  
18 issued by the administrative law judges; specify clear  
19 expectations limiting arguments and discussion to evidence  
20 in the record of the contested case hearing held by the  
21 administrative law judge; address ex parte communications;  
22 and distinguish between using industry expertise and  
23 representing or advocating for an industry when reviewing  
24 a case.

25 Additionally, Government Code Section

1 2001.058(e) -- also available on page 312 of your board  
2 books -- states, in part, that a state agency may change a  
3 finding of fact or conclusion of law made by the  
4 administrative law judge at SOAH or can vacate or modify  
5 an order issued by that judge only if the agency  
6 determines that the administrative law judge did not  
7 properly apply or interpret applicable law, agency rules,  
8 written policies or prior administrative decisions, that a  
9 prior administrative decision on which the judge relied on  
10 is incorrect or should be changed, or that a technical  
11 error in a finding of fact should be changed.

12 Of course, with changing anything in a PFD the  
13 agency must also state in writing the specific reason and  
14 legal basis made for any changes.

15 The APA, that I just went over, Government Code  
16 Section 2001.058(e), and Occupations Code Section 2301.709  
17 provide guidelines and directives for the board hearing  
18 contested cases, including limiting arguments and  
19 discussions to evidence in the administrative record at  
20 SOAH.

21 Government Code Section 2001.060 gives an  
22 overview of those materials that parties submit to SOAH,  
23 so I thought it might be helpful in talking about limiting  
24 information to the record at SOAH for you to get an  
25 overview of what is actually submitted by the parties to

1 SOAH, and those include pleadings, motions, evidence,  
2 questions and offers of proof, objections, proposed  
3 findings, exceptions, rulings, and any other information.

4 All of this information is available to board members in  
5 making their final decision.

6 The administrative record at SOAH is developed  
7 when the parties to a contested case present their cases  
8 to the SOAH administrative law judge and that happens in  
9 the fact-finding trial at SOAH.

10 These cases, especially protest cases, can  
11 result in multiple days of testimony and hundreds if not  
12 thousands of pages of materials at SOAH. Additionally,  
13 even after the judge at SOAH issues that proposal for  
14 decision that comes to the board, even before it comes to  
15 the board, the parties to the case get an additional 20  
16 days to respond to the administrative law judge explaining  
17 why they think something in that proposal for decision  
18 should change.

19 The parties can argue that the administrative  
20 law judge did not properly apply or interpret applicable  
21 law, rules, policies or prior administrative decisions,  
22 that a prior administrative decision on which the judge  
23 relied on is incorrect or should be changed, or that a  
24 technical error in a finding of fact should be changed.

25 And this might all sound familiar, because

1 these are the exact same factors the board must consider  
2 when evaluating a PFD. The board will already have all of  
3 those parties' responses in the exceptions period that was  
4 presented at SOAH. That's in the administrative record at  
5 SOAH.

6 So going to the staff recommendations, these  
7 amendments and new sections before you will align with the  
8 Sunset recommendations and Sunset Bill 604. To give you a  
9 brief overview of the rules recommended by staff, the  
10 rules provide each party a maximum of 15 minutes for their  
11 initial presentation to the board without any rebuttal or  
12 closing statements to avoid having the parties re-litigate  
13 the case before the board in a trial structure.

14 The rules specify clear expectations limiting  
15 argument and discussion to evidence in the record held at  
16 SOAH. They address a prohibition on ex parte  
17 communication, and they address the requirement that board  
18 members may use their industry expertise to help them  
19 understand the case and make effective decisions; however,  
20 board members are not advocates for a particular industry.

21 And the staff recommendations prohibit additional written  
22 materials or presentation aids from being presented to the  
23 board by the parties.

24 And members, this concludes my remarks. I'm  
25 happy to answer any questions the board has on the staff

1 recommendation for the adoption recommendation to the full  
2 board of these contested case rules. Thank you.

3 MR. BACARISSE: Thank you, Ms. Beaver.

4 Are there any questions from our subcommittee  
5 members for Ms. Beaver at this point?

6 MS. WASHBURN: Chairman, I have a question.

7 MR. BACARISSE: Yes, Member Washburn.

8 MS. WASHBURN: Do we know what other agencies  
9 do that may have contested cases?

10 MS. BEAVER: That's a great question, and I  
11 actually have Associate General Counsel Aline from my  
12 office on the line, and I know she has done some research  
13 into what other states have done, so Chairman, if I may  
14 turn this question over to Aline.

15 MR. BACARISSE: Yes, and if she would opine and  
16 give us facts on not only other states but also other  
17 agencies within the State of Texas if she could do that as  
18 well.

19 Was that your question, Member Washburn?

20 MS. WASHBURN: That was really my question,  
21 other agencies in the state, but I would like to hear that  
22 other information as well.

23 MR. BACARISSE: Great. So are we clear on  
24 that, Aline? Are we good?

25 MS. AUCOIN: I'm clear. For the record, I am

1 Aline Aucoin, associate general counsel for Texas DMV.

2 I did not research the laws and rules for  
3 agencies in other states; however, I have started  
4 researching the laws and rules for other state agencies in  
5 Texas.

6 So for starters, if a state agency does not  
7 accept written materials after the proposal for decision  
8 becomes final, the state agency will not have a rule that  
9 imposes a page limit on the written materials that it does  
10 not accept.

11 At the bottom of page 152 of your board  
12 materials, continuing to the top of page 153, including  
13 footnote number 1 at the bottom of page 153, one of the  
14 commenters stated that no other state agency places such  
15 constricting limits on the length of briefs or other  
16 written materials presented to the agency's governing body  
17 when reviewing a SOAH proposal for decision.

18 The commenter states that he has found only one  
19 state agency that imposes page limitations, and he cites  
20 to two of the Public Utility Commission's rules regarding  
21 page limits of 50 pages and 100 pages.

22 However, the commenter cited to the wrong  
23 rules, because the rules that he cites apply to the  
24 underlying proceeding before the administrative law judge  
25 rather than the portion of the proceeding after the

1 proposal for decision becomes final and before the final  
2 order is issued.

3 The Public Utility Commission's rule regarding  
4 the commission's action after a proposal for decision is  
5 16 Texas Administrative Code, Section 22.262, which does  
6 not authorize written materials to be submitted to the  
7 commission after the proposal for decision becomes final.

8 Also, the Public Utility Commission's rule does  
9 not allow oral argument unless the commission decides to  
10 allow oral argument. If the commission decides to allow  
11 oral argument, the commission has the authority to limit  
12 the duration of oral argument.

13 I confirmed my interpretation of the PUC rules  
14 with the PUC managing attorney since I disagreed with one  
15 of the commenter's interpretation of the PUC rules.

16 And I just want to note that no other state  
17 agency hears contested cases like the protest cases that  
18 come before our board, in which Texas DMV is not a party;  
19 however, other state agencies do hear contested cases in  
20 which the subject matter and the facts can be complex,  
21 such as the Comptroller's tax cases or the Public Utility  
22 Commission's cases. A Comptroller's tax case can have a  
23 direct financial impact on an entire industry. A single  
24 tax case could impact millions of dollars every year.

25 Our board must decide when it needs to exercise

1 its authority to issue a final order while still acting in  
2 compliance with the law. I'm still researching other  
3 agency laws and rules and policies; however, some other  
4 state agencies have different authority than our board to  
5 change language in the administrative law judge's proposal  
6 for decision.

7 For example, both the Comptroller and the  
8 Public Utility Commission have authority to change a  
9 finding of fact that is not supported by a preponderance  
10 of the evidence. This is authority in addition to the  
11 authority that our board has under Government Code Section  
12 2001.058(e).

13 In 2011 the legislature took away the Texas  
14 Medical Board's authority under Government Code Section  
15 2001.058(e). The Texas Medical Board is prohibited from  
16 changing the administrative law judge's findings of fact  
17 or conclusions of law. So I just wanted to point that out  
18 because it's dangerous to just wholesale compare DMV to  
19 another state agency, because their governing laws may be  
20 different than ours.

21 Also, the Comptroller does not allow oral  
22 argument after the proposal for decision becomes final;  
23 however, the Comptroller allows the parties to submit  
24 written briefs on contested case issues only if the  
25 Comptroller determines that additional argument from the



1 parties will be helpful before making a final decision.

2           The Comptroller's rule says that briefs will be  
3 limited to the issues identified in the order, and  
4 arguments addressing any issues not identified in the  
5 order will not be considered.

6           The Comptroller's general counsel for hearings  
7 and tax litigation doesn't think that the Comptroller has  
8 issued an order for additional briefing since the  
9 Comptroller's rule became effective on January 1 of 2019.

10           The State Board for Educator Certification does  
11 allow each side ten minutes to make oral argument to the  
12 board. In addition, that board allows three pages of  
13 written materials that are double-spaced.

14           This information is contained in that board's  
15 operating procedures rather than an administrative rule,  
16 and also, the cases that this board determines involve the  
17 certification of a person to serve as an educator, a bit  
18 different than the cases that our board hears.

19           The Texas Department of Transportation does not  
20 authorize oral argument; however, they allow a person up  
21 to three minutes to comment at the Transportation  
22 Commission meeting. The Transportation Commission is the  
23 governing board for TxDOT.

24           TxDOT doesn't prohibit a party from submitting  
25 written materials to the commission prior to the issuance

1 of a final order; however, TxDOT doesn't encourage it  
2 either. TxDOT said that they would likely accept a  
3 written submission if one was actually submitted.

4 The TxDOT contested cases primarily deal with  
5 construction contract claims and outdoor advertising,  
6 which is otherwise known as billboards.

7 And that's the information that I've found so  
8 far. I'm going to continue doing research, though.

9 MR. BACARISSE: Thank you, Ms. Aucoin.

10 Members, any question, any follow-up to this  
11 information?

12 (No response.)

13 MR. BACARISSE: I have one just to clarify, if  
14 I may. What I heard you say is that obviously different  
15 agencies, different state agencies operate under the law  
16 and the code and regulations that are specific to each  
17 agency, so while there may be some variation in what goes  
18 on in these hearings, they're guided and directed by the  
19 statutes and the administrative law and the operational  
20 procedures of each particular state agency. Right?

21 So it's fairly hard to compare apples to apples  
22 across various state administrative agencies. Would that  
23 be fair to say?

24 MS. AUCOIN: That's a correct statement.

25 MR. BACARISSE: Thank you.

1 Any other questions, members?

2 (No response.)

3 MR. BACARISSE: Seeing none, at this point I  
4 just want to check in back with Ms. Beaver.

5 Thank you, Ms. Aucoin.

6 Ms. Beaver, do we have any comments from the  
7 public today?

8 MS. BEAVER: Yes, we have seven individuals who  
9 have signed up to provide public comment. They have all  
10 been given instructions on how to raise their hand to get  
11 recognized once they have their name called. And the  
12 first person is Martin Alaniz, when you're ready,  
13 Chairman.

14 MR. BACARISSE: Great. Thank you.

15 We would like to now hear from Martin Alaniz.

16 Please raise your hand, use the instructions  
17 provided to you, and please be mindful about the limiting  
18 of any background noise that you can control, and also,  
19 please state your name for the record and if you are  
20 representing anyone.

21 You will have three minutes, and you'll be  
22 muted by the host after speaking for three minutes. So  
23 the floor is yours.

24 MR. ALANIZ: Hello. For the record, my name is  
25 Martin Alaniz from Coffey & Alaniz. I'm here today

1 representing myself in support of rejecting the new  
2 proposed rules of 206.22 and 215.60. I also want to  
3 advocate for the proposed rule revisions to 215.60  
4 submitted to the board by industry members on January 7,  
5 included on pages 266 to 269.

6 Now, it was my understanding that the board did  
7 not want to adopt the proposed rules at the last board  
8 meeting so that staff could revise those rule to address  
9 the issues presented by the commenters.

10 In an unexpected turn, the new proposed rules  
11 go in the opposite direction and just make the rules more  
12 draconian and arbitrary than those initially proposed,  
13 reducing oral argument time and completely removing  
14 presentation aids.

15 I don't understand why the interested parties  
16 who practice before the board were not invited for an  
17 informal working session to give a real-time feedback and  
18 input on the real-world consequences of such rules.

19 Now, first, the changes to Rule 206.22. I  
20 supported and still fully support the proposed rule  
21 published in the Texas Register which allows for 20  
22 minutes or oral argument and five minutes for rebuttal.  
23 Second, the new proposed revisions to 215.60 essentially  
24 is completely stricken.

25 Under Texas Occupations Code 2301.709(d) it

1 states that the board shall adopt rules and policies of  
2 established standards for reviewing cases under this  
3 subchapter. That language is clear, and the proposed  
4 rules submitted to the board by the stakeholders complies  
5 with that mandate and sufficiently addresses the goals of  
6 the Sunset Commission.

7 I want to push back on this overreaction and  
8 overcorrection to the Commission's report and hearing on  
9 January 13. The justification for limiting our due  
10 process appears to rest on the use of misleading terms.  
11 First of all, the phrase "re-litigating the case and  
12 anti-competitive behavior."

13 Allowing the parties to argue before the  
14 decision-maker in the case is not new evidence nor is it  
15 re-litigating the matter, especially considering that time  
16 limitations are already imposed on the parties. The  
17 parties have a right to argue that a decision should be  
18 overturned under .058(e) --

19 MEETING HOST: You have one minute remaining.

20 MR. ALANIZ: -- and it is not anti-  
21 competitive, and it is an appropriate limit on the  
22 discussion. So unless the Texas Legislature decides  
23 otherwise, the board still has authority under .058(e) to  
24 make changes to findings of fact and conclusions of law,  
25 which assumes that it's possible for SOAH to be wrong.

1           In those cases the new proposed rules deny  
2 parties due process and do not support the parties'  
3 ability to make that argument to the board. And as  
4 previously stated, it also conflicts with APA 2001.062,  
5 which allows for submission of briefs. How else would the  
6 board know which findings of fact and conclusions of law  
7 need to be changed when there's hundreds of them?

8           Therefore, I ask the committee members to allow  
9 the board to continue to be the final decision-maker and  
10 not just a rubber stamp for SOAH and reject these new  
11 proposed rules in order to fashion rules that are both  
12 equitable to the parties and meet the duties of the board.

13           Thank you very much.

14           MR. BACARISSE: Thank you, Mr. Alaniz. I  
15 appreciate your advocacy for your position. Thank you.

16           Tracey, we have additional comments?

17           MS. BEAVER: Yes. The next commenter is Mr.  
18 William Crocker.

19           MR. BACARISSE: Absolutely. We'll now hear  
20 from Mr. William Crocker.

21           Please raise your hand using the instructions  
22 provided to you and please be mindful about limiting any  
23 background noise. Also, please state your name of the  
24 record and if you are representing anyone.

25           You'll have three minutes, and you'll be muted

1 by the host after speaking for three minutes.

2 Mr. Crocker, you have the floor.

3 MR. CROCKER: Mr. Chairman, can you hear me  
4 now?

5 MR. BACARISSE: Yes, sir, I can. I think all  
6 board members can also hear you, so we'll start the clock  
7 when you begin speaking.

8 MR. CROCKER: Good. Thank you very much. I'm  
9 in my car and trying to manage more devices than I have  
10 fingers to manipulate right now. Thank you very much.

11 MR. BACARISSE: Yes, sir, we understand. Thank  
12 you.

13 MR. CROCKER: These are my remarks, Mr.  
14 Chairman.

15 Thank you for this opportunity to speak on the  
16 critical issues you are considering. Going back to square  
17 one, please remember that the reason for the adoption of  
18 the Texas Motor Vehicle Commission Code in 1971 was the  
19 necessity to protect Texas new car and truck dealers from  
20 the abuse of a superior bargaining position by the  
21 manufacturers. That is still the reason for the existence  
22 of the Licensing Division of the DMV today.

23 When the dealer's position was fully  
24 understood, the Texas House adopted the proposed statute  
25 by a vote of 145 to 5, and the vote in the Texas Senate

1 was 31 to nothing. It should be noted that a similar  
2 statute has now been adopted by every state in the union.

3 The statute was never intended to be anti-  
4 competitive, and in Texas it has never been anti-  
5 competitive, and I speak to you as the first executive  
6 director of the old Texas Motor Vehicle Commission and a  
7 practitioner before that commission or its successors ever  
8 since.

9 That was true throughout the time that the  
10 commission was composed of four dealers and two public  
11 members. The purpose of protecting dealers continued to  
12 be understood for many years after the composition of the  
13 commission changed.

14 The dealer members have always provided insight  
15 into the real world of the licensed new car dealer and the  
16 commission, and the board respected and profited from that  
17 insight. Now the voice offering that insight has been  
18 reduced to that of two persons on the board of nine  
19 members. They are strong voices, and the board is  
20 fortunate to have them, but they may not be as fully  
21 respected as they should be. The rules you are  
22 considering seem to be designed to deny the --

23 MEETING HOST: You have one minute remaining.

24 MR. CROCKER: -- of that insight.

25 The SOAH judges typically have very little



1 experience in the motor vehicle dealership business; some  
2 have little experience in any business. The background  
3 and experience that justifies the deference that is due to  
4 the decisions of the DMV Board can only come from the  
5 board itself.

6 The board members must have full knowledge of  
7 the facts of each contested case. All too often those  
8 facts and their significance must be provided to the board  
9 by the parties through a contested case. The parties  
10 generally speak through their respective attorneys, making  
11 what are now called presentations and using what are now  
12 known as presentation aids to make their presentations.

13 The entire board, including the voices of the  
14 dealer members, can profit from the support and assistance  
15 of those presentations and presentation aids. It makes no  
16 sense to deny the board the benefit of those presentations  
17 and presentation aids.

18 MEETING HOST: Your three minutes are up.

19 MR. BACARISSE: Mr. Crocker, thank you for  
20 making time to address the committee today. We sincerely  
21 appreciate what you have to say and what you're conveying.

22 Thank you.

23 Tracey, do we have another speaker?

24 MS. BEAVER: Yes. We have Leon Komkov.

25 MR. BACARISSE: Great. I will now hear from

1 Leon Komkov.

2 Please raise your hand using the instructions  
3 provided to you and please be mindful about limiting any  
4 background noise. Also, please state your name for the  
5 record and if you're representing anyone.

6 You'll have three minutes, and you'll be muted  
7 by the host after speaking for that three-minute time.  
8 You now have the floor.

9 MR. KOMKOV: Mr. Chairman, am I live? Hello.  
10 Can y'all hear me?

11 MR. BACARISSE: Yes, I can hear you, and the  
12 other board members can hear you, so when you're ready to  
13 begin we'll start the clock.

14 MR. KOMKOV: Thank you very much, Mr. Chairman.  
15 I'm not very technically adept.

16 MR. BACARISSE: I understand; I'm with you.

17 (General laughter.)

18 MR. KOMKOV: Thank you.

19 Members of the subcommittee, staff, thank you  
20 so much for the work you've put into this and for your  
21 time this afternoon.

22 My name is Leon Komkov, K-O-M-K-O-V. I'm an  
23 attorney from Austin, Texas, representing myself.

24 Some of the comments earlier I would be  
25 repetitive, so I think I can cut short my presentation a

1 bit.

2 I appear in opposition to Proposed Rule 215.60.

3 At the last board meeting I was one of several parties  
4 who expressed concern about the limitations that were  
5 being proposed for written material submitted to the board  
6 in contested cases.

7 Specifically, I expressed a concern that the  
8 rules did not expressly provide for the submission of  
9 briefs to the board. Also, certain board members, I know,  
10 asked the staff to revisit the issue, and that's why we're  
11 here today.

12 The most recent draft of 215.60 purports to  
13 address the concerns expressed by the interested parties  
14 at the last meeting by prohibiting parties from filing any  
15 written materials whatsoever with the board.

16 Members of the committee, a brief is not a  
17 privilege that's accorded lawyers for their own  
18 edification; a brief is for the benefit of the board, a  
19 brief is a roadmap, a concise roadmap that tells the board  
20 what issues are important and what issues are not,  
21 frankly.

22 For instance -- and I'll give an example you  
23 all may be familiar with -- in a recent contested case  
24 before this board the administrative record was well over  
25 100,000 pages; it was approaching 200,000 pages.

1           Without a brief directing the board to what  
2 issues are actually contested, where those issues appear  
3 in the record and what evidence has been offered in  
4 support of those issues, the board is going to face an  
5 impossible task. It will be unable to discharge its  
6 duties as would any decision-maker faced with hundreds of  
7 thousands of pages of "records that are available to you."

8           If I dump six truckloads of paper on your desk and say  
9 there it is, it's available, you're not going to know  
10 what's being thought about.

11           MEETING HOST: You have one minute remaining.

12           MR. KOMKOV: Adequate briefing is the only  
13 means you can ensure, as requested by Sunset, that  
14 evidence outside the SOAH record is not introduced. If a  
15 party to a contested case may say written argument  
16 unsupported by the evidence, the opposing party could urge  
17 with citation to the record that argument be on the  
18 record. But conversely, if all you have is ten minutes of  
19 oral presentation, it's going to be very easy for one  
20 party to come in, cite to something that's not in the  
21 evidentiary record, and the opposing party is only going  
22 to say, Members, it's not in the record. Yes, it is. No,  
23 it's not, go look at the 166,000 pages and find out for  
24 yourself.

25           It's an impractical answer to this. It leaves

1 your staff with digging through hundreds of thousands of  
2 pages to see if the parties were accurate in their oral  
3 argument, or if it's more likely you don't want to spend  
4 your life digging through thousands and thousands of  
5 pages, you're effectively being left as a rubber stamp for  
6 SOAH and abrogating the duty that the board has to be the  
7 final decision-maker here.

8 Thank y'all so much for your time.

9 MR. BACARISSE: Thank you, Mr. Komkov. I  
10 appreciate your taking time to address the committee.

11 Tracey, any others?

12 MS. BEAVER: Yes, we have four others. The  
13 next one is Dudley McCalla.

14 MR. BACARISSE: Great. We'll now hear from  
15 Dudley McCalla.

16 Please raise your hand using the instructions  
17 that have been provided to you, and please be mindful  
18 about limiting any background noise. Also, please state  
19 your name for the record and if you are representing  
20 anyone.

21 You'll have three minutes from the time you  
22 begin speaking, and you'll be muted by the host after the  
23 three minutes. You have the floor.

24 (No response.)

25 MR. BACARISSE: Mr. Garcia, are we working with

1 our speaker to get him connected?

2 MS. BEAVER: Chairman Bacarisse, this is  
3 General Counsel Tracey Beaver. If I may?

4 MR. BACARISSE: Yes, ma'am.

5 MS. BEAVER: It does not look like we have Mr.  
6 McCalla raising his hand at this point in the attendee  
7 list, so if we could go ahead and move on to the next  
8 commenter and we can circle back with him?

9 MR. BACARISSE: Sure.

10 MS. BEAVER: Great. The next commenter is Mr.  
11 Bruce Bennett.

12 MR. BACARISSE: Great. We will now hear from  
13 Mr. Bruce Bennett.

14 Please raise your hand using the instructions  
15 that have been provided top you, and please be mindful  
16 about limiting any background noise. Also, please state  
17 your name for the record and if you are representing  
18 anyone.

19 You'll have three minutes from the time you  
20 begin speaking, and you'll be muted by the host after  
21 speaking for three minutes. Go right ahead, sir.

22 MR. BENNETT: Yes. I'm Bruce Bennett, an  
23 attorney from Austin representing myself.

24 The staff's new version of Proposed Rule 215.60  
25 which prohibits the parties from filing any written

1 materials with the board violates the APA. The APA allows  
2 the parties to a contested case to present briefs to the  
3 board, the final decision-maker.

4 The version of the Proposed Rule 215.60 that I  
5 and other lawyers submitted on January 7, and which is at  
6 pages 268 and 269 of the board book, complies with the APA  
7 and Chapter 2301. Our proposed version also satisfies the  
8 concerns of the Sunset Advisory Commission expressed in  
9 its June 2019 report and last week.

10 Let's take a look at those concerns one at a  
11 time. First, the Commission said the board was allowing  
12 oral argument to regularly turn into hours of discussion.

13 The proposed rules limit oral argument. The board has  
14 the power to enforce those limits.

15 Nothing in our proposed version impairs the  
16 board's power to enforce those limits. Allowing parties  
17 to submit briefs and proposed final orders will help focus  
18 the oral argument on the key disputed issues in the case  
19 and will help keep the argument within the specified time  
20 limits.

21 Second, the Sunset Commission said the board  
22 and the parties were discussing evidence outside the  
23 official record. Nothing in our proposed version permits  
24 the parties or the board to go outside the official  
25 record. Any brief or presentational aid must include

1 citations to the administrative record.

2 The Sunset Commission, in its report, said the  
3 board can remand the case if new or additional evidence is  
4 needed, and that's set out in their appendix. Our  
5 proposed rule provides for remands when necessary.

6 Third, the board was "attempting to rewrite  
7 PFDs without proper justification." SOAH can commit legal  
8 errors and make incorrect proposed decisions. The parties  
9 to the contested case can help provide the necessary  
10 justification for rejecting or modifying a PFD or a  
11 proposed finding or for remanding the case to SOAH for  
12 further proceedings.

13 MEETING HOST: You have one minute remaining.

14 MR. BENNETT: Briefs and proposed orders from  
15 the parties will help the board navigate the requirements  
16 for correcting a SOAH judge's error.

17 The fourth concern was expressed about avoiding  
18 anti-competitive behavior. Nothing in our version  
19 encourages any anti-competitive behavior. In fact,  
20 allowing briefs will help avoid it.

21 And, Mr. Chairman, if I can just address one  
22 more thing. I was the commenter who talked about the PUC  
23 rules, and those PUC rules are very general; it talks  
24 about the presiding officer can set the limits or expand  
25 them, and it applies to any document filed with the PUC.



1 And I will also note that no agency rule can defeat the  
2 APA opportunity of providing you with a brief, and in  
3 fact, the Insurance Code and the TCEQ statute recognizes  
4 that the board shall consider briefs in compliance with  
5 the APA.

6 That concludes my remarks. Thank you for your  
7 time.

8 MR. BACARISSE: Thank you very much, sir. I  
9 appreciate it.

10 Who's next?

11 MS. BEAVER: Karen Phillips is our next  
12 commenter.

13 MR. BACARISSE: Absolutely. We will now hear  
14 from Karen Phillips.

15 Karen, please raise your hand with the  
16 instructions that have been provided and please be mindful  
17 about limiting any background noise. Also, please state  
18 your name for the record and if you're representing  
19 anyone.

20 You'll have three minutes, and you'll be muted  
21 by the host after speaking for three minutes, and we'll  
22 start the clock when you begin speaking. Thank you. You  
23 have the floor.

24 MS. PHILLIPS: Good afternoon, board members.  
25 Thank you, Chairman Bacarisse. I'm Karen Phillips,

1 general counsel for the Texas Automobile Dealers  
2 Association.

3 The subchapters' proposed rules that had been  
4 previously published in August, as well as the newly  
5 written proposed rules received by me on 1/15/21  
6 substantially, in my opinion, unnecessarily limit the  
7 information that a party may provide to the board  
8 regarding a SOAH proposal.

9 The board must be given the tools necessary for  
10 it to discharge its required and stated responsibilities  
11 in the Government Code, and TADA is concerned that these  
12 proposed rules will not give the board the information  
13 that is essential for the board to meet its obligations.

14 An agency's rulemaking must comport with its  
15 statutory directives, and this includes allowing briefs  
16 and oral argument in a contested case as the board may  
17 hear all argument from any party as the board allows under  
18 2301.709.

19 TADA recognizes rules may be adopted to hear a  
20 case by the board; however, Government Code must also be  
21 adhered to when establishing rules for reviewing a case  
22 pursuant to 2301.709(d). Limiting argument and discussion  
23 to evidence in the record does not mean disallowing any  
24 argument or limiting argument to an extent that the board  
25 is not able to discharge its responsibility under the

1 Occupations Code or the Government Code.

2 Written and oral argument by parties' counsel  
3 and questioning by the board is not re-litigating a case.

4 To litigate a case includes making rulings regarding  
5 depositions, written discovery, pleadings, motions,  
6 applying the Texas Rules of Evidence, and ruling on  
7 questions of evidence, witness testimony, issuing orders  
8 relating to hearings and prehearing matters, admitting or  
9 denying party status, none of which are applicable to the  
10 argument and discussion of the final argument offered in a  
11 contested case before the board.

12 MEETING HOST: You have one minute remaining.

13 MS. PHILLIPS: The board's Government Code  
14 responsibilities include changing findings of fact,  
15 conclusion of law, vacating an order, modifying an order  
16 if the ALJ does not properly apply or interpret law,  
17 rules, policies, decisions or that a technical error or  
18 finding should be changed.

19 Counsel for the parties focus their arguments  
20 on these concerns, and the focus revolves around the  
21 record, and it should be welcomed and encouraged by any  
22 decision-maker, not constrained.

23 The board should not be placed in a position of  
24 not hearing argument. No ALJ is infallible, always  
25 correct, or perfect. In conclusion, the board must

1 correct errors, and in order to do so must comply with the  
2 Government Code, Occupations Code, Transportation Code and  
3 allow for discussion, questioning, and argument. Thank  
4 you.

5 MR. BACARISSE: Thank you, Ms. Phillips. We  
6 appreciate your time today.

7 Ms. Beaver, who is next?

8 MS. BEAVER: Our next commenter is Mr. Jarod  
9 Stewart.

10 MR. BACARISSE: Great. We'll now hear from Mr.  
11 Jarod Stewart. Mr. Stewart, please raise your hand using  
12 the instructions that have been provided to you and please  
13 be mindful about limiting any background noise. Also,  
14 please state your name for the record and if you're  
15 representing anyone.

16 You'll have three minutes, and you'll be muted  
17 by the host after speaking for three minutes. Mr.  
18 Stewart, you now have the floor.

19 MR. STEWART: Mr. Chairman and subcommittee  
20 members, thank you for this opportunity. I also  
21 participated in the last board meeting last month, and I'm  
22 an attorney in Houston and representing myself today.

23 I fully support the proposed rules submitted by  
24 several noted practitioners and people with a lot of  
25 experience in this area on January 7, found at pages 266

1 to 269 of your book for this meeting today.

2 My understanding of the concerns raised by  
3 several board members at the meeting last month was that  
4 the proposal submitted by staff would not allow the board  
5 to do its job in terms of the limits and that this  
6 subcommittee was being set up to address ways in which the  
7 information could be provided to the board while  
8 simultaneously addressing concerns of the Sunset  
9 Commission, and the proposal that is now before you today  
10 is like swinging a sledgehammer at a gnat.

11 The concerns addressed by the Sunset Commission  
12 are not resolved by eliminating all written materials and  
13 eliminating any opportunity for a rebuttal, both of which  
14 help the board understand the issues before the board and  
15 focus the board on the issues that are important and any  
16 errors that have been committed by the SOAH ALJ.

17 And the existing rules in terms of time limits  
18 and not being able to cite to evidence outside of the  
19 record can be enforced and can be addressed with the page  
20 limit proposals that were submitted on January 7 in that  
21 letter.

22 I am very concerned that eliminating submission  
23 of any written materials violates the Texas Government  
24 Code Section 2001.062, which gives parties the right, if  
25 there is an adverse decision being made against them, to

1 present briefs to the officials who are to render the  
2 decision.

3 And the officials rendering the final decision  
4 in a contested case are the board, and if that's taken  
5 away, then that is not only violating the Government Code,  
6 it is violating the due process rights of the parties who  
7 are submitting --

8 MEETING HOST: You have one minute remaining.

9 MR. STEWART: -- their case for resolution by  
10 the board, and so if the board is deprived of this  
11 information, then it's not able to render a decision that  
12 is informed and that is in accordance with the parties'  
13 rights.

14 In the long run adopting the proposed  
15 recommendations by the staff would make the board a rubber  
16 stamp, whereas adopting the rules submitted on January 7  
17 would protect the interests of all parties and the  
18 citizens of this state by ensuring that fair hearings are  
19 conducted and that the board makes sound decisions based  
20 on the information that is in the record.

21 And I'm also concerned that if that rule is  
22 adopted that's been submitted by staff today, that would  
23 violate notice and comment rulemaking, because the public  
24 was only informed of potential page limits and limits on  
25 the amount of time. There was never any notice that there

1 would be zero written materials submitted, which is a very  
2 different scenario than having some --

3 MEETING HOST: Your time is up.

4 MR. BACARISSE: Thank you. We do appreciate  
5 your comments and have heard them. Thank you.

6 Tracey, do we have anyone else that's in line  
7 to make comment?

8 MS. BEAVER: That was the last commenter that  
9 we had signed up, but we can go ahead and circle back and  
10 see if Mr. Dudley McCalla is on the line.

11 MR. BACARISSE: Great. If Mr. McCalla can be  
12 raised, we'd love to hear from him.

13 MR. McCALLA: I just pressed star three.

14 MR. BACARISSE: Mr. McCalla, hello. Let me  
15 just introduce you briefly, and then you'll have the  
16 floor. We'll now hear from Dudley McCalla. Please raise  
17 your hand -- you've already done that -- and be mindful  
18 about limiting any background noise. Also, state your  
19 name for the record and if you're representing anyone.

20 You'll have three minutes, and then you'll be  
21 muted by the host after speaking for three minutes, but  
22 we'll start the clock when you begin, and you now have the  
23 floor, sir.

24 MR. McCALLA: Thank you, Mr. Chairman and  
25 committee members. My name is Dudley McCalla. I have

1 practiced administrative law in Austin for over 60 years,  
2 and I'm not representing anyone other than myself today.

3 The Administrative Procedure Act was passed by  
4 the legislature in 1975 and become effective January 1 of  
5 1976. It has always given parties to a contested case  
6 opportunity to present briefs to agency officials who are  
7 to render the final decision in a contested case for that  
8 period of time.

9 These provisions of current .062 and the  
10 predecessors were so important to the administrative law  
11 of this state that they have been contained without  
12 interruption in the Administrative Procedure Act since  
13 1976.

14 So I do submit respectfully that a proposed  
15 rule such as 215.60, which prohibits presentation of any  
16 written material to the board -- and briefs certainly are  
17 included within that -- cannot be sustained because  
18 generally, briefly stated, agency rules cannot prohibit  
19 legally what the statute allows.

20 Thank you very much, Mr. Chairman.

21 MR. BACARISSE: Mr. McCalla, thank you for  
22 sticking with it here with this technological craziness  
23 and persisting to be able to speak with us. We greatly  
24 appreciate that.

25 Ms. Beaver, are there any other public



1 commenters at this time?

2 MS. BEAVER: Tracey Beaver, general counsel,  
3 for the record.

4 We have no other public commenters signed up to  
5 comment today. Thank you.

6 MR. BACARISSE: Thank you.

7 Members, you may have a question for Tracey. I  
8 have one, but let me ask if either member has a question  
9 at this point.

10 MS. WASHBURN: Go right ahead.

11 MR. BACARISSE: Well, I'm just curious, Ms.  
12 Beaver, if you can enlighten me. Does the APA actually  
13 allow for submissions to a board, and if so, does that  
14 administrative law differ from agency to agency? And what  
15 does the APA say about submissions to the Texas DMV?

16 MS. BEAVER: Tracey Beaver, general counsel,  
17 for the record.

18 Thank you for that question. The board has  
19 complete discretion whether to allow any oral argument or  
20 materials to be submitted or no oral argument or materials  
21 to be submitted. There is no requirement that the board  
22 allow any presentation from parties or any written  
23 materials under the APA. That does apply to all state  
24 agencies in Texas.

25 There were several comments about a specific

1 section of the APA, Government Code Section 2001.062,  
2 regarding briefs, and if I may turn this time over to  
3 Assistant General Counsel Aline, I know that she has done  
4 some in-depth research on that issue.

5 MR. BACARISSE: Certainly. Thank you.

6 MS. AUCOIN: For the record, I am Aline Aucoin,  
7 associate general counsel for TxDMV.

8 You can find a copy of Government Code Section  
9 2001.062 on page 315 of your materials. Section 2001.062  
10 doesn't require our board to accept written briefs if the  
11 board sufficiently reviewed the administrative record from  
12 the State Office of Administrative Hearings.

13 If you look at Subsection (a) of that statute,  
14 it says, "In a contested case if a majority of the state  
15 agency officials who are to render a final decision have  
16 not heard the case or read the record, the decision, if  
17 adverse to a party other than the agency itself, may not  
18 be made until" -- and then it talks about in paragraph (2)  
19 allows the parties who are adversely affected to present  
20 briefs.

21 The board is not required to read every single  
22 word in the administrative record. The courts will  
23 presume that the board reviewed the record. There was one  
24 case before the Third Court of Appeals in which the board  
25 members did not read the entire record. The court

1 presumed that the board members gave due consideration to  
2 some of the evidence, the objections and replies of the  
3 parties to the proposal for decision from the  
4 administrative law judge, and rendered the decision with  
5 knowledge of the material evidence in the case.

6 Section 2001.062 does not prohibit the board  
7 members from obtaining assistance from TxDMV staff to  
8 comply with the requirements to review the record. The  
9 board has successfully decided cases without written  
10 materials for the past two years.

11 Tracey will continue to make sure the board  
12 members comply with the requirements under Section  
13 2001.062 even if the board adopts rules that don't allow  
14 the parties to file written materials with the board.

15 MR. BACARISSE: Thank you, Ms. Aucoin.

16 I neglected to mention earlier that we do -- we  
17 as a board and as this subcommittee -- I think I speak for  
18 my fellow members. We do appreciate anyone and everyone  
19 who took the time today to participate in this  
20 subcommittee by providing comments and taking the time to  
21 express their ideas. I'm married to an attorney, I used  
22 to be the district clerk in Harris County, I appreciate  
23 strong advocacy, so thank you for making time to speak to  
24 us today.

25 I'll just say this: I think that attorneys --

1 also I would mention that attorneys and representatives  
2 for our regulated entities expressed their ideas on having  
3 the board consider information at the board meetings, and  
4 I would just like to emphasize again that we've been  
5 advised by our counsel that the board cannot receive or  
6 use new evidence or information to make a decision.

7 I'll tell you, the Sunset report for Texas DMV  
8 specifically states that governing boards with final order  
9 authority on contested cases -- and that includes us --  
10 must base our final decision on evidence contained solely  
11 within the official administrative record at SOAH.

12 And, Tracey, do you want to remind us what kind  
13 of information is contained in those SOAH administrative  
14 records, just for refreshing our memory?

15 MS. BEAVER: Yes. Tracey Beaver, general  
16 counsel, for the record.

17 Under Government Code Section 2001.060, the  
18 materials in the administrative record at SOAH include  
19 pleadings, motions, evidence, questions and offers of  
20 proof, objections, proposed findings and exceptions,  
21 rulings, and other information that includes information  
22 that is presented by the parties after the proposal for  
23 decision is issued by the judge.

24 The parties have 20 days to tell the SOAH ALJ  
25 why they disagree with the proposed final decision. All

1 of that information is available to board members in  
2 making their final decision and all of that information is  
3 in the administrative record prior to it being passed over  
4 to the board's jurisdiction.

5 MR. BACARISSE: Thank you. I just have one  
6 other question about that. What's the risk if our board  
7 or any future board would allow additional information  
8 outside of that record to be considered? Where we were,  
9 again, taking up consideration of final orders or other  
10 things that were presented to us, would we not then sort  
11 of open up an opportunity for the other party to then  
12 appeal that, and in a sense are we acting as some sort of  
13 a judicial body instead of our own administrative role?  
14 Where do we fall, what happens there?

15 MS. BEAVER: Yes. Tracey Beaver, general  
16 counsel, for the record.

17 The Sunset Commission, after doing the review  
18 of TxDMV back in 2019, their final report stated that a  
19 procedural violation such as making changes based on  
20 information outside the record puts the entire State of  
21 Texas at risk in an appeal, and more so, it's  
22 fundamentally unfair to the party who prevailed based on  
23 the record produced at SOAH.

24 I think that's extremely important. The  
25 parties had an opportunity to present the cases at SOAH,

1 including all of that information, briefings and evidence.

2 If the board makes modifications or changes on a proposal  
3 for decision that is sent to the board from SOAH, the  
4 parties or the public will not be able to determine  
5 whether those changes or modifications are based on issues  
6 within or outside of the SOAH record.

7 And the Sunset Commission was very clear in  
8 their Sunset report from 2019 that that is a huge risk to  
9 the state, to the board, and also unfair fundamentally to  
10 the parties.

11 In addition, it takes the board's attention  
12 away from what they should be looking at, which is the  
13 proposal for decision. You're going to have more  
14 information, proposed final orders, or other briefs  
15 outside of the record to then evaluate and read when you  
16 should be focusing your attention on that information that  
17 was presented at SOAH, the judge evaluated, and came up  
18 with a proposed final decision for the board to consider.

19 Thank you.

20 MR. BACARISSE: Thank you.

21 Members, any questions on any of that  
22 conversation or any other questions that you may have?

23 MS. WASHBURN: I have a question.

24 MR. BACARISSE: Yes. Member Gillman -- Member  
25 Washburn. I'm sorry.

1 MS. WASHBURN: Member Gillman, did you have a  
2 question? Because I know I've already asked a question.

3 This actually goes back to -- and if it's  
4 inappropriate to ask this question now, this goes back to  
5 the comments that Ms. Brewster made earlier.

6 She talked about some quotations from a  
7 legislator -- I think it was Vice Chair Buckingham -- and  
8 I wrote these down, so don't hold me to the exact words,  
9 but I have a question at the end of it. So I just wrote  
10 down: worry about anti-competitive behavior; recent  
11 rulemaking we've shown competitive behavior; Sunset  
12 Advisory Commission is watching; and then this one is what  
13 got me: make life painful for them.

14 I was curious to know what we think that means,  
15 or maybe what would happen if we don't provide a rule that  
16 they -- that's good for them. I don't know if that's a  
17 Tracey question or a Whitney question since she brought it  
18 up at the beginning.

19 MS. BREWSTER: Mr. Chair, I can take that one  
20 if you're all right with that.

21 MR. BACARISSE: Sure, Ms. Brewster, go ahead.

22 MS. BREWSTER: Thank you. Whitney Brewster,  
23 executive director.

24 The Sunset Commission every legislative session  
25 has a Sunset Bill. They can put items in that Sunset Bill

1 that determine how the legislature wants the board to  
2 handle these cases. So I think the reference -- and this  
3 is my speculation -- is referring to the fact that the  
4 legislature can determine that if they believe that the  
5 board is not compliant with the Sunset recommendation, and  
6 it's hard to say what that rule might look like -- I'm  
7 sorry -- that statutory language might look like. Excuse  
8 me.

9 MS. WASHBURN: Are you saying that they'll do  
10 it for us if we don't do it? Is that what that means?

11 MS. BREWSTER: Yes, ma'am.

12 MS. WASHBURN: Okay. Thank you.

13 MR. BACARISSE: I'll tell you, just by way of  
14 past experience -- if I may opine just for a moment, board  
15 members -- several years ago you may know that I served on  
16 another state board as a board member, and we went through  
17 the Sunset review process, and it was exceptionally  
18 painful.

19 And you know, at some points I wondered what  
20 have we done wrong or why were we on such a hot seat, and  
21 at one point actually the Sunset Commission voted to  
22 dissolve our agency, and if it wasn't for the veto of the  
23 governor, that agency wouldn't be here today.

24 And to Ms. Brewster's point, Sunset is an  
25 incredibly powerful commission and they can go back -- as



1 she said, they have a Sunset Bill every session of the  
2 legislature, and so even though we went through Sunset  
3 last session, they still have governing authority over us,  
4 so they could pass something that mandates some activity  
5 for us that we may not enjoy, so they're incredibly  
6 powerful in that sense.

7 Ms. Brewster, I have a question just come to  
8 mind. What has the Governor's Office said, if anything,  
9 about any of this or our Sunset process? Have you gotten  
10 feedback from them generally or specifically?

11 MS. BREWSTER: Thank you. Whitney Brewster,  
12 executive director.

13 We have had general guidance from the  
14 Governor's Office about compliance just generally with  
15 Sunset and that we are to follow the recommendations of  
16 Sunset; nothing specifically to this particular item.  
17 Thank you.

18 MR. BACARISSE: Now, we understand, though,  
19 their general counsel to us, which is follow the  
20 recommendations of the Sunset Commission, and therefore  
21 the legislature.

22 Any other questions, board members, from either  
23 of you?

24 I'm sorry. Member Gillman, I see you're saying  
25 something, but I don't hear you.

1 MS. GILLMAN: I just was saying that I don't  
2 have questions but whenever you're ready for comments.

3 MR. BACARISSE: I'd certainly entertain a  
4 comment, absolutely. Go ahead.

5 MS. GILLMAN: I'm agreeing with some of the  
6 comments today, that I thought this subcommittee was to be  
7 formed to finalize and formalize the process that was  
8 already in place, and it seems like as a result of the  
9 Sunset hearing that I'm agreeing that things are going  
10 backwards into a more restrictive and limited proposal.

11 My comment is that I think that that's the  
12 wrong direction, and I kind of wanted to start, if it's  
13 okay, if you'll allow me, to address a little bit of  
14 Senator Buckingham's comments from the hearing.

15 I did go back and listen to those three minutes  
16 of the hearing, and I'm agreeing that we should not  
17 re-litigate cases; I'm agreeing that there should not be  
18 new evidence when we hear contested cases before the  
19 board; I'm agreeing that there should not be new parties  
20 brought in when we hear contested cases; and I'm agreeing  
21 with Senator Buckingham that we should not go off into new  
22 directions.

23 However -- and I've been thinking a lot about  
24 that word "anti-competitive" and "anti-competitive  
25 behavior" -- I feel like depriving the board of seeing

1       briefs, hearing briefs, proposed final orders and hearing  
2       rebuttals is in fact promoting an anti-competitive  
3       behavior. I think it is depriving the board of the tools  
4       and information necessary to make a good decision.

5                I also wanted to address, if it's okay with  
6       you, Mr. Chairman, the concerns that the -- and I'm  
7       looking at page 312 and 315 of our books -- I feel like --  
8       or I have always been told that the board is the final  
9       order, the board is the final decision, not SOAH, and  
10      therefore we had to hear the briefs and even presentation  
11      aids and rebuttals in order to take the thousands of pages  
12      of a case and reduce it down to just a few minutes.

13              So on page 312 that Government Code which we  
14      have a responsibility to uphold, it says the state agency  
15      may change decisions by SOAH. And then on page 315, that  
16      Section 2001.062, both sides get an opportunity to present  
17      briefs.

18              So I feel like the arguments made by the call-  
19      in people today that have so much experience, they know  
20      that in order for a board to make a decision and reduce  
21      the thousands of pieces of paper in a contested case, I  
22      think that we need all these briefs and proposed final  
23      orders and rebuttals and presentation aids, and let's  
24      limit them -- that is the track we were going on -- limit  
25      them as proposed from the -- let's see, what page was

1 that? -- on page 268 -- well, I think it starts on 267, so  
2 limiting, you know, that you have to submit them certain  
3 number of days prior, that you are limited to certain  
4 number of pages, that you're limited to certain number of  
5 minutes, all of that seems very reasonable.

6 But I don't know that we should throw out -- I  
7 don't think that we should throw out or limit what the  
8 board sees. I think that, in fact, staff's proposals  
9 actually violate our charge to make good decisions.

10 I think that we should adopt the  
11 recommendations submitted by that group of fine attorneys,  
12 starting on page -- I guess the letter starts 266 but the  
13 proposals on 268 and 269.

14 So those are my comments. What do you think  
15 about that?

16 MR. BACARISSE: You know, Member Gillman, I  
17 love you, and I'll tell you this, I love the advocates  
18 that we heard from today. These are fine, fine advocates,  
19 they really are.

20 And in so many ways I understand the points  
21 being made, but I'll just say this, we've heard from the  
22 legislature and we know what they want. We know what  
23 their mandate is; it's very clear, and we -- I mean, from  
24 my prior experience I'm just going to tell you that you  
25 need to, as a board, as an entity in order to prevent

1 future problems for our agency, we need to hear the  
2 legislature.

3           And these issues that you're discussing, I'm  
4 very sympathetic, but the point is we're having this  
5 conversation in the wrong venue. If they want to do this,  
6 they need to change the law. They need to go to the Pink  
7 Building and they need to change the law, because right  
8 now what the legislature is telling us is you need to  
9 adopt a rule that governs the directive that was given to  
10 us by the legislature, which just says in very clear  
11 expectations that their arguments be limited, discussion  
12 on contested cases before the board need to be focused on  
13 evidence from the hearing held by the State Office of  
14 Administrative Hearings law judge, and it's not our role  
15 as a board to ask for additional information, arguments,  
16 or to re-litigate cases.

17           You know, essentially, the case is heard by the  
18 judge at SOAH, and his job is to hear all these points and  
19 to hear the parties' arguments and to look at the  
20 evidence.

21           The proposed rule that we want to recommend or  
22 that's been recommended to us by our staff and our counsel  
23 back in August aligned with what Sunset told us needed to  
24 happen, and I've just had past experience where if you  
25 don't hear the legislature, they have all the leverage --

1 let's just put it that way, they have all the leverage.

2 And so I think if we want to see things  
3 differently, to your point, if we want to see things  
4 operate differently, well, that's a question that needs to  
5 be managed at the legislature. They've given us, Here are  
6 the rules governing your agency. And as a part of Sunset  
7 we have to go through this process, we have to take their  
8 advice and counsel, and we have to move forward.

9 And so that's my point of view as someone who  
10 sits on this board and is a customer of auto dealers and  
11 you and others that are friends, but I also see as a  
12 public member what the legislature is saying, and I hear  
13 them and they speak with a very loud voice.

14 Member Washburn, any other comments?

15 MS. WASHBURN: I've got just a couple of  
16 comments.

17 MR. BACARISSE: Certainly.

18 MS. WASHBURN: I also really appreciate the  
19 speakers coming to give their point of view. It's very  
20 helpful for me; I appreciate that. And I also understand  
21 how important this is, I understand how important it is to  
22 the people that involved in these cases. I understand the  
23 emotions, I understand it involves people's livelihoods,  
24 and I will say the last thing I want to be considered is a  
25 rubber stamp board. I don't think anybody on this board

1 wants to be that. We all spend a lot of time doing this.

2 Right? So that's not what we want to be.

3 But I do think we always have to remember who  
4 we represent. I don't represent manufacturers, I'm here  
5 to represent the people of the State of Texas, and we've  
6 been told that that's not what we're doing right now,  
7 we've been told that we are representing our industries in  
8 some cases, potentially.

9 You know, we get these cases, we receive  
10 hundreds and hundreds of pages to read ahead of time, and  
11 I know everybody on the board, I mean, we all prepare, we  
12 spend hours and hours and hours preparing, so I still kind  
13 of struggle with if I'm reading all of this and we're not  
14 providing any additional information in the presentation,  
15 you know -- in some cases why do we even need the  
16 presentation, I understand -- but certainly I don't think  
17 there's any reason to extend it or provide additional  
18 presentation aids. I know I personally spent a lot of  
19 time reviewing this.

20 You know, we've heard, as Member Bacarisse  
21 said, as we heard from Senator Buckingham, and I don't  
22 want them to make our life painful for us. We know what  
23 our role is here as a board. I don't want to lose the  
24 ability to do what we do. Right? I still want to be able  
25 to hear these cases, because I think it's important that

1 we do that.

2 So you know, I just wanted to put those  
3 comments out there. I support the draft as it is written  
4 today, because I do believe we receive all the  
5 information, and I don't want to be in the position where  
6 we are being accused of re-litigating a case.

7 MR. BACARISSE: Thank you.

8 MS. GILLMAN: May I talk?

9 MR. BACARISSE: Yes, Member Gillman.

10 MS. GILLMAN: So I agree, I don't want to  
11 re-litigate either, but I think it's important that the --  
12 it is important to have a summary provided, because while  
13 I read the record, the hundreds and hundreds of pages, I  
14 think it's not a bad thing to have a 15- to 20-minute  
15 briefing and a rebuttal when these cases do, in fact,  
16 affect millions of dollars and hundreds of employees.

17 I think it was our attorney, Aline Aucoin, that  
18 said the decisions of this board can affect our entire  
19 industry. I'm agreeing that the decisions made on this  
20 board can affect millions of dollars and employees. The  
21 decisions of this board have ripple effects for years and  
22 years on future cases, and how in the world can our board  
23 make the decisions without these little small briefs.  
24 It's a small section of time that we invest to allow  
25 proposed final orders and hear rebuttals.



1           So it's not a humongous investment compared to  
2 the hours and hours of testimony. I think it's helpful  
3 for all board members to hear it, and so that's why I'm  
4 for reducing the hundreds and hundreds of pages to 50, as  
5 long as -- and I'm agreeing with Senator Buckingham to not  
6 re-litigate, not introduce new evidence, no new parties to  
7 the case, I'm agreeing with all of that. It's basically  
8 summarizing in order for the board to make a decision,  
9 because we're not a rubber stamp for SOAH. So I'm  
10 proposing the recommendations on page 268 and 269.

11           MR. BACARISSE: Thank you, Member Gillman.

12           May we take a brief break at this point, if  
13 y'all are amendable to that? I think it might be helpful  
14 to just take a brief break, about five minutes.

15           And, Ms. Beaver, a question. If we want to  
16 consult with you, how is that best done in this medium?

17           MS. BEAVER: Tracey Beaver, general counsel,  
18 for the record.

19           If you'd like to consult with me, feel free to  
20 give me a call while you're on break and have your video  
21 off and be muted. That way we can have a confidential  
22 conversation offline.

23           MR. BACARISSE: Okay. Great. So members, if  
24 you want to do that in this -- you know, why don't we say  
25 ten-minute break. It's 2:34 right now, so we'll come back

1 at 2:45. Is that amenable? I just want to give you time.

2 I'm sorry, Ms. Beaver.

3 MS. BEAVER: Chairman, Tracey Beaver, general  
4 counsel, for the record.

5 I'm sorry. Just to clarify, it would be each  
6 individual member individually with legal advice; it  
7 wouldn't be members together.

8 MR. BACARISSE: Right, because we have our  
9 meetings open here. Right.

10 I just want to put that out there. If each of  
11 you have a question, that's fine. So we'll reconvene in  
12 the public meeting at 2:45, and we're just taking a break.

13 Is that the proper way to state things, Tracey?

14 MS. BEAVER: Yes. Thank you, Chair.

15 MR. BACARISSE: Thank you. So we'll be on  
16 break, we'll reconvene at 2:45. Thank you.

17 (Whereupon, a brief recess was taken.)

18 MR. BACARISSE: It is now 2:48 p.m., and I want  
19 to reconvene this public meeting of the Contested Case  
20 Rule Subcommittee. So are members back with me? Member  
21 Washburn, can you hear me? I see you. And Member  
22 Gillman, I see you and you can hear. We're good? Okay,  
23 great. Thank you, members.

24 I would like to ask if any members -- at this  
25 point I think we've had great discussion, it's candid and

1 I appreciate it, and I love the fact that our board has  
2 the kind of camaraderie amongst us that we can speak  
3 candidly to one another, that's helpful. And also I  
4 appreciate all the public comments, so I appreciate those  
5 that have been involved in this work for many, many years,  
6 so a lot of respect here that I have for each of you and  
7 our commenters today.

8 At this point I'd like to ask if anybody would  
9 like to make a motion or submit a motion, and I see that  
10 Member Gillman's hand is up, so you have the floor. Turn  
11 your mic on.

12 MS. GILLMAN: Thank you. At this time I move  
13 that the subcommittee adopt the proposed rule language  
14 from those commenters on page 268 and 269; that's to  
15 recommend to the full board and change the staff  
16 recommendation to allow 20 minutes for presentation and an  
17 additional five-minute rebuttal, limited to information in  
18 the SOAH record, and yes, allowing the board to ask  
19 questions of parties within the SOAH record only, and I'd  
20 like to maintain that the chairman have discretion to  
21 increase the time, at his discretion, for oral  
22 presentations, and make all of these changes to the rule  
23 text consistent with this motion.

24 MR. BACARISSE: All right. And that completes  
25 your motion. Is there a second for that motion?

1 MS. WASHBURN: Sorry about that. So I second,  
2 but seconding just starts conversation. Correct?

3 MR. BACARISSE: Yes, that's correct. At this  
4 point the motion now has a second, and we can begin  
5 comment before we vote on the motion.

6 MS. WASHBURN: Okay.

7 MR. BACARISSE: So now we have a motion from  
8 Member Gillman, and it's been seconded by Member Washburn.  
9 So is there now any comment on the motion?

10 Member Washburn, do you have comment?

11 MS. WASHBURN: I think I might have made my  
12 comment out of order.

13 MR. BACARISSE: You can do it again, that's  
14 okay.

15 MS. WASHBURN: That's okay.

16 MR. BACARISSE: So Member Washburn, do you want  
17 to restate, or do you have a comment?

18 MS. WASHBURN: I think I stated it unless it's  
19 necessary to restate it.

20 MR. BACARISSE: Let me ask our general counsel,  
21 Tracey Beaver. Is it necessary to restate comment, or  
22 since we're all on the record, comments have been made by  
23 members?

24 MS. BEAVER: Trace Beaver, general counsel, for  
25 the record.

1           It's fine to have additional deliberation after  
2 the motion; that's typical in Robert's Rules. If there's  
3 additional comments and discussion you'd like to have on a  
4 specific comment, especially since it was specific to the  
5 information on page 268 and 269, it might be helpful just  
6 to kind of specify what it is that the commenters'  
7 suggestions were that the motion revolved around, how many  
8 pages were going to be admitted, since that is in the  
9 board books. If there's no other motion or deliberation,  
10 then you can ask for a vote as well.

11           MR. BACARISSE: Okay. Very good.

12           MS. GILLMAN: Is there discussion --

13           MR. BACARISSE: I'm sorry. For the record,  
14 Member Gillman, go ahead.

15           MS. GILLMAN: Member Washburn, remind me of  
16 your comments.

17           MS. WASHBURN: I mean, my basic comments were  
18 just remembering that we represent the people of the State  
19 of Texas, not our industry, although we are on this board  
20 to provide our input and our background, that we've  
21 already received a lot of information on these cases, and  
22 I don't feel like it's necessary -- although I do want to  
23 hear from both parties, I don't think that it's necessary  
24 to increase the amount of time, so I'm in favor of the 15  
25 minutes that's been proposed.

1 MS. GILLMAN: Instead of 20?

2 MS. WASHBURN: I'm in favor of what's been  
3 proposed by staff in the current draft. And just  
4 generally, because we get so much information ahead of  
5 time, we have all of the information.

6 If we're not introducing any new information, I  
7 don't know why we need to have extensive comments,  
8 rebuttals and extensive presentation aids provided,  
9 because I do think it does lend itself towards us going in  
10 directions that maybe we didn't plan on going. And I  
11 think we've done that a little bit in some of our past  
12 board meetings, you know.

13 And just to kind of also follow up with what  
14 Member Bacarisse said, I just don't want to get in a  
15 position that this privilege is taken away from us because  
16 of abuse.

17 MR. BACARISSE: Okay. That's fine. I mean,  
18 that's her comment.

19 Let me ask, Member Gillman, do you wish to  
20 comment further? I mean, I think you very well and  
21 passionately and professionally explained your point. If  
22 there's anything else, please go ahead.

23 MS. GILLMAN: I guess my comment is that when  
24 I'm reading these cases and because I've been in the  
25 automotive industry for 30 years, I know and I've lived a

1 lot of the scenarios, but there are many, many members  
2 that don't live it and breathe it, and so I feel like even  
3 though there are hundreds of pages of testimony that may  
4 take years and years to prepare, that a 20-minute summary  
5 and a five-minute rebuttal is helpful.

6 But I honestly think that the members of the  
7 board are owed that in order to make an informed decision.

8 Just reading hundreds and hundreds of pages, I really  
9 feel like the board is deprived of a good story if they  
10 can't hear it, and five-minute rebuttal is five minutes;  
11 it's not re-litigating a case.

12 I'm wanting to be sensitive to the comment not  
13 re-litigating, I want to be attentive to that, I want to  
14 be respectful, but I also feel the charge that SOAH is not  
15 the final decision, we're not a rubber stamp.

16 I don't know; I don't understand why simple  
17 things like -- and this is what staff recommended that I  
18 disagree -- why can't the chairman grant more time if he  
19 wants to? I mean, if someone goes over their five minutes  
20 and they have another one minute, it just doesn't seem  
21 that insensitive. I don't know.

22 So I'm wanting to be respectful, conscious, and  
23 follow not a new trail -- this is not blazing a new trail,  
24 it's defining stuff that's been on the books I think since  
25 the '70s. I don't think we should go backwards in our

1 efforts to hear all the evidence. I don't think we should  
2 be limiting.

3 MS. WASHBURN: Mr. Chairman, can I comment?

4 MR. BACARISSE: Yes, Member Washburn.

5 MS. WASHBURN: And I understand where you're  
6 coming from, Member Gillman, and I don't disagree, you  
7 know, assuming if Sunset would approve it, if we wanted to  
8 give the chairman to provide extra time if it's needed, to  
9 be flexible that way.

10 But also remember that each side gets to  
11 present their case for 15 minutes and then we have as much  
12 time as we want to talk about it. So we're all reading --  
13 right -- we all have the ability to bring up different  
14 points to discuss, so it's not just the 15 minutes and the  
15 15 minutes; there's lots of discussion between us as well.

16 MR. BACARISSE: And we also would have time to  
17 question general counsel as well, so there's that.

18 Are there any other comments? We have a motion  
19 and a second on the floor. Are we ready to vote on this  
20 motion, members?

21 Okay. I'll call the vote on the motion from  
22 Member Gillman, which is essentially to adopt -- Member  
23 Gillman, would you mind -- I'm sorry -- restating the  
24 motion so I don't butcher it?

25 MS. GILLMAN: No problem.



1 I move this subcommittee adopt the proposed  
2 rule language from the commenters on page 268 and 269 and  
3 recommend that to the full board and change the staff  
4 recommendation to allow parties 20 minutes for  
5 presentation and an additional five-minute rebuttal time,  
6 limited to information in the SOAH record, and allow the  
7 board to ask questions of parties within the SOAH record,  
8 and giving chairman discretion to increase the time for  
9 oral presentation and make changes to the rule text  
10 consistent with this motion.

11 MR. BACARISSE: That motion has been read.  
12 Thank you.

13 All in favor of the motion signify by aye and  
14 raising your hand.

15 MS. GILLMAN: Aye.

16 MR. BACARISSE: Opposed signify by raising  
17 your hand and saying nay.

18 Nay.

19 MS. WASHBURN: Nay.

20 MR. BACARISSE: The motion fails. Member  
21 Gillman voted for it. I'm just making notes here for the  
22 record. And Washburn and I were nay.

23 The chair would entertain a new motion at this  
24 time, if there is one from either member, or I can make  
25 one certainly.

1 MS. WASHBURN: I can make a motion.

2 MR. BACARISSE: Member Washburn.

3 MS. WASHBURN: I'd like to make a motion that  
4 we recommend to the full board  
5 to publish the adopted  
6 amendments in the new section  
7 in the Texas Register, as  
8 recommended by staff.

9 MR. BACARISSE: Very good. Is there a second  
10 for that motion? I will second that motion.

11 MS. GILLMAN: And now we get to comment?

12 MR. BACARISSE: Now we have a discussion, yes.  
13 Member Gillman.

14 MS. GILLMAN: Yes. I would like to discuss  
15 specific changes to that, and I'm trying to come up with a  
16 compromise. Specifically can we possibly break down some  
17 of the recommendations and just talk about -- because it's  
18 not really that extensive. There are certain pieces that  
19 could be talked about specifically. Would it be okay with  
20 that? May I?

21 MR. BACARISSE: I think that's a question for  
22 our general counsel.

23 Ms. Beaver, would you give us guidance? I  
24 mean, I think we can discuss whatever the member would  
25 like to discuss, but we have a motion and a second.

1 MS. GILLMAN: The specific --

2 MS. BEAVER: Yes.

3 MS. GILLMAN: Oh, I'm sorry. Go ahead, Tracey.

4 MS. BEAVER: Tracey Beaver, general counsel,  
5 for the record.

6 Yes, it's fine to have member Gillman go  
7 through each of the provisions in the staff  
8 recommendations, and if Member Gillman would like to try  
9 to make an amended motion, we can also take a break and I  
10 can discuss with Member Gillman options and also make sure  
11 that we're not making a new motion when there's already a  
12 motion on the table. Thank you.

13 MR. BACARISSE: Okay, great. Stacey, Member  
14 Gillman.

15 MS. GILLMAN: I think it would be -- I don't  
16 know. I kind of want to understand is there complete  
17 opposition to any -- on this subcommittee is there a  
18 complete opposition to any brief being submitted or  
19 proposed final order? Because that, I think, has been  
20 lined out.

21 MR. BACARISSE: Yes.

22 MS. GILLMAN: And I think that it is -- so I'm  
23 not talking about at this moment minutes to present or  
24 number of days; it's just this subcommittee -- you all are  
25 in complete disagreement that they, the attorneys for both

1 parties, can submit any brief at all?

2 MR. BACARISSE: Thank you for that. Let me  
3 just offer a comment, if I may, and Member Washburn is  
4 certainly welcome to.

5 What these rules that have been proposed by  
6 staff represent is -- and Tracey Beaver, make sure I don't  
7 misstate this -- my understanding what these rules  
8 represent that what we now have a motion is the agreement  
9 between the Sunset Commission members and Texas DMV as to  
10 what would be right and appropriate for our board to do,  
11 period.

12 It's already been very clearly explained to us  
13 through the Sunset process what we were doing that was  
14 outside of what the Sunset Commission and its members of  
15 the legislature believed and Sunset staff believed was  
16 outside of bounds.

17 So what we have here is a set of proposed new  
18 rules to bring us into compliance with what the Sunset  
19 Commission wanted to see. And on all the other issues,  
20 all the other findings that Sunset had in their report  
21 from the last session, we've checked the box, we're in  
22 compliance. This issue remains the last issue.

23 And so what we have before us in the staff  
24 recommended rules are what the Sunset Commission has said  
25 will work and be appropriate. So anything we do outside

1 of that, we are now stepping outside of what Sunset  
2 Commission has said is right and appropriate.

3 MS. GILLMAN: You're talking about in those  
4 three minutes?

5 MR. BACARISSE: I'm referring to the rules that  
6 the staff has presented to us today that we now have a  
7 motion and a second and we're discussing, that body of  
8 work.

9 All of the things in that body of work  
10 represent what Sunset believes is right and appropriate.  
11 Anything that we change or modify or what-have-you then  
12 steps us outside of what Sunset believes is right and  
13 appropriate.

14 So it's a package that you can't unpack because  
15 then -- I'm just saying what I believe to be true from  
16 Sunset's view -- because if you then unpack this thing,  
17 then you step outside of what Sunset believed was right  
18 and appropriate.

19 Am I misstating that, Tracey?

20 MS. BEAVER: Tracey Beaver, general counsel,  
21 for the record.

22 I just wanted to mention that the Sunset  
23 Commission has issued a compliance report on these  
24 contested case rules and found that the department, the  
25 board, was not in compliance with Sunset on the proposed

1 rules.

2 And those proposed rules did allow for  
3 presentation aids, oral argument presentation, and  
4 rebuttal, and so the department, in reviewing the  
5 compliance report, the Sunset Commission recommendations  
6 from 2019, the APA, Occupations Code Chapter 2301 and  
7 other legislative mandates, as well as the hearing from  
8 last week, have developed a recommendation for this  
9 subcommittee to consider that we hope is more in line with  
10 the Sunset Commission recommendations to get into  
11 compliance.

12 I can't say that Sunset has blessed these rules  
13 or this recommendation, because they are not going to give  
14 us input at this point about whether or not the  
15 deliberation that we're having is in compliance with  
16 Sunset, but based on all of that information as a whole,  
17 knowing the totality of the rules as proposed in August  
18 were not in compliance, that's how staff came up with the  
19 recommendation before you today. Thank you.

20 MS. GILLMAN: I guess I just did not interpret  
21 Sunset as saying that -- I thought Sunset was saying  
22 anything outside of the record, any new parties, any new  
23 evidence outside of the record is out of compliance, but  
24 briefings or aids, proposed final orders all within the  
25 record, all within the record is not violating anything,

1 but in fact staying within record.

2 As long as we stay within the PFD and  
3 conclusions of law, we are within the nice box that we can  
4 make a good decision. Anything outside of that, I'm  
5 agreeing is going in a strange direction or trying to  
6 re-litigate, but as long as these presentation aids or  
7 briefs are limited to the evidence contained in the SOAH  
8 administrative record, there's nothing wrong with that.

9 MR. BACARISSE: Tracey, would you be able to  
10 help us understand the difference there, or if there is  
11 one?

12 MS. BEAVER: Sure. Sunset has let us know in  
13 their compliance report that the proposed rules from  
14 August that did allow for parties to give presentation  
15 aids to be considered by the board was not in compliance  
16 with their recommendation.

17 And I can just go back to previous comments  
18 from the Sunset Commission report from 2019 that goes back  
19 to your question, Chairman, about what is the risk in  
20 allowing the opportunity for parties to submit additional  
21 documents for the board to consider when they are hearing  
22 contested cases.

23 And the Sunset Commission report from 2019  
24 stated that a procedural violation, such as making changes  
25 based on information outside the record, puts the state at

1 risk in an appeal and is fundamentally unfair to the party  
2 who prevailed based on the record produced at SOAH.

3 If the board makes modifications to a proposal  
4 for decision and we have these additional documents and  
5 presentation aids before the board, the parties or the  
6 public may not be able to determine whether the  
7 modifications are based on issues within or outside the  
8 SOAH record, because the parties have submitted additional  
9 information to the board.

10 So staff recommendation is to not allow  
11 additional information to be submitted to the board  
12 outside of the SOAH record, because the parties had ample  
13 opportunity to provide all of that information, as I  
14 discussed previously, in the SOAH record, including an  
15 additional 20 days after the SOAH judge issues the  
16 proposal for decision to explain why they disagree with  
17 the proposal for decision, and that's all available to the  
18 board to consider.

19 I just wanted to mention that of course it's  
20 fine to have deliberation after a motion, but if the goal  
21 is to change the motion to make it opposite of what it is,  
22 that's not an amendment.

23 MR. BACARISSE: Right.

24 MS. BEAVER: An amendment would just have to  
25 vary the motion slightly. Thank you.



1 MR. BACARISSE: Thank you.

2 So we have a motion and a second. Any other  
3 comment? Any additional question?

4 MS. GILLMAN: I'm just feeling that this is  
5 limiting -- this recommendation is limiting the board in  
6 their ability to make a decision.

7 MR. BACARISSE: I appreciate your point of  
8 view; I do.

9 MS. GILLMAN: And I'm very worried that these  
10 recommendations -- this recommendation is so limiting that  
11 it's -- so this recommendation provides no rebuttal at  
12 all, this recommendation takes away all permission to the  
13 chairman to add time, this recommendation says that board  
14 members -- I don't understand why we can't ask questions.

15 I mean, on page 16 it says -- it's stricken  
16 that board members cannot ask questions on the evidence  
17 contained in the SOAH administrative record. Why can't we  
18 ask questions? I don't understand why you would agree to  
19 that.

20 MR. BACARISSE: Tracey, do you want to answer  
21 the question in terms of board members having a question  
22 about something in the record that we could ask you as  
23 general counsel or any general counsel in the future if  
24 we're in a hearing? Is that appropriate?

25 MS. BEAVER: Tracey Beaver, general counsel,

1 for the record.

2 I believe that that provision was just moved  
3 from the bottom of page 16 and top of page 17, but we do  
4 have Aline on the line, associate general counsel, if I  
5 could have her answer that question.

6 MR. BACARISSE: Yes, that would be great.

7 Ms. Aucoin.

8 MS. AUCOIN: So as Tracey stated, the language  
9 that Board Member Gillman was asking about, it wasn't  
10 stricken entirely; it was merely moved. So the language  
11 regarding board members asking questions regarding  
12 arguments for a request to remand, including remand for  
13 further consideration of evidence, that language is now on  
14 page 16, starting on line 23, going into page 17 on lines  
15 1 and 2.

16 MR. BACARISSE: Thank you for that  
17 clarification. Go ahead.

18 MS. AUCOIN: I believe there was a question  
19 about whether parties can object about arguments made for  
20 evidence that's outside the record.

21 Certainly the parties -- under the current  
22 draft language, the parties do still have the right to  
23 object when someone is talking about evidence that's  
24 outside the record without using up their time for the  
25 rebuttal. They don't get a rebuttal, but the complaint

1 about arguments outside the record is not counted against  
2 the time that they're allowed.

3 MS. GILLMAN: Well, sometimes a rebuttal is a  
4 good way for opposing counsel to correct the  
5 presentation -- the oral presentation that just happened.  
6 With no rebuttal, how can a member get the story  
7 straight?

8 I mean, it's nice to have a five-minute  
9 rebuttal so that if the number-one presenter says  
10 something wrong, the rebuttal helps to set the record  
11 straight. It works both sides -- I mean, it works both  
12 ways. I think a rebuttal seems logical.

13 MR. BACARISSE: I appreciate your point. We  
14 have a motion on the floor to either adopt these draft  
15 rules as drafted by staff and send them on to the full  
16 board for their consideration.

17 I think it was very important that we clear up  
18 whether or not we have an opportunity as board members  
19 under these new rules to ask questions, which thankfully,  
20 that language got moved, not stricken so that's good news.

21 MS. GILLMAN: Tell me where it is that -- I  
22 know this proposal -- this motion deletes rebuttals and  
23 deletes presentation aids. Tell me about, because I don't  
24 see it in here, about briefs and proposed final orders.

25 MR. BACARISSE: Tracey, can you speak to that,

1 or Aline?

2 MS. BEAVER: Sure. Tracey Beaver, general  
3 counsel, for the record.

4 If parties aren't submitting any written  
5 materials, then they would not be presenting any briefs or  
6 proposed final orders outside of what they have submitted  
7 to the SOAH ALJ either during the pendency of the case or  
8 during the their 20 days' exceptions period after the  
9 proposal for decision is issued by the judge. Thank you.

10 MR. BACARISSE: So that's the time when all of  
11 that activity would happen, and then by the time it would  
12 get to the board, that's all in the record. Am I correct,  
13 Ms. Beaver?

14 MS. BEAVER: Tracey Beaver, general counsel,  
15 for the record.

16 Yes. Whatever the parties choose to present to  
17 SOAH is in the SOAH record, and all of that information is  
18 available to the board when they're hearing the case.  
19 Parties may or may not chose to submit certain materials;  
20 it's up to their counsel what they choose to submit.  
21 Thank you.

22 MS. GILLMAN: And they submit how many days  
23 ahead of time, Tracey?

24 MS. BEAVER: Yes, sure. Tracey Beaver, general  
25 counsel, for the record.

1           So the parties to the SOAH case are able to  
2 present all of their evidence and arguments to the SOAH  
3 ALJ during the case. Then after the SOAH judge makes the  
4 decision, the proposed final decision, there's what's  
5 called an exceptions period where the parties are given  
6 notice of what the proposed final decision, says and  
7 they're asked to submit anything to the judge that they  
8 disagree with or think that should be changed in the  
9 proposal for decision.

10           Then the judge reviews that information that's  
11 submitted and makes a decision about whether to change the  
12 proposal for decision and issues a letter. That's all in  
13 the SOAH administrative record that is available to the  
14 board members.

15           MS. GILLMAN: But nothing is able -- in this  
16 staff recommendation there's nothing able to be submitted  
17 before it comes before the board. Is that right? Because  
18 it might be two or three years later.

19           MS. BEAVER: Tracey Beaver, general counsel,  
20 for the record.

21           After the SOAH judge gives jurisdiction over  
22 the board, there is no provision in the staff-recommended  
23 language to allow parties to submit additional information  
24 outside the record. That's correct.

25           MS. GILLMAN: I just think that it's so

1 limiting. I'm begging for some kind of compromise.

2 MR. BACARISSE: I understand where you're  
3 coming from, Member Gillman. I think that what I'm  
4 hearing -- and I don't claim to be right, but what I'm  
5 hearing Ms. Beaver say to us is that this kind of activity  
6 that you're discussing happens in the SOAH hearing, and  
7 all of that goes into the record which we then, if there  
8 was an appeal and it comes to the DMV Board, the board  
9 then would have all of those arguments in the record to be  
10 able to examine and question as we examine the case, as we  
11 hear the case.

12 So in a sense, the activity you're discussing,  
13 which is important, happens at the SOAH level and not  
14 again at the board level, if that's a fair description  
15 kind of in summary.

16 I understand your frustration, and it is duly  
17 noted. I mean, I understand it. And let me say that when  
18 we get to the full board if there are questions or  
19 comments that each of you has for the board's edification  
20 and education, you should make them when we're considering  
21 this motion, whatever gets passed.

22 Any other question or comment? We have a  
23 motion and a second on the floor now.

24 (No response.)

25 MR. BACARISSE: Hearing none else, I will call

1 the vote.

2 Member Gillman?

3 MS. GILLMAN: Nay.

4 MR. BACARISSE: Okay. Thank you.

5 Member Washburn?

6 MS. WASHBURN: Aye.

7 MR. BACARISSE: And I, Chairman Bacarisse, vote  
8 aye, so this passes on to the full board for their  
9 consideration.

10 Just making notes here, and at this point I  
11 think we are ready to perhaps move to agenda item number  
12 6. Is that right, Ms. Beaver? I've lost track; I'm  
13 sorry.

14 MS. BEAVER: Tracey Beaver, general counsel,  
15 for the record.

16 We'll not have a closed session today so we're  
17 not taking up agenda item 4 or 5. You're correct; the  
18 next agenda item is number 6.

19 MR. BACARISSE: Right. Very good. Thank you.  
20 I forgot to mention that.

21 Agenda item number 6 is public comment, and are  
22 there any people signed up under this area, Tracey, that  
23 we did not hear from previously?

24 MS. BEAVER: Tracey Beaver, general counsel,  
25 for the record.

1           There are no public commenters today. Thank  
2 you.

3           MR. BACARISSE: Okay. Thank you.

4           Hearing the fact that there are no public  
5 commenters, I would ask that we move to item number 7,  
6 which is adjournment. Do I have a motion?

7           MS. GILLMAN: So moved.

8           MS. WASHBURN: Second.

9           MR. BACARISSE: Second.

10          I want to say to each of you thank you for your  
11 time, your professionalism, your dedication. I love and  
12 appreciate every member of this board, and you two  
13 specifically, today for what you've given to the effort  
14 and to the people, and I think there will be more  
15 discussion on this as we bring the item forward to the  
16 full board at the next meeting.

17          So thank you both for your time today, keep  
18 Member Prewitt in your prayers and we will see you  
19 virtually, hopefully, if not personally, sometime in the  
20 near future.

21          We have a motion and a second to adjourn. All  
22 in favor aye.

23          (A chorus of ayes.)

24          MR. BACARISSE: Opposed nay.

25          (No response.)



1                   MR. BACARISSE: Okay. It's unanimous. Let the  
2 record reflect that that was a unanimous vote, and this  
3 meeting is adjourned.

4                   (Whereupon, at 3:25 p.m., the meeting was  
5 adjourned.)

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C E R T I F I C A T E

MEETING OF: TxDMV Contested Case Rules Subcommittee  
LOCATION: Austin, Texas  
DATE: January 19, 2021

I do hereby certify that the foregoing pages, numbers 1 through 90, inclusive, are the true, accurate, and complete transcript prepared from the verbal recording made by electronic recording by Nancy H. King before the Texas Department of Motor Vehicles.

DATE: January 28, 2021

/s/ Nancy H. King  
(Transcriber)

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