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Judicial Deference to Agency Interpretations of Statutes

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I. INTRODUCTION[1]

The term "*Chevron* deference" has become so ubiquitous in the legal lexicon that the general practitioner would probably assume that every state uses the federal approach in determining whether to defer to agency interpretations of statutes. However, most states have not adopted *Chevron* in all particulars and neither has Texas.

Texas has, however, followed the United States Supreme Court's example in *Chevron* by attempting to regularize what had previously been a rather haphazard, almost ad hoc approach to determine whether courts should accord deference to agencies, and if so, how much. In 2011, nearly three decades after the United States Supreme Court handed down *Chevron,* the Texas Supreme Court articulated its own agency-deference standard in *Railroad Commission of Texas v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011).

As Dudley McCalla, one of the legends of Texas administrative law, has said: "Few words have engendered as much controversy in administrative law as" the word "deference." Dudley D. McCalla, *Deference (and Related Issues)*, 14 TEX. TECH ADMIN. L.J. 363, 364 (2013). Neither federal nor state standards will end this controversy, as neither yield definitive answers in every case as to whether deference should be given. But both the *Texas Citizens* and *Chevron* tests provide a useful framework for analysis, and any lawyer making or resisting a deference argument should start with one of these cases, depending on the forum.

II. TEXAS DEFERENCE TO AGENCY INTERPRETATION

In *Texas Citizens*, the Texas Supreme Court attempted to articulate the proper level of deference that a court owes to an agency's interpretation of a statutory provision. After reviewing the apparently disparate standards that Texas courts had previously employed in addressing this question, the Court attempted to synthesize these past holdings into one unified test. Importantly, though, the Court did not feel called upon to overrule or disavow any prior decisions, perhaps suggesting that past distinctions had been a function of loose language rather than deliberate distinction. Thus, favorable prior decisions can be argued as authority in current agency-deference cases, so long as they are filtered through the *Texas Citizens* paradigm. Accordingly, this section provides an overview of the specific agency-deference test adopted by the Supreme Court in *Texas Citizens*, then looks at both the pre- and post-*Texas Citizens* cases to provide additional context for deciding what is clear—and what is open to argument—about the scope of agency deference in Texas.

A. *Texas Citizens'* Standard for Judicial Deference to Agency Interpretation of Statutes

Texas Citizens involved a challenge to a permit issued by the Texas Railroad Commission for a waste-injection well based on the Commission's finding that the well was "in the public interest" as required by statute. 336 S.W.3d 621–23. At issue was whether the Commission's narrow interpretation of "public interest," which did not include any consideration of increased vehicular traffic, deserved deference. *Id.* at 623–24. Acknowledging that its prior decisions

[1] Special thanks to Shay Longtain, University of Michigan Law School, J.D. candidate 2019, for his assistance with this paper.

"stated this principle in differing ways," the Texas Supreme Court articulated what purported to be a definitive standard on deference to agency interpretations: "an agency's interpretation of a statute it is charged with enforcing is entitled to 'serious consideration,' so long as the construction is reasonable and does not conflict with the statute's language." *Id.* at 624. Thus, in such situations, Texas courts "should grant an administrative agency's interpretation of a statute it is charged with enforcing some deference." *Id.* To accord "serious consideration," Texas courts "will generally uphold an agency's interpretation of a statute it is charged by the Legislature with enforcing, so long as the construction is reasonable and does not contradict the plain language of the statute." *Id.* at 625 (internal quotations omitted) (quoting *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008)).

Flexibility is the watchword of the *Texas Citizens* test. The Court prefaced the modifier "generally" to a standard that already applied only to a "reasonable" agency construction of statutory language that the reviewing court had already determined was not "plain." Beyond that, the Court preserved the previously-articulated limitation that deference is given only to "formal opinions adopted after formal proceedings." *Id.* at 625 (quoting *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747–48 (Tex. 2006)). The Court summarized these additional requirements, not part of its formal test but equally important, in these words:

> It is true that courts give some deference to an agency regulation containing a *reasonable* interpretation of an ambiguous statute. But there are several qualifiers in that statement. First, it applies to formal opinions adopted after formal proceedings, not isolated comments during a hearing or opinions [in a court brief]. Second, the language at issue *must be ambiguous*; an agency's opinion cannot change plain language. Third, the agency's construction must be reasonable; alternative *unreasonable* constructions do not make a policy ambiguous.

Id. (alteration in original) (first two emphases added) (quoting *Fiess*, 202 S.W.3d at 747–48).

The careful reader will note that the three "qualifiers" really add only one new requirement to the *Texas Citizens* three-part test—the "formal opinion adopted after formal proceedings" requirement. But, in the words of a late-night TV sales pitch, "wait—there's more!!"

Beyond these four thoroughly-discussed requirements, the Court raised and considered two additional matters, which might perhaps be called "emphasizing factors." Although not susceptible to a simple "yes" or "no" answer, these factors are to be considered along a continuum from less deference to more, which in a close case might tilt the balance one way or the other.

First, the Court noted that the Commission's interpretation of the statute was "long-standing" and remarked that "an agency's long-standing construction of a statute, especially in light of subsequent legislative amendments, is particularly worthy of [a court's] deference." *Id.* at 632. While this by no means is an absolute rule, if the converse is generally true—that recent changes in long-standing agency interpretation are to be viewed skeptically, even if the new interpretation otherwise meets the *Texas Citizens* test—then this might represent a real change in Texas law. The Court has, however, previously found novel interpretations to be persuasive. *See*

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