CASE NO. D-9377
DOCKET NO. 503-92-529

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| IN THE MATTER OF THE | § | BEFORE THE |
| COMPLAINT AGAINST | § | TEXAS STATE BOARD |
| STANISLAW R. BURZYNSKI, M.D., | § | |
| RESPONDENT | § | OF MEDICAL EXAMINERS |

BRIEF IN OPPOSITION TO THE BOARD'S MOTION TO STRIKE
AND IN SUPPORT OF PETITIONS IN INTERVENTION

TO THE HONORABLE TEXAS STATE BOARD OF MEDICAL EXAMINERS:

COMES NOW, Respondent, STANISLAW R. BURZYNSKI, M.D., by his undersigned attorney and submits this Brief in Support of the Motions to Intervene submitted by some of Respondent's patients, and in opposition to the Board's Motion to Strike the Petitions to Intervene.

I

More than sixty patients have filed Notices of Appearance and Petitions to Intervene in this action. The Board has filed Motions to Strike these Petitions, and many of the patients have submitted responsive or supplemental materials.

In essence, Dr. Burzynski's patients seek to intervene in this medical licensing case because they will be directly affected and irreparably injured in the event that this proceeding results in an order revoking Dr. Burzynski's medical license. This is so because most of the patients seeking to intervene have terminal cancer. There is no known cure for their disease. Dr. Burzynski's

treatment for many is their last hope. Dr. Burzynski is currently the only doctor who utilizes antineoplastons.[1]

II.

The legal issue presented at this time to the Administrative Law Judge is whether Dr. Burzynski's patients are proper parties to this action. Statutory authority is not dispositive of this issue.

Section 187.11 of the Rules and Regulation promulgated by the Texas State Board of Medical Examiners (April 15, 1992 edition) entitled "Parties in interest" states:

> Any party in interest may appear in any proceeding before the Board. All appearances shall be subject to a Motion to Strike upon a showing that a party has no justiciable or administratively cognizable interest in the proceeding.

In accordance with this section, many patients have appeared in this proceeding by filing a Notice of Appearance and a Petition to Intervene. However, their appearances are subject to a Motion to Strike by the Board, and the Board has done exactly that. However, under Section 187.11, it is clear that the Board has the burden of proof of demonstrating that the patients have no

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[1] That is not to say that Dr. Burzynski is the only physician or scientist who believes that antineoplaston therapy is effective. There are scores of doctors throughout the country who support his work and agree with his conclusions. Moreover, as evidenced by some of the letters submitted by the patients seeking intervention, many local physicians monitoring Dr. Burzynski's patients, have recommended that the patients continue on Dr. Burzynski's treatment.

"justiciable or administratively cognizable interest in the proceeding." Thus, unless the Board can carry its burden of proof, the appearances of the patients should not be struck

Section 155.3 of Chapter 155 Rules of Procedure of the State Office of Administrative Hearings defines as party as "a person or agency named, or admitted to participate in a case before the office." This definition offers no real guidance as to who should be admitted as a party.[2]

III.

Respondent's review of the case law has not found any authority which is dispositive of the issue. However, some of the cases do state general interpretive principles which are germanin. Moreover, a review of the fact patterns of some of these cases may provide a framework or analogies which may be useful.

The Austin Civil Court of Appeals has recently stated that:

> As a matter of policy, the right to participate in agency proceedings is liberally construed in order to allow the agency the benefit of diverse viewpoints. Railroad Comm'n of Texas v. Ennis Transp. Co. 695 S.W. 2d 706 (Tex.App. 1985, writ ref'd n.r.e.)

Fort Bend County v. Texas Parks & Wildlife Com'n 818 S.W.2d 898, 899 (Tex.Civ. App.-- Aus. 1991)

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[2] Section 3(5) of the Administrative Procedure and Texas Register Act ("APTRA") contains a substantially identical definition of the party, and is accordingly equally unhelpful.

Previously, the same court explained in greater detail that:

> Since administrative proceedings are different from judicial proceedings in purpose, nature, procedural rules, evidence rules, relief available and the availability of review, it is understandable that one's right to appear in an agency proceeding should be liberally recognized. Moreover, administrative tribunals are created to ascertain and uphold the public interest through the exercise of their investigative, rulemaking and quasi-judicial powers. Any strictures upon standing in an administrative agency would thus be inconsistent with the proposition that the agency ought to entertain the advocacy of various interests and viewpoints in determining where the public interest lies and how it may be furthered.

Texas Industrial Traffic League v. R.R. Com'n of Texas, 628 S.W. 2d 187, 197 (Tex Civ. App. - - Aus. 1982).

In Hooks v. Texas Dpt. of Water Resources, 602 S.W.2d 389 (Tex. Civ. App. Austin - 1980) rev 611 S.W.2d 417, (Tex.1981) downstream riparian property owners filed an appeal from the decision of the district court upholding an order by the Water Commission which granted a waste discharge permit to an abutting property owner.

The plaintiffs were permitted to appear before the commission because the hearing examiner determined that they "may be affected by the actions taken as a result of the hearing." Id. at 419. The Austin Appellate Court sua sponte held that although the appellants were proper parties to the administrative hearing, they had no standing to appeal. The Supreme Court reversed and held that since they unquestionably will be affected by the grant of the permit, they have standing to appeal.

Using the language of Hooks, it cannot be denied that Dr. Burzynski's patients will be affected by the actions taken as a result of this hearing, and they will be affected in a much more direct and personal way than the downstream riparian landowners in Hooks.

In City of Houston v. Public Utility Cm'n, 599 S.W.2d 687 (Civ. App. - Austin 1980), the City of Houston in its capacity as an "interested regulatory authority" sued to appeal the PUC's authorizing of rate increases in certain incorporated areas (none of which were in or subject to the jurisdiction of Houston). The trial court dismissed the case, inter alia, on the ground that the city had not received or alleged an injury and that the city did not have justiciable interest.

The Appellate Court held that as a matter of law the City did not have a "justiciable interest in the hearing because the PUC had only determined rates in areas outside of the city's limits. The Appellate Court noted:

> For a party to be aggrieved by a final decision setting utility rates he must allege and show how he has been injured or damaged other than as a member of the general public."

City of Houston v. Public Utility Cm'n, 599 S.W.2d at 690.

Although the counterfactual was not addressed by the court, presumably had the PUC's decision affected areas within the territorial limits of the city, then it would have been "aggrieved" and would have had standing to sue.

IV.

Although Texas has not addressed the specific issue presented by these motions, at least one jurisdiction has. 1 Pa. Admin Code 35.28 Entitled "Eligibility to intervene" provides:

> (a) Persons. A petition to intervene may be filed by a person claiming ta right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. The right or interest may be one of the following:
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> > (2) An interest which may be directly affected and which is not adequately represented by existing parties, and to which petitioners may be bound by an action of the agency in the proceeding. The following may have an interest: consumers, customers or other patrons served by the applicant or respondent . . . ."
> >
> > (3) Other interest of such nature that participation of the petitioner may be in the public interest

(A copy of this statute is annexed to this brief.)

Cf. Koch, Administrative Law and Practice Section 5.16.

## CONCLUSION

There cannot be any doubt about the fact that Dr. Burzynski's patients will be directly affected if this proceeding results in the revocation of his medical license. Some or all of them will die. It is hard to imagine a more direct or vital interest. Therefore, in some sense, Dr. Burzynski's patients have as great if not a greater interest in his license as he does. For these

reasons, the Motions by the Board to Strike the intervention of Dr. Burzynski's patients should be denied.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was sent by federal express to Dewey E. Helmcamp III, Esq., Assistant Attorney General, General Litigation Division, P.O. Box 12548, Austin, Texas 78711-2548 on this 21st day of January, 1993.

Richard A. Jaffe