



COMMISSION MEETING MINUTES
May 23, 2005

The Commissioners of the Texas Alcoholic Beverage Commission met in Regular Session on Monday, May 23, 2005, at the Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Suite 185, Austin, Texas.

PRESIDING: John T. Steen, Jr., Chairman

PRESENT: Jose Cuevas, Jr., Commissioner
Gail Madden, Commissioner

STAFF PRESENT: Alan Steen, Administrator

Carolyn Beck, Public Information Officer,
Executive
Lou Bright, General Counsel, Executive
Jeannene Fox, Assistant Administrator,
Executive
Buck Fuller, Director, Compliance
David Garza, Director, Homeland Security,
Executive
Gary Henderson, Enterprise Operations Team
Leader, Information Resources
Linda Jackson, Administrative Assistant,
Executive
Renee Johnston, Executive Assistant, Executive
Dexter Jones, Director of Marketing Practices,

Executive

Charlie Kerr, Director of Business Services
Janet Meisenheimer, Chemist, Marketing
Practices, Executive
James "Sam" Smelser, Chief of Enforcement

GUESTS PRESENT:

Barry Andrews, Andrews North Texas Distributing
Dewey Brackin, Attorney, Gardere Wynne Sewell
Frank Deaderick, President, Standard Sales
Company
Arthur DeCelle, Vice President/General Counsel,
The Beer Institute
Rick Donley, President, Beer Alliance of Texas
Doug DuBois, Jr., Director of Membership and
Education, Texas Petroleum Marketers and
Convenience Store Association
Greg Flores, Director of Legislative Affairs, H-E-B
David Jabour, President, Twin Liquors
Sylvia Jabour, General Counsel, Twin Liquors
Steve LaMantia, L & F Distributors
Judy Lindquist, General Counsel, H-E-B
Fred Marosko, Texas Package Stores
Association
Jack Martin, Attorney at Law, Representing H-E-
B
William McDonald, City Manager, City of Hubbard
Mike McGuire, Andrews North Texas Distributing
Mike McKinney, Executive Vice President,
Wholesale Beer Distributors of Texas
Lindsay Meche, Representing Republic Beverage
John Nau, CEO, Silver Eagle Distributors
Fred Niemann, Attorney, Representing Texas
Package Stores Association
Christian Ninaud, Policy Analyst, Sunset
Advisory Commission
John Schwartz, Attorney, Representing Beer
Alliance of Texas
Ken Simon, Partner of Locke, Liddell & Sapp,
Representing Beer Alliance of Texas

Robert Sparks, Executive Director, Licensed Beverage Distributors, Inc.
Keith Strama, Attorney, Representing Wholesale Beer Distributors of Texas
Ted Thomas, Vice President, Glazer's
Ralph Townes, Vice President of Texas, Glazer's
Randy Yarbrough, Wholesale Beer Distributors of Texas

CALL TO ORDER

Chairman John T. Steen, Jr., called the meeting of the Texas Alcoholic Beverage Commission (TABC) to order, welcoming all in attendance.

APPROVAL OF COMMISSION MEETING MINUTES OF MARCH 28, 2005

Chairman Steen called for a motion to approve the TABC Commission meeting minutes. **Commissioner Madden moved that the Commissioners approve the minutes of the March 28, 2005, meeting. Commissioner Cuevas seconded the motion. The motion carried.**

ADMINISTRATOR'S REPORT

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

Legislative Activities

- Administrator Steen reported on the Supreme Court ruling, which essentially says that in-state and out-of-state wineries must be treated equally. The ruling holds that the Interstate Commerce Clause makes it unconstitutional to allow in-state wineries to ship directly to consumers but not out-of-state wineries. Also, Texas Governor Perry signed Senate Bill 877, which allows direct shipping to Texas consumers for personal consumption. Administrator Steen stated that TABC has been fielding several inquiries on this issue and has posted information on the website explaining the new law with helpful links to information such as how to

obtain a Texas sales tax permit. Also, letters and e-mails have been sent to over 70 industry associations, wineries, wholesalers, and wine-related publications informing them of the new law. TABC was also interviewed on national public radio out in California with regards to that bill.

- TABC's Sunset bill passed out of the House on May 10. In the Senate, the bill was referred to a committee last week. Administrator Steen stated that staff will be monitoring the bill closely and will keep the Commissioners advised.
- Administrator Steen stated that staff felt that TABC's appropriations bill was soon at hand. He stated that this would be reported in detail once the bill is signed.
- TABC employees are pleased to hear that state employees got a pay raise of some kind, as well as certified peace officers. Morale has been high in the field with regard to the pay increase.

Fiscal Stewardship

Administrator Steen stated that fiscal stewardship reporting is usually on the Commission agendas. As the report is very short, Administrator Steen opted to present the report. He reported that there were only two settlements on vehicle accidents in 2004, totaling \$2,445.

Versa

Administrator Steen reported that starting next week, data conversion will begin. No data will be entered into M204 after midnight, May 27. The M204 data will be available for inquiry during the week of conversion, but not for data entry. All licensing activities will be shut down next week in order that the data can be downloaded. The new software will be available at the start of business on June 6th. Administrator Steen expressed his excitement over the new system. He commended Garry Sitz and staff for doing a good job. The Commissioners also expressed excitement over the new system.

Employee Retirement

Administrator Steen announced that Janet Meisenheimer, TABC's chemist, would be retiring at the end of the month after serving as TABC's chemist for 29 years. Administrator Steen asked Ms. Meisenheimer to stand so that the staff and Commissioners could recognize her with a round of applause. After she was recognized, Ms. Meisenheimer stated it had been her honor to work at TABC. In behalf of the Commission, Chairman Steen thanked Ms. Meisenheimer for her loyal service over the many years.

APPROVAL OF PETITION BY THE CITY OF HUBBARD FOR ORDER PERMITTING ADOPTION OF A CENTRAL BUSINESS DISTRICT ORDINANCE PURSUANT TO §109.35 OF THE ALCOHOLIC BEVERAGE CODE

Chairman Steen called upon General Counsel Lou Bright to discuss the petition by the City of Hubbard (Attachment 1).

Mr. Bright explained that §109.35 of the Alcoholic Beverage Code provides that a city may petition TABC for an order authorizing the city to adopt an ordinance that bans open containers in a prescribed central business district of that city. It does not ban open containers inside buildings or automobiles that are banned by other laws. He stated that the City of Hubbard has filed such a petition, and Mr. Bright has reviewed the petition and determined that it meets the requirements mandated by §109.35. He recommended that the Commissioners sign the order authorizing the ordinance and stated that a representative from the City of Hubbard was in attendance to answer any questions the Commissioners may have.

William McDonald, City Manager of the City of Hubbard, thanked the Commissioners for their consideration of the ordinance. He explained that the City of Hubbard would be celebrating its 124th year of existence this summer, and the ordinance was considered of great importance to the citizens of Hubbard. In response to Chairman Steen's questions about the City of Hubbard, Mr. McDonald stated that the City of Hubbard has a population of 1,600 and is in Hill County, located halfway between Waco and Corsicana on Highway 31.

Chairman Steen called for a motion. Commissioner Madden moved that the Commission authorize adoption of an ordinance prohibiting possession of open containers of alcoholic beverages in the central

business district of Hubbard as described in the city's petition. Commissioner Cuevas seconded the motion. The motion carried.

EXECUTIVE SESSION

Chairman Steen stated that the next item on the agenda was the public comment section. However, as the public comments appeared to be regarding Rule 45.110, Chairman Steen asked if the Commissioners would rather first go into Executive Session to consult with legal counsel regarding pending and anticipated litigation against the agency. Commissioners Madden and Cuevas agreed.

Chairman Steen announced that the Regular Open Session of the Texas Alcoholic Beverage Commission would be recessed, the time being 1:40 p.m., May 23, 2005. He announced that an Executive Session would be held to consult with legal counsel regarding pending and anticipated litigation against the agency, pursuant to Texas Government Code §551.071.

Following the Executive Session, **Chairman Steen announced that the Texas Alcoholic Beverage Commission had concluded its Executive Session and was in Open Session, the date being May 23, 2005, and the time, 2:28 p.m. He stated that no final action, decision, or vote was made in the Executive Session.**

ADOPTION OF AMENDMENT TO 16 TEXAS ADMINISTRATIVE CODE §45.110 GOVERNING INDUCEMENTS

Chairman Steen called upon Lou Bright to discuss the amendment to Rule 45.110 (Attachment 2). Eight individuals registered to provide public comment, and Chairman Steen asked that public comment be limited to five minutes each.

Administrator Steen first opened the discussion, explaining that TABC had been approached in the Fall of 2004 by a sector from the middle tier asking for the agency's interpretation of the Alcoholic Beverage Code and TABC rules on discount pricing. Over the past six months, TABC and industry members have taken an intense look into the discount pricing issues. Administrator Steen

noted that from this intense review, it was discovered that the issue of discount pricing has not been a priority for the agency and that some policy has been interpreted based on 40-year-old memoranda or on “that’s the way we’ve always done it.” He stated that this has led to a playing field that may not be as level as TABC had wanted. He stated that he takes responsibility for this and that he would ensure it would be fixed. Administrator Steen emphasized that TABC is ethically and professionally responsible for dealing with issues that affect those whom TABC regulates. He noted that the issue of discount pricing is not his issue, not Lou Bright’s issue, but is the industry’s issue. Administrator Steen stated that TABC, as regulator, was here today to hear the issues, take the issues seriously, weight the facts, and make as much impact to the industry in a positive way as possible. He thanked those in attendance for their time in helping TABC address the discount pricing issue.

Mr. Bright discussed some of the options the Commissioners could take regarding the rule. Some of the options included passing the rule as published in the *Texas Register*; passing the rule with amendments to the published text; voting the rule down; and tabling the proposal, with or without instructions to the administrator to take further action(s).

Mr. Bright stated that it was the staff’s recommendation that the rule be adopted with some amendments to the text as was originally published. Specifically, staff recommend that the following sentence be added to the published text: “This paragraph does not affect the interpretation, application or enforcement of any other provision of the Alcoholic Beverage Code or rules of the Commission nor does it impair the right of any wholesale tier member to independently establish its own selling price.”

He stated that the rule is an interpretation of two narrow provisions within the Alcoholic Beverage Code. One of those two provisions is that upper tier members in both the liquor and the malt beverage industry may not provide “inducements” to members of the retail tier. The second provision is that members of the liquor industry cannot allow an “excessive discount” to members of the retail tier. He explained that TABC must determine what an inducement is or what an excessive discount is by rulemaking interpretation, and thus, that is what the proposed paragraph in the rule would do.

Mr. Bright noted that statutes exist to protect against conditions that existed before and during prohibition and are one of the primary reasons that the regulatory body of law was called into existence: the reason being, to protect

against the dominance of the retail tier by the powerful members of the manufacturing and wholesale tier. The question before TABC is whether multi-location volume discounts overcome the independence of the retail tier. Mr. Bright stated that this has been discussed at great length, and that TABC has received no evidence or indication that chain stores—that would get multi-location volume discounts—would have their independence overborne by that pricing structure. He stated that the rule with the proposed amendment would mean that to calculate the price of a product by reference to the volume of multiple locations under the same ownership is not a per se violation of TABC's inducement and excessive discount rule. It does, however, give the staff the freedom to determine in a contextually driven way whether or not other laws are violated by that practice. He added that it does not compel any member of the industry to do anything and does not require any particular kind of pricing or any particular conduct. It, in fact, removes the agency from regulating or pretending to regulate the way in which industry members place their product.

Mr. Bright recounted that over the years, there has been inconsistent interpretation of the issue, with a wide degree of disagreement among industry members and even agency members about what the law meant. He stated that the rule is needed so that it is clear what the provisions in the statute mean on the words "inducement" and "multi-volume discounts." Mr. Bright stated that as far as he has been able to determine, there is no serious disagreement that it is lawful to price a product by reference to multi-location sales. He noted a letter received from the Wholesale Beer Distributors of Texas dated May 19, 2005, in which a statement is made that "there is no statute or rule which prohibits a distributor from offering volume discounts based on multiple-store purchases."

Mr. Bright stated that TABC has received some serious objections to the rule amendment, which deserve TABC's most serious consideration. He stated that he attempted to address them in some reform from the staff's perspective in his May 16th letter (Attachment 2). During the course of discussions among staff and industry members as to why the proposal may be a bad idea, inevitably they discussed violations of other laws and other rules. So in the end, there was general agreement that it was wisest to enforce those other laws and other rules for the purposes for which they were intended and to interpret inducement and excessive discounts for the purposes for which they were intended, which was not to bar multiple location volume discounts.

Mr. Bright discussed other arguments presented to the Commissioners. One argument against the rule made by some retailers is that Chapter 22 of the Alcoholic Beverage Code implicitly recognizes the possibility of multi-location volume discounts. Mr. Bright stated that this was addressed in his letter of May 16 (Attachment 2). Another argument against the rule is the effect of the proposal on the competitive standing of small retailers that are in competition with big stores. Mr. Bright noted that a disparity currently exists between the large warehouse-type stores and the smaller convenience stores or other on-premise places. Secondly, this is a difficulty that small retailers have--not just in the alcoholic beverage industry--in the array of products that they sell. Mr. Bright added that some commenters of the rule amendment, citing the Texas Retailers Association, the Gulf Coast Retailers Association and H-E-B, have indicated they currently operate at a competitive disadvantage as multiple locations, smaller stores, as individual locations do not purchase in large volume.

Mr. Bright discussed one argument that staff have spent an extraordinary amount of time .concerning the objection mounted under antitrust issues. The argument is basically two-fold:

- 1) Pricing practices--particularly multi-location volume discounts--is a practice that could well violate an array of antitrust laws. Under this argument, passage of the rule amendment could encourage more anti-competitive behavior in the marketplace.

Mr. Bright stated that while alcoholic beverages are unique and ought to be treated differently than other consumer goods in an array of issues, this is not one of them, since antitrust is an issue that goes across an array of products. Also, antitrust concerns generally are not within TABC's statutory mission, nor does the agency have the expertise to involve antitrust considerations in the exercise of its authority. There are other entities, such as the Federal Trade Commission and Attorney General's Office, that are constituted in the law to protect against antitrust behavior. Mr. Bright doubted that the rule amendment would encourage more anti-competitive behavior, as the rule removes government regulation, allowing greater freedom, and therefore greater competition.

- 2) Under the 1940 Supreme Court case, *Parker v. Brown*, a state--as a matter of its policy for legitimate public reasons--can endorse a program

in which anti-competitive behavior dominates the marketplace. Those who are engaged in that marketplace then are exempt from liability for violating antitrust law. Mr. Bright explained that under this argument, the rule could provoke someone to say that they have the *Parker v. Brown* defense available to them because of TABC's rule and they could therefore engage in anti-competitive behavior. Whether their ultimate defense when they are sued about the anti-competitive behavior is successful or not, it would take years for the courts to work that out and thus, the rule could be a destabilizing force in the marketplace.

Mr. Bright stated that he did not believe that a serious argument could be made. He discussed the elements in law that a person must establish in order to raise such a defense, such as proving that the state actively supervised the anti-competitive behavior. He discussed the Supreme Court ruling which basically states that it is not enough that anti-competitive behavior is prompted by state action; rather, the anti-competitive behavior must be compelled by direction of the state. Therefore, Mr. Bright felt that this would allay any concern that TABC may inadvertently provoke unwelcome anti-competitive behavior in the marketplace.

Mr. Bright also discussed that multi-location volume discounts may or may not be a violation of federal law. There are multi-location volume discounts offered for an array of non-alcoholic beverage products. Some industry members have suggested that TABC should craft its rules so as to address other non-Alcoholic Beverage Code concerns. Mr. Bright stated that TABC operates under very limited authority and that adoption of the rule focuses on that authority and not on other concerns and does not unduly inject TABC into the pre-negotiations between buyers and sellers of alcoholic beverages.

PUBLIC COMMENT

Chairman Steen called upon Jack Martin, an attorney for H-E-B. Mr. Martin introduced himself, stating he was an attorney in solo practice, representing the H-E-B Grocery Company.

Mr. Martin stated that it was clear that there was nothing in the Alcoholic Beverage Code or the rules that prevents the granting of discounts based on volumes of sales to multiple locations. He stated that the ruling stems from

the fact that the Code is a codification of two different rules of law, one dealing with beer and one dealing with distilled spirits and wine, and there are differences between those two statutes that had to be harmonized when the Code was made. He added that there are still distinctions that exist in the Code; however, there is really no difference, and he believed that was the case here. Section 22.15 states that volume discounts based on multiple location sales are authorized. He noted that it does not specifically state that they are authorized for package store permittees, but it refers to restrictions to five locations per package store permittees. He recognized that a retailer has the ability to get volume discounts based upon sales to all of the retailer's locations as long as the retailer owns those locations. He stated that would be true not only for package stores, but to any retailer. Mr. Martin pointed out that package store permittees deal with liquor, which is distilled spirits and wine, but the limitation that is discussed in the provision deals with alcoholic beverages. He explained this recognizes that a package store permittee also holds 99% of the time a retail dealer's off-premise permit allows the package store permittee to sell beer. He summarized that volume discounts apply not only to distilled spirits and wine, but also to beer under the retail dealer's license. Mr. Martin discussed whether same multi-location volume discounts constitute excessive discounts or inducements. He concluded that volume discounts are not excessive discounts nor are they inducements.

Mr. Martin discussed the antitrust issues, stating that such issues are not within the purview of TABC and that antitrust competitive issues can be addressed by the Federal Trade Commission or the Texas Attorney General. He also discussed the *Parker v. Brown* antitrust argument, which he stated did not apply to this issue. He said that the proposed rule amendment would expand competition and would allow for the negotiation of volume discounts between two levels of the industry. He added he was confident that a ruling from the Federal Trade Commission or Texas Attorney General would determine the rule to not be anti-competitive.

Chairman Steen then called upon Judy Lindquist, General Counsel of H-E-B, who indicated on her card that she may wish to speak. She opted not to provide comment, as someone else would be providing comment. Chairman Steen then called upon John Schwartz from the Beer Alliance of Texas.

Mr. Schwartz introduced himself, stating he was a commercial litigator and that he handles many commercial matters including antitrust matters. He

announced at the onset that the Beer Alliance of Texas strenuously opposed the amendment to the rule. He provided the following reasons:

- It is unnecessary because the current rule accurately and adequately reflects the provisions in the Alcoholic Beverage Code, which prohibit inducements and excessive discounts.
- By offering a multi-location volume discount on beer, the sale must necessarily involve an improper inducement or an excessive discount, because there is no economic justification for the discounts. Each individual premises has to be individually marketed to, with each individual store receiving its product from the distributor. There are no economies of scale that are going to allow for a business reason for the discount for a multi-premises volume discount.
- The proposed amendment invites anti-competitive behavior. He cited an example of what is occurring in other states, with powerful retail and manufacturing interests placing pressure on the distributor to grant multi-premises volume discounts, even though there is no economies of scale or efficiencies that flow back to the distributor, thereby undermining the distributor's independence. He again stated he has found no evidence that there is a business justification for multi-premises volume discounts.
- There will be antitrust litigation over this provision, which will be enormously expensive and complicated. Mr. Schwartz stated that if the Commission adopts the rule, the Beer Alliance of Texas believes the rule would create significant antitrust exposure that would cost its clients a great deal of money and would put them at potential risk.

Chairman Steen called on Arthur DeCelle, Vice President and General Counsel of the Beer Institute.

Mr. DeCelle stated that Texas law, including the policy on multi-premises' volume discounts, has been carefully designed to uphold the integrity and stability in the alcoholic beverage marketplace. Speaking in behalf of the brewers, he stated they were opposed to the proposed change and have recommended an alternative which would have codified the existing policy on single-store volume discounts [*(e) Calculating the price of alcohol beverages*

by reference to the volume of sales to a single licensed retail location does not constitute an unlawful inducement or an excessive discount.”].

He told the Commissioners that the brewers believe that the proposed change would create some form of discrimination at all three levels of the system. He stated that the idea of inducements and the overall concerns that led to the creation of TABC that are incorporated into the agency’s mission statement, all deal with the structure of the industry and relationships. He noted that the Commission has the often-difficult role of trying to be the arbiter of those interests. By taking a single issue such as the volume discount with all of those other moving parts and existing business relationships, Mr. DeCelle believed that the proposed rule change would create disparities. He provided examples from the brewers’ perspective of how the proposed change would create disparities. Mr. DeCelle concluded his statements, stating the brewers believe that to ensure the local presence and the accountability that it brings to a socially sensitive product category, that the Commissioners either adopt the recommendation that was submitted in their written comments or that no action be taken at this time.

Chairman Steen called upon Keith Strama, an attorney with the Wholesale Beer Distributors in Texas.

Mr. Strama thanked Lou Bright for the openness of the meeting and for including everyone in the discussion. He stated that the discussion was about a code provision that prevents excessive discounts, and the Commission had adopted a rule which is almost an exact restatement of the Robinson-Patman Act, which says a discount is not excessive if economically justified. He stated that there is an economic justification specifically for beer, and although the gentleman from H-E-B pointed out that liquor and beer really aren’t that different, Mr. Strama disagreed, stating there was a big difference. In liquor, package stores can sell or distribute to some degree; however, it is prohibited in the beer industry. Mr. Strama explained that there is now some support for changing this to allow beer to be self-distributed, citing that 22 members of the Texas House voted for it when it was proposed on the House floor in the Sunset Bill. However, 119 members voted against it, making it an overwhelming defeat against the concept of self-distribution. He explained that without self-distribution, there is no economic justification for a volume discount.

Mr. Strama stated that the beer distributors are the only ones who can set the price, and they do not need any more clarification as they know how to comply with the rule, which is an exact mirror of federal antitrust law. He stated that the distributors see no reason to change the rule. Being that this is a highly regulated industry, he cautioned it was very possible that this could create a valid antitrust exemption for large retailers. If it turns out to be a valid antitrust defense, then it would be devastating to the industry.

Chairman Steen called upon Frank Deaderick. Mr. Deaderick introduced himself as the President of Standard Sales Company, which is a beer distributorship operating in west Texas. Additionally, he is a member and on the board of directors of the Wholesale Beer Distributors of Texas.

Mr. Deaderick expressed his appreciation for the opportunity in behalf of beer wholesalers to provide input on the proposed modification to Rule 45.110. He stated that the rule as it currently exists is an exact mirror of the principles articulated in the federal Robinson-Patman Antitrust Act. Generally, this federal act prohibits a supplier from offering one retailer a price different from another retailer without economic justification for the price difference. He pointed out that the analysis of when there is an economic justification for the volume discount is extremely complicated and is often litigated. The act generally prohibits volume discounts when the discount is functionally unavailable to most retailers in the market and there is not economic justification in the forms of cost savings for a distributor. He expressed his opinion that the Beer Distributors of Texas needed no further clarification on the antitrust law or on Rule 45.110. He explained that beer distributors become concerned whenever a government or governmental agency becomes involved in pricing because it always has a profound effect on the marketplace. He stated that TABC's present rule was adequate, and no other rule or modification on pricing needed to be adopted.

Mr. Deaderick reminded the Commissioners that the current Sunset Commission, after reviewing the agency for the past year, has declined to involve itself in this complicated area of the law. Also, the House Licensing and Administrative Procedures Committee has reviewed the matter in detail and also has declined to become involved in this matter. The state legislature itself has not adopted nor advanced any legislation or amendment to any bill on this subject. Therefore, it was his belief that the issue had been studied extensively, and the current rule founded well for the alcoholic beverage industry and the three-tier system.

He added that the proposed rule modification would create profound confusion among retailers, who believe that they would be entitled by law to volume discounts automatically. This confusion in the marketplace is unnecessary and places distributors in a compromised negotiating position. A modification of the rule would encourage some retailers to demand volume discounts which are in violation of federal antitrust laws. He also noted that modifying the rule would have a profound negative impact on the marketplace by giving substantial pricing advantages only to large mega-retailers and giving substantial pricing disadvantages to small retailers.

In behalf of the beer distributors of Texas, Mr. DeCelle thanked the Commissioners for allowing them to be a part of the discussions and hoped that they would decide the proposed rule modification was completely unnecessary.

Chairman Steen called upon Rick Donley with the Beer Alliance of Texas. Mr. Donley thanked the Commissioners and staff for affording them the opportunity to comment on the proposed amendment. He stated that he did not want to belabor this issue since the Beer Alliance has made its position known to the Commissioners for some time. He did wish to make two final points.

First, he believed that the opponents of the amendment were asking the Commission to adopt a concept that the legislative process has summarily rejected both during the Sunset review process in the final Sunset Commission report and the House Committee on Licensing and Administrative Procedures' deliberations of April 13, 2005, concerning House Bill 2544. He stated that the retailers that are the only beneficiaries of this amendment now want the Commission to override the findings of the Sunset Commission and the House Committee that is charged with oversight of the agency. He told the Commissioners that he did not believe this was a wise use of the agency's regulatory authority.

Secondly, he stated that the proposed amendment is at odds with the state's regulatory policy that has been in place since repealed prohibition. The underlying principle of the Alcoholic Beverage Code has been based on prohibiting giving things of value that unfairly give a competitive advantage to either those who are making the offer and/or those who would receive such an offer. To illustrate his point, he handed the Commissioners a copy of a marketing practice bulletin issued by TABC staff (Attachment 2) in response to

the question of giving drink coasters to the retailer. He stated that the coaster items cost a fraction of a penny. The bulletin stated that this practice came under scrutiny as large upper-tier members could potentially gain unfair competitive advantage over their smaller competitors by exercising their buying power to unlawfully discount the price of promotional items to retailers and thereby creating economic dependence by retailers on specific upper-tier members. Mr. Donley stated that he failed to see how discounting a promotional item valued at less than one cent becomes an unlawful inducement, yet the discounting of a product offered only to a select few retailers that is valued in the millions of dollars does not constitute an unlawful benefit.

Mr. Donley asked the Commissioners to not apply the rule to all beverages. To do so, would not only do great harm to literally thousands of small Texas retailers but would also begin to destroy a regulatory system that has served the state well. He stated that current law gives all necessary guidance and that the Beer Alliance believes the industry has sufficient notice of what constitutes an unlawful inducement and, therefore, no further comment is necessary from this agency.

Chairman Steen called upon the last speaker, Dewey Brackin, attorney with the Texas Retailers Association.

Mr. Brackin stated that he was with the firm of Gardere Wynne Sewell and was representing the Texas Retailers Association as well as the Kroger Company, a grocery store chain in Texas. He brought up a point that he believed had been lost in all of the discussions that day regarding the foundation of the three-tier system. The three-tier system is not to protect a manufacturer, a distributor, or a retailer; rather, the system was founded to protect Texas consumers from the classic tied house problems that were exhibited in Old England and the United States prior to prohibition.

Mr. Brackin stated that the rule modification would help Texas consumers and that a valid economic justification for volume discounts exists today. He asked the Commissioners to extend this basic principle of economics to multiple stores owned by the same common ownership, as package stores do it today. He stated that his clients were only asking for the opportunity to be on the same level playing field that the package stores currently enjoy. They would then use the price differential to pass it along down to the consumer so

the consumer ultimately benefits. With regard to the antitrust arguments, Mr. Brackin stated that he did not see any fear of any anticompetitive effects.

ADOPTION OF AMENDMENT TO 16 TEXAS ADMINISTRATIVE CODE
§45.110 GOVERNING INDUCEMENTS – CONTINUED

Commissioner Madden stated that she and Commissioner Cuevas had voted to publish the rule, as they felt strongly that this would be a good process to put the issue on the table for discussion. Commissioner Madden stated that she had talked with several people—people for and people against—about the rule change. Regardless of the number of people she talked with, she stated she was conflicted about the rule change. Because she has a small business, she could understand the concerns about the rule change. Ms. Madden stated that she was curious to know what Chairman Steen’s and Commissioner Cuevas’ thoughts were on the issue.

Chairman Steen took that opportunity to enlighten the audience, stating that because there are only three Commissioners, the open meetings law prohibits them from talking with one another outside of a Commission meeting. Therefore, they have not discussed the rule change among themselves, and the audience will be hearing it all “live” along with the Commissioners.

Commissioner Cuevas asked Administrator Steen to address a few matters. He stated that the legislature had been looking into this issue and declined to get involved in this area. He asked Administrator Steen how he perceived this. Administrator Steen referenced an informal transcript of this topic from the House Licensing and Administrative Procedures meeting of April 13. At the Committee meeting, Representative Flores asked if the Committee’s work on this issue was premature and if it would take precedence. Administrator Steen had responded to the Representative that the Committee’s work would take precedence and that TABC would stop the rule-making process; then TABC would wait until the end of the session and then would proceed further in accordance to whether the law passed or did not pass. Commissioner Cuevas asked Administrator Steen if it was his belief that the Committee was going to let TABC address the issue. Administrator Steen said that was his understanding.

Commissioner Cuevas stated that he kept hearing the reference “it mirrors federal law;” he asked what TABC was addressing that mirrors federal law.

General Counsel Bright responded, explaining there is a concept in federal law about whether or not a behavior has economic justification. If it does not have economic justification, then by implication it may be a violation of federal antitrust law. He believed that the argument being made to the Commissioners was based on existing Rule 45.110, which states that one of the factors TABC will consider in determining whether a practice is an unlawful inducement is that the practice is not offered to similarly situated retailers within the same market without legitimate reasons.

Commissioner Cuevas asked that Administrator Steen recap the letter that went out in December (Attachment 2) and provide an update on what TABC is currently doing. Administrator Steen stated that the letter was sent in response to discussion from the December 20th Commission meeting. At that meeting, the Commissioners instructed staff to explore the possibility of engaging in rule making. The letter was sent to industry members stating that in the interim of the rulemaking period, TABC would not institute enforcement actions against industry members for the manner in which they calculate the price of their product. Commissioner Cuevas asked if this has been the agency's practice for 40 years. Administrator Steen stated that it was his understanding that multi-store discounts have been allowed since the early '60s.

Commissioner Madden asked if Representative Geren had anything to say about the multi-store discounts during the House Licensing and Administrative Procedures Committee meeting; Administrator Steen stated that Representative Geren did not have any specific issues on this area, as he was concerned about dual licensing and other issues.

Chairman Steen reminded the Commissioners of what General Counsel Bright sent to them, stating that in regard to this issue, they could act in one of four ways: They could adopt the rule in the form in which it was originally published in the March 18, 2005, edition of the *Texas Register*; they could adopt the rule with revisions to the originally published text; they could vote to reject the proposed amendment; or they could table the matter for further consideration.

Commissioner Madden stated she felt she could no longer talk about the issue anymore, as there had already been a tremendous amount of discussion. She asked Commissioner Cuevas if he wished to discuss the issue further. He replied that he did not, and he believed there had been plenty of opportunity to

read the information and listen to interested stakeholders. He agreed that this has been difficult. As he started out as a small businessman, he understands the plight of small business owners. Yet, all businesses start small with the hope of becoming larger businesses. Despite the difficulty of making a determination, Commissioner Cuevas stated that this issue has fallen on the Commissioners' table, and he would prefer not to table the issue. He stated that he believed that the Commissioners either needed to make a decision and move forward or else table it with instructions so the staff know the direction that the Commissioners want.

Chairman Steen asked what was the pleasure of the Commissioners. Commissioner Madden stated that she was making a motion that the rule modification be tabled. Chairman Steen asked if there was a second. Commissioner Cuevas questioned if the issue was tabled, whether it would mean that the December letter holds. Administrator Steen stated that the December letter holds until rulemaking is completed and that he would probably provide an updated letter to the industry to reiterate this.

Chairman Steen asked if there was a second to the motion. Commissioner Cuevas asked Commissioner Madden if this would serve the purpose of her intention, meaning that TABC would operate under the December letter. Administrator Steen clarified that what would be communicated is that pending further decisions in rulemaking, TABC would not take any action until staff have specific direction one way or the other. Commissioner Madden stated that she did not know if she agreed with the rule modification, because as a business decision, she thought it was wrong. She suggested that the Commissioners may need to go back to the original intent. Commissioner Cuevas stated that he did not know if they could go all the way back to the original intent; however, he thought that the Commissioners should close the loop so that every party knows where the Commission stands. Commissioner Madden asked Commissioner Cuevas if he would be comfortable in tabling the issue, leaving the wording in the December 20th letter. Commissioner Cuevas replied that it would not be his favorite way to do it, but that he would like to hear what the Chairman had to say. Chairman Steen stated that he was waiting for a second to the motion and asked if Commissioner Cuevas chose to second the motion.

Commissioner Cuevas seconded the motion, so that deliberations could begin. Chairman Steen stated he was in favor of tabling the issue; pending some resolution, the December 20th letter—which may be updated—would

continue to stand. **As there was no further discussion, Chairman Steen called for a vote. With two ayes and one nay, the motion passed to table the adoption of the amendment to 16 Texas Administrative Code §45.110 governing inducements.**

NEXT MEETING: MONDAY, JUNE 27, 2005

Chairman Steen announced the next meeting of the Texas Alcoholic Beverage Commission scheduled for June 27, 2005.

CLOSING COMMENTS

Commissioner Madden asked to say something before adjournment. She wanted to share an exciting federally funded program that was happening in Dallas, called the Dallas Community Prosecution Program. The purpose of the program is to reduce and prevent crime in targeted neighborhoods, with a community prosecutor organizing an ACTION (All Coming Together in Our Neighborhood) team. This is a collaborative effort involving residents, TABC, the Dallas Police Department, the Dallas Fire Department, the Department of Code Compliance, and other agencies. Commissioner Madden discussed the Oak Lawn Community Prosecution Program, headed by Assistant City Attorney Laura Perkins, which has been involved in monthly bar sweeps involving TABC and other agencies. This was featured last November on a news segment. Commissioner Madden stated that this was an effective program that is making a difference in the Oak Lawn community. She stated that she believed these programs are being implemented in major cities across the state, and encouraged the Commissioners to look into this program in their areas.

Chairman Steen asked General Counsel Bright about the earlier motion made. He stated that a motion to table was made by Commissioner Madden, and Commissioner Cuevas seconded the motion. There was discussion, then the Commissioners voted, with Commissioner Cuevas voting against the motion. Chairman Steen asked if there was any problem with this; Mr. Bright stated that there was no problem.

Rick Donley with the Beer Alliance of Texas asked to speak so that he could clarify the comments he and Mr. Deaderick made with reference to the House Licensing and Administrative Procedures Committee taking up this action. He

provided information (Attachment 2) that would allow them to see and listen to the entire transcript that would let them know there were further discussions on the issue, particularly the discussion between Mr. Donley and Representative Geren.

ADJOURNMENT

Being no further business, Chairman Steen called for a motion to adjourn. Commissioner Madden moved that the Texas Alcoholic Beverage Commission meeting be adjourned. Commissioner Cuevas seconded. The motion carried, and Chairman Steen announced that the meeting was adjourned.