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June 24, 2021

Mr. John R. Turner, P.E.
827 Spring Creek Drive
Grapevine, TX 76051

Re: Formal Response to Request for Policy Advisory Request Regarding Who is Eligible to Complete a Predominant Use Study Regarding the Use of Natural Gas or Electricity by a Business Entity; Policy Advisory Request No. 56

Dear Mr. Turner:

The Texas Board of Professional Engineers and Land Surveyors (Board) met in public session on May 27, 2021 and approved this response to your requests, dated October 4, 2020.

Request:
You seek guidance on the following issues:

1. Are non-licensed engineering graduates from accredited colleges able to legally perform Predominant Use Studies for their employers as indicated in the Texas Comptroller of Public Accounts Rule §3.295?

2. Are non-licensed engineering graduates from accredited colleges precluded by the Texas Engineering Practice Act from performing Predominant Use Studies for firms they are not employed by?

3. Is an engineer performing, or offering to perform, a Predominant Use Study for a company the engineer is not employed by performing, or offering to perform, engineering services for the public?

4. Can a company offer to perform Predominant Use Studies if it is not a registered engineering firm and does not employ at least one-full time engineer?

5. Is it precluded by the Texas Engineering Practice Act, or at least misleading, for an engineer to stamp a Predominant Use Study that says it was performed by a company that is not a registered engineering firm, even if the engineer's registered engineering firm actually performed the work?

Background:
The Policy Advisory Opinion process allows the Board to issue interpretations of the Texas Engineering Practice Act (the Act) [Texas Occupations Code, Chapter 1001] and Board Rules to address specific questions. The committee reviewed this request and determined that it can be answered by reference to the existing language of a statute or Board rule and does not need to go through the full Policy Advisory process.

For background, predominant use studies are discussed specifically in 34 Texas Administrative Code (Tex. Admin. Code) §3.295, relating to Natural Gas and Electricity. 34 Tex. Admin. Code §3.295 is contained in Title 34, relating to Public Finance, Part 1, relating to the Comptroller of Public Accounts, Chapter 3, relating to Tax Administration, Subchapter O, relating to State and Local Sales and Use Taxes of the Tex. Admin. Code.

Predominant use is not directly defined in the Comptroller's rules, but is discussed specifically in 34 Tex. Admin. Code §3.295(f) and (g). Predominant use studies are conducted to determine the taxability of natural gas or electricity used by a business entity and the potential eligibility of sales tax exemptions. Please note that predominant use studies fall under the jurisdiction of the Office of the Comptroller of Public Accounts (Comptroller). As such, the mechanisms of how a predominant use study is conducted is outside of the Board's jurisdiction. Questions on the actual process of conducting a predominant use study should be directed to the Office of the Comptroller.

However, the referenced rules do stipulate who can conduct a predominant use study. Per 34 Tex. Admin. Code §3.295(g)(1)(C), the kilowatt rating or BTU rating, duty factor, and electrical or natural gas computations of a predominant use study must be certified by a registered engineer or a person with an engineering degree from an accredited engineering college. Further, the owner of the busines and the engineer must certify the study per 34 Tex. Admin. Code §3.295(g)(1)(D).

While 34 Texas Administrative Code (Tex. Admin. Code) §3.295 allows predominant use studies to be completed by a registered engineer or a person with an engineering degree from an accredited engineering college (termed a "graduate engineer" under Section §1001.406 of the Act), the Act limits who is allowed to offer engineering services to the public in Texas.

Specifically, §1001.003 of the Act defines the practice of engineering as the performance or an offer to perform any public or private service or creative work which requires engineering education, training, and experience in applying special knowledge or judgement of the mathematical, physical, or engineering sciences to the service or creative work. Functions that constitute the practice of engineering in Texas, including consultation, evaluation, or performing an engineering survey or study. The completion of predominant use studies requires engineering education, training, and experience; and, if done for third-party clients, constitute the practice of engineering. As such, the completion of a predominant use study would be considered the practice of engineering.

Further §§1001.004(c)(2)(A) and 1001.301(a) require that only a person licensed as a professional engineer may engage in the practice of engineering in Texas. However, Subchapter B of the Act does allow for exemptions from this requirement, specifically if the person is not performing engineering services for the public. For example, the exemption covers the activities of an employee of a private corporation or privately owned public utility when the employee is conducting engineering services only for his or her employer.

However, based on discussions with staff at the Comptroller's office, it is our understanding that the actual knowledge and skills needed to complete a predominant use study would not meet the definition of the "practice of engineering" as defined in the Act. According to the Comptroller's Office, a predominant use study involves gathering readily available data associated with the equipment, such as the BTU rating and duty factor. Further, this data is then only used in simple mathematical equations that could be completed by anyone. Special knowledge of mathematical, physical, or engineering sciences is not needed to complete the study.

Response:
Regarding your first two questions, while a graduate engineer or professional engineer are required to complete a predominant use study under the relevant rules promulgated by the Comptroller, the Board does not consider the completion of said studies to meet the definition of the practice of engineering. As such, a licensed professional engineer is not required to complete a predominant use study to be compliant with Board rules and the Board would not require these studies to be signed and sealed by a licensed professional engineer. Further, as the Board does not consider these studies

to be the practice of engineering, and thus not subject to the Act, the firm registration requirements would also not be applicable.

Stakeholder Feedback:
To solicit feedback from stakeholders and interested parties, the Board published a draft version of this response in March 2021 in both the Texas Register and on the Board's website for a 30-day comment period. One comment was received supporting the proposed response.

Conclusion:
No new Policy Advisory Opinion will be developed for this request.

Thank you for your support of the policy advisory opinion process. If you have any questions, please contact Mr. Michael Sims, P.E., Director of Compliance & Enforcement, at (512) 440-7723.

Sincerely,

Lance Kinney, Ph.D., P.E.
Executive Director

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