

**COMMENTS for MODIFIED APPEALS PROCEEDINGS TO THE COMMISSION REGULATIONS, CHAPTER 13, Section 100450.100** Comment Period: May 14, 2015 – June 15, 2015

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General Comment	Inland Counties Emergency Medical Agency (ICEMA)	ICEMA agrees with the May 14, 2015, revisions to the proposed appeal regulation, and supports adoption of the regulation in its present form.	Comment acknowledged.
General Comment	El Dorado County EMS Agency	Objection to Rulemaking Process: Allowing the opposing party on an appeal to unilaterally adopt appeal procedures for the hearing body is a denial of due process.	Comment acknowledged.
General Comment	El Dorado County EMS Agency	The appeal regulations must be proposed and adopted by the Commission, not the Authority.	Comment acknowledged. No change made. Pursuant to Health & Safety Code, Section 1797.107, the EMS Authority has been given the statutory responsibility to promulgate regulations. The Commission on EMS has the statutory responsibility to approve rules and regulations created by the EMS Authority.
100450.100	El Dorado County EMS Agency	The proposed regulations do not meet the APA clarity standard (GC § 11349.1) See comments below.	Comment acknowledged.
100450.100 (a), (f)	El Dorado County EMS Agency	The internal ambiguity has not been resolved. The Authority has created an inherent conflict by stating that the appeal will be conducted in accordance with the APA procedures without exception and then changed the procedures in a later provision. Proposed regulation 100450.100(a) states that any appeal shall be conducted in accordance with the APA, GC § 11500 et seq. and associated regulations in Title 1 of the	Comment acknowledged.

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		CCRs; however this conflicts with Proposed regulation 100450(f) which changes the parameters of GC § 11517 relating to allowed Commission action on the proposed decision submitted by the ALJ.	
100450.100 (c) Page 1 Lines 17-22	County of Kern	<p>The County renews its request that subdivision (c) be modified to provide: “The administrative law judge, in making a proposed decision to the Commission <u>shall make and articulate findings of fact and conclusions of law, and either grant the appeal, approving the local EMS plan as submitted to the Authority, or deny the appeal, disapproving the local EMS plan as submitted to the Authority, consistent with California Health and Safety Code section 10197.105 (d).</u>”</p> <p>EMSA has not proposed any regulations or guidelines dictating the format of the administrative law judge’s decision. The judge must make a factual and legal determination under the statute that “the plan does not effectively meet the needs of the persons and is not consistent with coordinating activities in the geographical area served, or that the plan is not concordant and consistent with applicable guidelines or regulations, or both the guidelines and regulations, established by the authority.” H&amp; S § 1797.105(b). A written decision including findings of fact and conclusions of law would</p>	<p>Comment acknowledged. No change to language necessary. OAH provides a written decision with findings of fact and law in all matters.</p>

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		<p>assist the Commission in making the final determination and provide clarity to EMSA and the local EMS agency regarding the areas of any plan that are inadequate.</p> <p>Therefore, the County proposes the following modification to subdivision (c) to specifically instruct the ALJ and provide regulatory clarity:</p> <p>(c) be modified to provide: “The administrative law judge, in make a proposed decision to the Commission <u>shall make and articulate findings of fact and conclusions of law, and either grant the appeal, approving the local EMS plan as submitted to the Authority, or deny the appeal, disapproving the local EMS plan as submitted to the Authority, consistent with California Health and Safety Code section 10197.105 (d).</u>”</p>	
<p>100450.100 (d) Page 1 Lines 23-25</p>	<p>County of Kern</p>	<p>The County renews its request that subdivision (d) be modified to provide: “Upon receipt of the Proposed Decision and Order from the Office of Administrative Hearings, the Commission shall calendar a discussion and vote of the proposed decision at the next regularly scheduled Commission meeting <u>not less than 30 days from receipt of the Proposed Decision Order.</u>” See comments in attached letter.</p>	<p>Comment acknowledged. No change to proposed language. The commission on EMS has regularly scheduled meetings approximately every 90 days. In order to be considered as an agenda item pursuant to the Bagley-Keene open meetings act, a proposed decision must be received at least 10 days prior to a regularly scheduled meeting. If a proposed decision is received within 10 days prior to a regularly</p>

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		<p>Subdivision (d) provides that the Commission shall calendar a discussion and vote on the proposed decision at the next regularly scheduled meeting after receipt of the proposed decision and order. In the event the next regularly scheduled meeting is only a short time after the Commission receives the proposed decision, there will be insufficient time for the Commission and local EMS agency to consider the proposed decision fully. It is neither prudent or appropriate to rely on the vagaries of agenda publication as a calendaring standard for Commission rulings related to appeals</p> <p>Therefore, the County proposes again the following modification to subdivision (d):</p> <p>(d) Upon receipt of the Proposed Decision and Order from the Office of Administrative Hearings, the Commission shall calendar a discussion and vote of the proposed decision at the next regularly scheduled Commission meeting <u>not less than 30 days from receipt of the Proposed Decision Order.</u></p> <p>County has read and considered EMSA's comments but without clarity in the actual appeals process rules calendaring of the discussion process is open to discretion, abuse and or</p>	<p>scheduled meeting, it will be calendared as an agenda item at the next meeting. This proposed regulatory framework will allow all decisions to be heard within the 100 day time limit imposed by the APA for adoption of proposed decisions. Commissioners will therefore have a minimum of 10 and a maximum of 100 days to review a proposed decision.</p>

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		unnecessary delay.	
100450.100 (d)	El Dorado County EMS Agency	It is a denial of due process if the LEMSAs are only given 10 days notice of the hearing before the Commission. Proposed regulation 100450.100(d) states that "upon receipt of the Proposed Decision and Order from the Office of Administrative Hearings, the Commission shall calendar a discussion and vote regarding the proposed decision at the next regularly scheduled Commission meeting." The Authority has indicated that under the current provision, the Commission will have a minimum of 10 days and a maximum of 100 days to review a proposed decision. This does not take into account procedural due process for the LEMSAs. Pursuant to Gov. Code 11517, 30 days after receipt of the proposed decision, the Commission is required to file the	Comment acknowledged.

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		<p>proposed decision on each party and its attorney. This also does not take into account the time needed to prepare a transcript of the administrative hearing, if necessary. The LEMSAs are entitled to sufficient time to read the proposed decision and to prepare oral or written arguments for the Commission hearing on the proposed decision. Giving the LEMSAs' 10 days notice of a hearing that may be conducted in another part of the state from where the LEMSA is located, without regard to the calendars of the necessary parties, without regard to the cost to the LEMSAs and without allowing the LEMSAs sufficient time to prepare oral and written arguments, if necessary, is a denial of due process. Commission meetings are held at locations throughout the state (i.e. San Diego, Sacramento, San Francisco, and Los Angeles). Special meetings may be required.</p> <p>Additionally, the proposed appeal regulations, as written, are a denial of due process in that the decision to "not adopt" the proposed ALJ decision does not provide for due process during the Commission's reconsideration of the appeal as required by GC 11517.</p>	
100450.100 (f)	El Dorado County EMS Agency	The ambiguity has not been resolved. Proposed regulations 100450.100(a) states that any appeal shall be	<a href="#">Comment acknowledged.</a>

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		<p>conducted in accordance with the APA, GC § 11500 et seq. and associated regulations in Title 1 of the CCRs; however, this conflicts with Proposed regulation 100450.100(f) which changes the parameters of GC § 11517 relating to allowed Commission action on the proposed decision submitted by the ALJ.</p> <p>Proposed regulation 100450.100(f) states that the Commission's vote on the proposed decision is limited to either 1) adopting the ALJ's proposed decision, 2) "not adopting" the ALJ's proposed decision, or 3) returning the proposed decision to the OAH for rehearing. This deviates from GC § 11517 decision options. The Authority responded that all of the decision parameters of GC 11517 relating to actions that may be taken on a proposed decision are "not available" to the Commission due to constraints contained in HSC 1797.5.</p> <p>Solely for the sake of argument, if the Commission is actually constrained by H&amp;S 1797.105 then having the ALJ hear the appeal alone is not an option for the Commission and the Commission is required to hear the appeal itself so that it directly makes the decision to either approve or reject the decision of the Authority. Any decision by the Commission requires that due process be afforded to the</p>	

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		<p>parties which includes the opportunity to be heard and that the Commission issue written findings of fact and conclusions of law. (GC 11425.50 and GC 11517)</p> <p>LEMSA asked whether the Commission was required to adopt the ALJ decision without change? (i.e. no technical or minor changes or clarifications that do not affect the factual or legal basis of the proposed decision.) The Authority responded that no changes or modifications are allowed. If that is true, then minor changes or clarifications that do not affect the factual or legal basis of the proposed decision will require the Commission to refer the proposed decision back to the ALJ for revision, return of the revised proposed decision to the Commission, service on the LEMSA and its attorney, another hearing before the Commission and then a final decision. This is a complete waste of time and money.</p> <p>LEMSA asked whether a Commission vote to "not adopt" the ALJ's proposed decision would result in the opposite decision by default. The Authority responded that a vote to "not adopt" a proposed decision is the adoption of the opposite conclusion. In order for the Commission to "not adopt" the ALJ decision, the Commission will have to</p>	

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		<p>consider the record and make findings and legal conclusions of its own.</p> <p>After the ALJ's issues the proposed decision there is a second level of decision making in which the Commission decides whether to adopt the proposed decision, the Commission is by default also making a decision to decide the appeal itself and such reconsideration requires the due process procedures set forth in Government Code 11517(c)(2)(E). The Commission cannot merely "not adopt" (reject) the proposed decision without reconsidering/deciding the appeal itself. Merely rejecting the ALJ decision without more, results in there being no disposition of the appeal and no decision for judicial review. If the Commission elects to "not adopt" (reject) the proposed ALJ decision then the Commission must review the record, accept oral or written argument and issue its own written decision setting forth the factual and legal basis for the decision. Without a written decision setting forth the factual and legal basis for the decision, judicial review is impossible and the LEMSA's would be denied due process.</p> <p>This adoption by default is a denial of due process to the LEMSA if the ALJ rejects the EMSA disapproval and the Commission votes to "not adopt" the decision of the ALJ (disapprove the</p>	

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		<p>EMS Plan). Adoption by default is a denial of due process to the Authority would also need a written decision from the Commission explaining the factual and legal basis for rejecting a decision for future guidance and reference.</p> <p>If the Commission is not required to follow due process procedural safeguards as set forth in the APA in making a contrary decision then the proposed Commission appeal procedures are unconstitutional. As stated in <i>Yanke v State Department of Public Health</i> 162 Cal.App.2d 600, 602-603, "The board may adopt the hearing officer's proposed decision (Gov Code § 11517, subd, (b)) and may do so without reading the transcript of the hearing. (<i>Hohreiter v. Garrison</i>, 81 Ca.App.2d 384, 396, et seq. [184 P.2d 323].) However, if the proposed decision is not adopted, the board, before it can render a contrary decision, must read the record and afford the parties the opportunity for argument. (Gov. Code § 11517, subd, (c)), <i>Hohreiter v. Garrison</i>, supra, p.396)" Under the proposed Commission appeal regulations, there is only the option to "not adopt" the proposed ALJ decision without any Commission review of the record, no opportunity for argument from the parties and no requirement for a written decision setting forth the</p>	

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		factual and legal basis for the contrary decision. This is a denial of due process.	
100450.100 (h) Page 2 Line 37	County of Kern	<p>The County renews its request that subdivision (h) be modified to provide: "The decision of the Commission <u>shall be deemed an exhaustion of administrative remedies.</u>" See comments in attached letter.</p> <p>The County objects to the deletion of subdivision (h) of Section 100450. The County requests that the subdivision read instead:</p> <p>(h) The decision of the Commission <u>shall be deemed an exhaustion of administrative remedies.</u></p>	<p>Comment acknowledged. Proposed current language is consistent with HSC 1797.105.</p>
100450.100 (h)	El Dorado County EMS Agency	<p>A final decision by the Commission should be deemed an exhausting of administrative remedies. The following change is proposed:</p> <p>(h) The final decision of the Commission shall be deemed an exhaustion of administrative remedies.</p>	<p>Comment acknowledged. Proposed current language is consistent with HSC 1797.105.</p>
100450.100 (i)	El Dorado County EMS Agency	<p>Proposed regulation 100450.100(h) states that "Costs of the administrative hearing shall be borne equally by the parties. Costs shall not include attorney's fees."</p> <p>What is specifically included in "costs of administrative hearing"? The cost of the services of the Office of</p>	<p>Comment acknowledged.</p>

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		<p>Administrative Hearings (OAH) is borne by the state agency to which the services are provided. (Government Code §11370.4) Under common law, the services of a judge are publicly funded.</p> <p>The amended regulation penalizes a LEMSA for exercising its right to due process (appeal). HSC 1797.105 gives the LEMSAs the statutory right to appeal a decision of the Authority to the Commission. There is nothing in the appeal statute that requires the LEMSA to pay for the costs of the administrative hearing.</p> <p>The amended regulation penalizes a LEMSA for exercising its right to due process (appeal). HSC 1797.105 gives the LEMSAs the statutory right to appeal a decision of the Authority to the Commission. There is nothing in the appeal statute that requires the LEMSA to pay the costs of the administrative hearing. Under the proposed regulations, a LEMSA can only appeal a decision of the Authority if the LEMSA is willing to bear half the costs of the "administrative hearing" whether the LEMSA wins or loses (in whole or in part) and regardless of the merits of the appeal. The Commission has a statutory duty to hear appeals of an Authority denial of a LEMSA EMS Plan. This regulation imposes a monetary penalty on the actual</p>	

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		<p>exercise of the right to a hearing. This regulation has a chilling effect on the LEMSA's statutory right to appeal and has no real or substantial relation to a proper legislative goal.</p> <p>Cost recovery in administrative proceedings is frequently related to professional licensing or regulatory enforcement wherein an agency only recovers costs for investigation and enforcement costs up to the start of the hearing. This is not a regulatory or enforcement situation, it is a determination by the Authority as to whether or not an EMS Plan conforms to the requirements of the EMS Act. No one loses a license and no one gets shut down. As noted by the Authority, if a plan is disapproved by the Authority, the LEMSA allowed to operate under the last approved plan.</p> <p>EI Dorado County EMS Agency objects to the Authority's attempt to include cost recovery in a regulation because it appears punitive in nature and an attempt to discourage the LEMSAs from exercising their statutory right to an appeal. This section should be deleted in its entirety.</p>	