

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge
June 17, 2011

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-10-1638; TCEQ Docket No. 2009-0942-PST-E; In Re:
Executive Director of the Texas Commission on Environmental Quality v.
Federico C. Villarreal dba A-1 Paint & Body Shop

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Supplemental Proposal for Decision on Remand and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than June 27, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than July 7, 2011.

This matter has been designated **TCEQ Docket No. 2009-0942-PST-E; SOAH Docket No. 582-10-1638**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Travis Vickery".

Travis Vickery
Administrative Law Judge

TV/lis
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

300 West 15th Street Suite 502
Austin, Texas 78701
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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: FEDERICO C. VILLARREAL / A-1 PAINT & BODY SHOP
SOAH DOCKET NUMBER: 582-10-1638
REFERRING AGENCY CASE: 2009-0942-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE
ALJ TRAVIS VICKERY

REPRESENTATIVE / ADDRESS

PARTIES

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHARLES KVINTA, JR.
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FREDERICO C. VILLARREAL

originally issued, the attached proposed order represents complete findings of fact and conclusions of law for both PFDs.

II. PROCEDURAL HISTORY ON REMAND

On October 9, 2009, the ED filed the Executive Director's Preliminary Report and Petition (EDPRP). The ED alleged violations against Respondent for failure to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which the applicable components of the system had not been brought into timely compliance with upgrade requirements.²

Respondent filed an Answer to the EDPRP on October 28, 2009, and the matter was referred to the SOAH on December 7, 2009, for the assignment of an ALJ to conduct a hearing and issue a PFD. On December 9, 2009, the Commission issued a notice of preliminary hearing, set for January 14, 2010 at SOAH.

A SOAH ALJ conducted a preliminary hearing on January 14, 2010. The hearing was attended by Phillip Goodwin and Marshall Coover, Staff Attorneys for the ED, and the Respondent, who represented himself. At the preliminary hearing, ED Exhibits A, B, C and D were admitted for jurisdictional purposes. Jurisdiction is undisputed and is therefore dealt with in the Findings of Fact and Conclusions of Law below. Consistent with the preliminary hearing, Order No. 1, issued on January 20, 2010, set a hearing on the merits for May 6, 2010.

The ED's First Amended Report and Petition (EDFARP) was filed and sent to the Respondent on April 27, 2010.

At the request of Respondent, on May 5, 2010, the ED and Respondent filed a Joint Motion for Continuance and Stipulations to allow the ED sufficient time to perform an analysis of Respondent's ability to pay the administrative penalty. On May 6, 2010, the ALJ granted the motion for continuance and reset the hearing for August 6, 2010.

² ED Ex. A and B.

On July 16, 2010, the ED filed a Motion for Leave to File a Motion for Summary Disposition (Motion for Leave) and a Motion for Summary Disposition (MSD). Respondent did not respond to the Motion for Leave. On July 26, 2010, the ALJ granted the Motion for Leave and cancelled the hearing on the merits. Respondent did not file a response to the MSD.

On September 9, 2010, the ALJ issued a PFD on Motion for Summary Disposition, recommending that the Commission find that the violations occurred; assess an administrative penalty of \$7,875.00; and order the corrective actions recommended by the ED.

At its November 18, 2010 Agenda, the Commission considered the PFD and Order for this matter recommending payment of the full \$7,875 administrative penalty. Based on Respondent's request, the Commission remanded the matter to SOAH to make the following determinations: (1) whether Respondent is still represented by counsel, and (2) factors relating to the Respondent's ability to pay the administrative penalty.

After this matter was remanded back to SOAH to address the two issues stated above, the ED filed a series of status reports.

On February 16, 2011, the ED filed a second motion to compel the Respondent to produce financial records to conduct a review of the Respondent's ability to pay the administrative penalty. On March 4, 2011, the ALJ issued Order No. 8, granting the ED's second motion to compel and requiring the Respondent to produce documents no later than March 18, 2011.

On April 6, 2011, the ED received 48 documents from the Respondent. Based on a review of those records, the ED filed a status report notifying the ALJ that he had determined that the Respondent was entitled to a partial deferral of the administrative penalty pursuant to TEX. WATER CODE § 7.034, and requesting that the record be closed.

On April 27, 2011, the ALJ issued Order No. 9, requiring the Respondent to file a response to the motion to close the evidentiary record or request a hearing no later than May 16,

2011. Order No. 9 also stated that, in the event the Respondent failed to file a response or request for hearing, the ALJ would issue findings regarding Mr. Kvinta's representation of Respondent and deem Respondent in agreement with the ED's proposed partial deferral of the administrative penalty. Order No. 9 also requested that the ED file proposed findings of fact and conclusions of law. Respondent did not file a response to the motion or request a hearing by May 16, 2011.³ The record closed that day and the ED timely filed proposed findings of fact and conclusions of law.

III. PROPOSED FINDINGS

In response to Issue No. 1, whether Respondent is still represented by counsel, the ALJ finds that he is not. On December 7, 2010, the ED filed a Status Report, which attached a December 2, 2010 email from Mr. Kvinta to the ED stating:

I authorize you and any of your staff to review the papers Mr. Villarreal brought to his hearing. I will continue to represent Mr. Villarreal for the limited purpose of being a contact person for the commission and for seeing that any documentation needed from Mr. Villarreal be provided to Judge Vickery and the commission. If Judge Vickery or the commission requires me to attend a hearing in Austin, I will be there. Hopefully this matter can be resolved without the necessity of a hearing.⁴

The ALJ finds that Mr. Kvinta does not represent Mr. Villarreal in the normal capacity as his lawyer, but only for the limited capacity as a contact person and to assist in providing documents to the ED, the ALJ, and the Commission.

As regards Issue No. 2, factors relating to the Respondent's ability to pay the administrative penalty, the ALJ finds that he is entitled to a partial deferral of the administrative penalty. Donna Chaffin of the Commission's Financial Administration Division reviewed Respondent's ability to pay the proposed administrative penalty. Pursuant to the Commission's

³ Note that Order No. 9 incorrectly indicated that the ALJ would find that Mr. Kvinta represented Respondent.

⁴ See ED's Status Report filed on December 7, 2011, at Attachment 1, dated December 2, 2010.

Financial Review Policy, the minimum amount payable by an operating business or employed individual is \$3,600. Ms. Chaffin determined that Respondent is unable to pay more than \$3,600. Ms. Chaffin recommended that Respondent be ordered to pay an administrative penalty of \$3,600, payable in monthly payments of \$100 each, with the remaining \$4,275 to be deferred pending compliance with the corrective actions, in accordance with the Commission's Financial Review Policy.

Therefore, the ALJ recommends that Respondent be ordered to pay \$3,600 in monthly payments of \$100 each, with the remaining \$4,275 to be deferred pending compliance with the corrective actions, in accordance with the Commission's Financial Review Policy.

IV. CONCLUSION

The ALJ recommends that the Commission find that the Respondent is represented by attorney Charles J. Kvinta, Jr. in a limited capacity as a contact person and to assist in providing documents to the ED, the ALJ, and the Commission. He also recommends that the Commission find that the violations occurred; assess an administrative penalty of \$7,875.00, with a deferral of \$4,275 as recommended by the ED; and order the corrective actions recommended by the ED.

SIGNED June 17, 2011.



TRAVIS VICKERY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER ASSESSING ADMINISTRATIVE PENALTIES
AGAINST AND ORDERING CORRECTIVE
ACTION BY FEDERICO C. VILLAREAL
D/B/A A-1 PAINT & BODY SHOP; TCEQ
DOCKET NO. 2009-0942-PST-E; SOAH
DOCKET NO. 582-10-1638**

On _____, 2010, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Report and Petition (EDFARP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Federico C. Villareal d/b/a A-1 Paint & Body Shop a/k/a A-1 Paint & Body Works (Respondent). A Supplemental Proposal for Decision on Remand (PFD) was presented by Travis Vickery, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Respondent owns real property with two inactive underground storage tanks (USTs) located at 521 West Main Street, Yorktown, DeWitt County, Texas (the Facility).
2. Respondent's USTs are not exempt or excluded from regulation and contain a regulated petroleum substance as defined in the rules of the Commission.
3. On March 31, 2009, a TCEQ Corpus Christi Regional Office investigator conducted a

compliance investigation at the Facility. The investigator documented that Respondent had failed to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system had not been brought into timely compliance with the upgrade requirements.

4. Respondent was notified of the violation on March 31, 2009, when he signed the TCEQ Exit Interview Form.
5. On May 29, 2009, a Notice of Enforcement was mailed to the Respondent, which he received on June 3, 2009.
6. On October 9, 2009, the Executive Director filed his Preliminary Report and Petition (EDPRP) in accordance with TEX. WATER CODE ANN. § 7.054. The EDPRP alleged that Respondent violated 30 TEX. ADMIN. CODE § 334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST for which any applicable component of the system had not been brought into timely compliance with the upgrade requirements.
7. On October 28, 2009, Respondent filed Respondent's Answer to the EDPRP and requested a hearing.
8. On December 7, 2009, this case was referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing.
9. On December 9, 2009, the TCEQ Chief Clerk mailed notice to Respondent of the preliminary hearing scheduled for January 14, 2010.
10. The notice of hearing:
 - Indicated the time, date, place, and nature of the hearing;
 - Stated the legal authority and jurisdiction for the hearing;

- Indicated the statutes and rules the Executive Director alleged Respondent violated.
 - Advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice and EDPRP being deemed as true and the relief sought in the notice possibly being granted by default; and
 - Included a copy of the Executive Director's penalty calculation worksheet, which shows how the penalty was calculated for the alleged violations.
11. On January 14, 2010, the Executive Director and Respondent appeared at a preliminary hearing and agreed to a procedural schedule leading to an evidentiary hearing on May 6, 2010.
 12. The Executive Director's First Amended Report and Petition (EDFARP) was filed and sent to the Respondent on April 27, 2010. The allegations in the EDFARP are substantially similar to those found in the EDPRP.
 13. In the EDPRP and the EDFARP, the Executive Director recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$7,875.00 against Respondent and that the Commission order Respondent to take certain corrective actions.
 14. On April 30, 2010, Respondent requested that the Executive Director perform an analysis of Respondent's ability to pay the administrative penalty.
 15. At the request of the Respondent, on May 5, 2010, the parties filed a Joint Motion for Continuance for the purpose of allowing the Executive Director sufficient time to perform an analysis of the Respondent's ability to pay the administrative penalty. The Motion for Continuance also stated that Respondent "has stipulated in writing to all matters in this case, including the calculation of the administrative penalty assessed."

16. On May 6, 2010, a SOAH ALJ granted the Motion for Continuance and set a new date for the hearing on the merits of August 6, 2010.
17. On May 3, 2010, the Executive Director sent a facsimile to counsel for Respondent advising him of deficiencies in the financial documents submitted by Respondent that required correction before an analysis of Respondent's ability to pay the administrative penalty could be performed.
18. On June 16, 2010, the Executive Director sent a letter to counsel for Respondent requesting that he provide supplemental information to the Executive Director no later than June 25, 2010, to allow the Executive Director sufficient time to perform the requested analysis prior to the hearing on the merits. Respondent failed to respond to the Executive Director's requests for additional information. The Executive Director was unable to perform the requested analysis of Respondent's ability to pay the administrative penalty, which was the basis of the request for a continuance in this matter.
19. On July 16, 2010, the Executive Director filed a Motion for Leave to File a Motion for Summary Disposition (Motion for Leave) and a Motion for Summary Disposition. Respondent did not respond to the Motion for Leave.
20. On July 26, 2010, the ALJ issued Order No. 6 granting the Motion for Leave and cancelled the hearing on the merits, stating that pursuant to 30 TEX. ADMIN. CODE § 80.137(b), that the Respondent would have until August 6, 2010, to file a response to the Motion for Summary Disposition.
21. Respondent did not file a response to the Motion for Summary Disposition.
22. The Respondent stipulated to the violation, penalty calculation, and corrective action recommended in the EDFARP.

23. The administrative penalty of \$7,875.00 is reasonable and necessary and was calculated according to the TCEQ Penalty Policy.
24. The corrective action set forth in the EDFARP, to permanently remove the UST system from service, is necessary and appropriate given the violation and the requirements of 30 TEX. ADMIN. CODE § 334.47(a)(2).
25. The Proposal for Decision was presented to the Commission at its November 18, 2010 Agenda meeting. The Commission ordered that the matter be referred back to SOAH to determine whether Respondent continued to be represented by counsel and to evaluate Respondent's financial ability to pay the administrative penalty assessed.
26. On December 7, 2010, the Executive Director filed a Status Report, which attached a December 2, 2010 email from attorney Charles J. Kvinta, Jr., to the Executive Director stating:

I authorize you and any of your staff to review the papers Mr. Villarreal brought to his hearing. I will continue to represent Mr. Villarreal for the limited purpose of being a contact person for the commission and for seeing that any documentation needed from Mr. Villarreal be provided to Judge Vickery and the commission. If Judge Vickery or the commission requires me to attend a hearing in Austin, I will be there. Hopefully this matter can be resolved without the necessity of a hearing.

27. On February 16, 2011, the Executive Director filed a second motion to compel the Respondent to produce financial records to conduct a review of the Respondent's ability to pay the administrative penalty. On March 4, 2011, the ALJ issued Order No. 8, granting the Executive Director's second motion to compel and requiring the Respondent to produce documents no later than March 18, 2011.

28. On April 6, 2011, the Executive Director received 48 documents from the Respondent. Based on a review of those records, the Executive Director filed a Status Report notifying the ALJ that he had determined that the Respondent was entitled to a partial deferral of the administrative penalty pursuant to TEX. WATER CODE § 7.034, and requesting that the record be closed.
29. On April 27, 2011, the ALJ issued Order No. 9, requiring the Respondent to file a response to the motion to close the evidentiary record or request a hearing no later than May 16, 2011. Order No. 9 also stated that in the event the Respondent failed to file a response or request for hearing, the ALJ would issue findings regarding whether Respondent was represented by counsel and deem Respondent in agreement with the Executive Director's proposed partial deferral of the administrative penalty. Order No. 9 also requested that the Executive Director file proposed findings of fact and conclusions of law.
30. Respondent did not file a response to the motion or request a hearing by May 16, 2011. The record closed on May 16, 2011, and the Executive Director timely filed proposed findings of fact and conclusions of law.
31. Under the Commission's Financial Review Policy, the penalty payable by an operating business or employed individual may be reduced to \$3,600.00, with the remaining amount of the administrative penalty deferred contingent upon compliance with the corrective actions, including compliance with the timely payment of the administrative penalty.
32. The Financial Assurance Section of the Commission's Financial Administration Division reviewed the financial documentation submitted by Respondent and determined that

Respondent is unable to pay part of the administrative penalty and recommends a deferral of \$4,275, contingent upon Respondent's timely and satisfactory compliance with all the terms of this Order.

33. Respondent is not represented by attorney Charles J. Kvinta, Jr. in the normal capacity as an attorney. Mr. Kvinta represents Mr. Villarreal in the limited capacity as a contact person and to assist in providing documents to the Executive Director, the ALJ, and the Commission.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health and Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000.00 per violation, per day for the violation alleged in this proceeding.
3. In addition to imposing an administrative penalty, the Commission may order the violator to take corrective action, as provided by TEX. WATER CODE ANN. § 7.073.
4. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations and the proposed penalty and corrective actions.
5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.27; and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalty and corrective actions.

6. SOAH has jurisdiction over the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law. TEX. GOV'T CODE ANN. ch. 2003.
7. Based on the Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE § 334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST for which the applicable components of the system had not been brought into timely compliance with the upgrade requirements.
8. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
 - Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for the alleged violation and a total administrative penalty of \$7,875.00 is justified and should be assessed against Respondent.

11. Because of Respondent's inability to pay, all but \$3,600 of the administrative penalty should be deferred pending compliance with the terms of this Order. Respondent should be allowed to pay the \$3,600 administrative penalty in \$100 monthly increments over a period of 36 months, as provided in the Commission's Financial Review Policy.
12. Based on the above Findings of Fact, Respondent should be required to take the corrective action that the Executive Director recommends.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Federico Villareal is assessed an administrative penalty in the amount of \$7,875.00 for violations of 30 TEX. ADMIN. CODE § 334.47(a)(2), with \$4,275 deferred contingent upon Respondent's timely and satisfactory compliance with all the terms of this Order. The remaining penalty of \$3,600 may be paid in \$100 increments over a period of 36 months. The first monthly payment shall be made within 30 days after the effective date of this Order. The payment of this administrative penalty and Federico Villareal's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Federico Villareal; Docket No. 2009-0942-PST-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. Within 30 days after the effective date of this Order, Federico Villareal shall permanently remove the UST system from service, in accordance with 30 TEX. ADMIN. CODE § 334.55.
3. Within 45 days after the effective date of this Order, Federico Villareal shall submit written certification and detailed supporting documentation, including photographs and a properly completed UST registration form to the TCEQ indicating that the UST has been removed, in accordance with 30 TEX. ADMIN. CODE § 334.7, to:

Registration and Reporting Section
Permitting & Remediation Support Division, MC 138
Texas Commission on Environmental Quality
P.O. Box 13087
Austin TX 78711-3087

4. Within 45 days after the effective date of this Order, Federico Villareal shall submit written certifications as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions Nos. 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.”

Federico Villareal shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

with a copy to:

Brad Gnezer, Waste Section Manager
Texas Commission on Environmental Quality
Corpus Christi Regional Office
6300 Ocean Drive, Suite 1200
Corpus Christi, Texas 78412-5503

5. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
6. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
7. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
8. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.

9. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Bryan W. Shaw, Chairman
For the Commission