

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

STATEMENT OF COMPLIANCE WITH

MANUAL OF RULEMAKING PROCEDURES

I, Assistant Attorney General J. Michael Miles, do hereby declare that I have examined the proposed rules and all related documents and that, based on them and my personal familiarity with the applicable procedures, the Manual of Rulemaking Procedures has been followed. Any exceptions are noted below.

J. MICHAEL MILES
Assistant Attorney General

Date: 2/8/78

published and served.

B. Assignment. Within ten days of receipt of a request pursuant to HE 403 A., the Chief Hearing Examiner shall assign a Hearing Examiner to hear the case, and the Hearing Examiner shall advise the Board as to the location at which and time during which a hearing should be held so as to allow for participation by all affected persons.

C. Duties. Consistent with law, the Hearing Examiner shall perform the following duties:

1. Grant or deny motions for discovery or for the taking of depositions.

2. Receive and act upon requests for subpoenas.

3. Hear and rule on motions.

4. Preside at the hearing.

5. Administer oaths and affirmations.

6. Grant or deny continuances.

7. Examine witnesses where he deems it necessary.

8. Prepare findings of fact, conclusions and recommendations.

Adopted

RULES OF THE OFFICE OF HEARING EXAMINERS

relating to

Procedures for Hearings Relating to Power Plant Siting
or High Voltage Transmission Line Routing

HE 401 Scope and Purpose. The procedures contained herein shall govern the conduct of all hearings conducted for the Environmental Quality Board involving the siting of large electric power generating plants, the routing of high voltage transmission lines and to the route exemption process contained in Minn. Stat. § 116C.57, subd. 5, provided, however, that the procedures for hearing concerning the revocation or suspension of a site certificate or construction permit shall be those contined in Minn. Rule HE Chapter Two, as are the hearings conducted pursuant to Minn. Stat. § 116C.57, subd. 3, relating to the determination of emergencies (see HE 416).

HE 402 Definitions.

A. Board. Board means the Environmental Quality Board.

B. Intervenor. Intervenor means any person granted permission to intervene in any proceeding pursuant to these rules.

C. Party. Party means the applicant, persons proposing routes or sites which the Board orders to be considered pursuant to Minn. Stat. Chapter 116C and rules adopted thereunder, and persons granted permission to intervene pursuant to HE 408. State agencies or participating department staff, citizen committees appointed by the Board, shall intervene if they are to formally advocate one route or site in preference to another. Notice is given that, pursuant to Minn. Stat. § 15.0421, only parties who could be adversely affected by the Report of the Hearing Examiner can be legally assured of the

opportunity to present argument to the Board prior to its decision.

D. Person. Person means an individual, partnership, joint venture, private or public corporation, association or society, firm, public service company, cooperative, political subdivision, municipal corporation, governmental unit or agency, public utility district, or any other entity, public or private, however organized.

E. Proceeding/Proceedings. As used herein, these terms mean all events including prehearings, hearings, orders and reports issued necessary to the completion of this hearing process on any application by a utility for the siting of a power plant, the routing of a transmission line, or exemptions.

F. Service; Serve. Unless otherwise provided by law, service or serve means service by First Class United States mail, postage prepaid and addressed to the person to be served at his last known address. An affidavit of service shall be made by the person making such service. Service by mail is complete upon the placing of the item to be served in the mail. Service may also be made personally.

HE 403 Hearing Examiners.

A. Request for Assignment. When the Board desires to order a hearing under this Chapter, it shall first file with the Chief Hearing Examiner a request for assignment of a Hearing Examiner, together with a draft of the notice of hearing proposed to be published and served.

B. Assignment. Within ten days of receipt of a request pursuant to HE 403 A., the Chief Hearing Examiner shall assign a Hearing Examiner to hear the case, and the Hearing Examiner shall advise the Board as to the location at which and time during which a hearing should be held so as to allow for participation by all affected persons.

C. Duties. Consistent with law, the Hearing Examiner shall perform the following duties:

1. Grant or deny motions for discovery or for the taking of depositions.

2. Receive and act upon requests for subpoenas.

3. Hear and rule on motions.

4. Preside at the hearing.

5. Administer oaths and affirmations.

6. Grant or deny continuances.

7. Examine witnesses where he deems it necessary.

8. Prepare findings of fact, conclusions and recommendations.

9. Make preliminary, interlocutory or other orders as he deems appropriate.

10. Do all things necessary and proper to the performance of the foregoing.

HE 404 Commencement.

A. Notice of Hearing. Proceedings under this chapter are commenced by the Board issuing a Notice of Hearing pursuant to the requirements

of Minn. Stat. Ch. 116C. The Notice of Hearing shall contain, but not be limited to, the following:

1. The date, time and place for each hearing.

2. Name and address and telephone number of the Hearing Examiner.

3. A citation to the Board's statutory authority to hold the hearing and to take the action proposed.

4. A description of the proposed project together with a citation to the relevant statutes or rules.

5. Notification that all persons may be represented by legal counsel, but that such representation is not required.

6. A citation to these rules and to any applicable procedural rules of the Board and where they may be obtained.

7. The name, address, phone number and function of the Public Advisor designated by the Board pursuant to Minn. Stat. § 116C.59, subd. 3

8. The name, address and telephone number of the appropriate member of the Power Plant Siting Staff who will be representing the Board and the name, address and telephone number of the member of the Attorney General's staff who may be contacted for advice on matters dealing with Board procedures.

9. A statement advising all persons of the right to intervene, the procedures which must be complied with, and a summary description of the rights and responsibilities intervening parties have as opposed to other persons wishing to participate.

10. The date, time and place of any prehearing conference.

11. The place where all interested persons may review all materials including all prefiled testimony and the date when such will be available.

12. A listing of the existing parties giving the name and address of the person designated to receive all notices.

13. A statement of the commencement times and places of the public hearings where cross-examination by parties will occur, where questioning by interested persons will occur, and where direct testimony or comments from the public will occur.

14. A statement indicating that hearings may be recessed and reset by the Hearing Examiner pursuant to HE 413.

15. A listing of witnesses exempted from appearing throughout the hearing process pursuant to HE 413.B, and a listing of the dates and places such witnesses will be in attendance.

B. Subsequent Notices. The Hearing Examiner may order subsequent notices to be issued by the Board as he deems appropriate containing corrections of earlier notices and additional information available after issuance of earlier notices. Such subsequent notices shall be disseminated in the same manner as the original notice, unless the Hearing Examiner, for good cause shown, orders some other method of dissemination.

C. Defects in the notices shall not invalidate the proceedings, provided a bona fide attempt to comply with this rule has been made.

HE 405 Right to Counsel. All persons may be represented by legal counsel, or by a person of their choice, or they may represent themselves.

HE 406 Time.

A. Computation of Time. In computing any period of time prescribed by these rules or the procedural rules of the Board, the day of the

last act, event, or default from which the designated period of time begins to run shall not be included. The last calendar day of the period so computed shall be included, unless it is a Saturday, Sunday or legal holiday, in which event the next working day shall be deemed the last day of the period.

B. Additional Time After Service By Mail. Whenever a person has the right or is required to do some act or take some action within a prescribed period after the service of a notice or other paper upon him, or whenever such service is required to be made within a prescribed period before a specified event, and the notice or paper is served by mail, three days shall be added to the prescribed period.

HE 407 Public Participation. At all hearings conducted pursuant to this chapter, all persons will be allowed and encouraged to participate without the necessity of intervening as parties. Such participation shall include, but not be limited to:

A. Offering direct testimony with or without benefit of oath or affirmation and without the necessity of prefiling as required by 413 I.

B. Offering direct testimony or other material in written form at or following the hearing.

However, testimony which is offered without benefit of oath or affirmation, or written testimony which is not subject to cross-examination, shall be given such weight as the Hearing Examiner deems appropriate.

C. Questioning all persons testifying. Any person who wishes to cross-examine a witness but who does not want to ask questions orally, may submit questions in writing to the Hearing Examiner, who will then

then ask the questions of the witness. Questions may be submitted before or during the hearings.

HE 408 Intervention.

A. Petition. Any person desiring to intervene in the hearings as a party shall submit a timely petition to intervene to the Hearing Examiner and shall serve the petition upon all existing parties. Timeliness will be determined by the Hearing Examiner in each case based on circumstances at the time of filing. The petition shall show how the petitioner's legal rights, duties or privileges may be determined or affected by the proceedings, how his rights, duties and privileges are not otherwise represented, and shall set forth the grounds and purposes for which intervention is sought and shall indicate petitioner's statutory or legal right to intervene, if one should exist. The Hearing Examiner, with the consent of all parties, may waive the requirement that the petition be in writing.

B. Objection. Any party may object to the petition for intervention by filing a Notice of Objection with the Hearing Examiner within seven days of service of the petition. The Notice shall state the party's reasons for objecting and shall be served upon all parties and the person petitioning to intervene.

C. Order. The Hearing Examiner shall allow intervention upon a proper showing pursuant to HE 408.A unless the Hearing Examiner finds that the petitioner's interest is adequately represented by one or more parties participating in the case. In the event the Hearing Examiner finds that one or more petitions are similar, he may order the petitions to be consolidated as one, allowing all such petitioners intervention but only as one party.

D. Responsibilities of Intervenors. Once a petition to intervene has been granted, an intervenor shall have all of the rights and responsbilities of a party.

HE 409 Disqualification. The Hearing Examiner shall withdraw from participation in the proceedings at any time if he deems himself disqualified for any reason. Upon the filing in good faith by a person of an affidavit of prejudice, the Chief Hearing Examiner shall determine the matter as a part of the record provided the affidavit shall be filed no later than 5 days prior to the date set for the first hearing date.

HE 410 Prehearing Conference.

A. Purpose. The purpose of the prehearing conference is to simplify the issues to be determined, to obtain stipulations to foundation for testimony or exhibits, to discuss schedules for hearings and other procedural events, and to resolve other matters that may be necessary or appropriate. Potential intervenors, and other interested persons, may attend the prehearing conference.

B. Procedure. Upon the request of any party or upon his own motion, the Hearing Examiner may, in his discretion, hold a prehearing conference which shall be held at a time, date and place to be determined by the Hearing Examiner to best maximize the ability of all interested persons to attend. Notice of any prehearing conference shall be given in the Notice of Hearing, if possible. Otherwise, notice shall be given pursuant to HE 404 B. The Hearing Examiner may require the parties to file a prehearing statement prior to the prehearing conference which shall contain such items as the Hearing Examiner deems necessary

to promote a useful prehearing conference. A prehearing conference shall be an informal proceeding conducted expeditiously by the Hearing Examiner. Agreements on the simplification of issues, amendments, stipulations, or other matters may be entered on the record or may be made the subject of an order by the Hearing Examiner.

HE 411 Depositions to Preserve Testimony. Upon the request of any person, the Hearing Examiner may order that the testimony of any witness be taken by deposition to preserve his testimony in the manner prescribed by law for depositions in civil actions. The request shall indicate the relevance of the testimony and shall make a showing that the witness will be unable or cannot be compelled to attend the hearing or show other good cause.

HE 412 Subpoenas. Requests for subpoenas for the attendance of witnesses or the production of documents shall be made in writing to the Hearing Examiner and shall contain a brief statement demonstrating the potential relevance of the testimony or evidence sought and shall identify any documents sought with specificity. The Hearing Examiner will grant the request for subpoenas only upon a finding of such relevance.

A. Service of Subpoenas.

1. A subpoena shall be served in the manner provided by the Rules of Civil Procedure for the District Courts of the State of Minnesota unless otherwise provided by law.

2. The cost of service, fees, and expenses of any witness subpoenaed shall be paid by the person at whose request the witness appears.

3. The person serving the subpoena shall make proof of service by filing the subpoena with the Hearing Examiner, together with his

affidavit of service.

B. Motion to Quash. Upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance therewith, the Hearing Examiner may quash or modify the subpoena if he finds that it is unreasonable or oppressive.

HE 413 Hearings.

A. Hearing Procedures.

1. Conduct of the Proceedings. The proceedings shall be conducted substantially in the following manner:

a. After opening the hearing, the Hearing Examiner shall indicate the procedural rules for the hearing including, but not limited to, the following:

(1) All persons may present evidence and argument with respect to the issues and cross-examine witnesses.

(2) All persons may be represented by legal counsel, but such representation is not required.

(3) The rules of evidence as set forth in HE 413.E.

b. Cross-examination shall be conducted in a sequence determined by the Hearing Examiner.

c. The record of the hearing shall be closed at a date to be set by the Hearing Examiner. Such date will correspond to a specific number of calendar days beyond the close of the last hearing date, computed pursuant to HE 406.A. Written comment will be accepted if postmarked no later than the date set by the Hearing Examiner. However, the record shall remain open beyond that date for the sole purpose of receiving the final Environmental Report or Environmental Impact Statement.

2. Sequence of the Proceedings.

a. All hearings shall recess at 11:00 p.m. unless the Hearing Examiner determines that the public interest will best be served in any given hearing by continuing the hearing beyond 11:00 p.m. The Hearing Examiner may, in his discretion, order a time and place for a continuance of that hearing.

b. The hearing may be scheduled in two stages. The first stage shall be for the purpose of introducing into evidence all of the prefiled direct testimony of the parties, and the cross-examination of each witness by all other parties. The subsequent stage shall be for the purpose of allowing all other interested persons to present their direct testimony and to question witnesses that offered testimony during the first stage of the hearing process.

c. Nothing contained herein shall be interpreted so as to prevent the public from being present during the first stage of the proceedings or to question witnesses at an appropriate time during the first stage of the proceedings, should time allow. The Hearing Examiner may give priority to those members of the public desiring to ask questions which would enable them to better prepare for cross-examination during subsequent stages. It is the intended purpose of the two-stage process to establish specific hearing dates for the primary purpose of public participation in order to avoid inconveniencing the general public by requiring them to wait until late at each hearing before having opportunity to offer direct testimony and ask questions. However, at the discretion of the Hearing Examiner, the applicant and other parties may present a brief summary of the prefiled direct testimony at the beginning of each session.

d. Nothing contained herein shall be interpreted so as to prevent the Hearing Examiner from establishing additional hearing dates on Motion or at his discretion.

3. Representation of State Agencies. Any state agency which participates in the proceedings as a party may only participate through its designated representative or counsel. Exceptions to this rule may be allowed at the discretion of the Hearing Examiner for good cause shown.

B. Availability of Witnesses. All witnesses who offer prefiled direct testimony in compliance with HE 413.I., shall be available for questioning by interested persons at each hearing date and place. In the event a witness cannot be available throughout the hearing process, the party on whose behalf the witness testified shall request an exemption from this rule of the Hearing Examiner prior to the publication of the Notice of Hearing. The request shall state the reasons why the witness cannot be present at each hearing, and the date, or dates, on which the witness can be available. For good cause shown, the Hearing Examiner shall grant the exemption and shall immediately notify the Board. The Board shall then include in the Notice of Hearing a statement indicating the name of the witness, the nature of his testimony, and the dates and places where the witness will be available for questioning by all parties and persons. The party requesting the exemption shall do so in writing and shall serve a copy of the request on all other parties. Any party may object to the exemption by filing his written objection with the Hearing Examiner and serving a copy on all parties within five working days of the date of the request. In the event an objection is made, the Hearing Examiner shall

immediately notify all parties of the date, time and place where he will hear arguments on the request, subsequent to which he shall issue an order granting or denying the request for exemption. The Hearing Examiner may also grant exemptions, at any time, upon a showing of need due to unforeseeable circumstances. The same notice and objection procedure may be followed if circumstances permit, or the Hearing Examiner may utilize any other procedure if he deems it more appropriate. A subsequent Notice of Hearing shall issue reflecting any such exemption granted by the Hearing Examiner.

In the event a witness has prefiled testimony and fails to present himself for questioning, such prefiled testimony shall be given such weight as the Hearing Examiner deems appropriate.

C. Rights of Persons. All persons shall have the right to present evidence, rebuttal testimony and argument with respect to the issues and to cross-examine witnesses.

D. Witnesses. Any person may be a witness or may present witnesses on his behalf at the hearings. Direct testimony shall be admitted as allowed by HE 407.

E. Rules of Evidence.

1. General Rules. The Hearing Examiner may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which prudent persons are accustomed to rely in the conduct of their serious affairs. The Hearing Examiner shall give effect to the rules of privilege recognized by law. Evidence which is incompetent, irrelevant, immaterial or unduly repetitious may be excluded.

2. Evidence Must be Offered to be Considered. All evidence to

be considered in the case, including all records and documents (except tax returns and tax reports) in the possession of the Board or a true and accurate photocopy thereof, shall be offered and made a part of the record in the case. No other factual information or evidence (except tax returns and tax reports) shall be considered in the determination of the case.

3. Documentary Evidence. Documentary evidence in the form of copies or excerpts may be received or incorporated by reference in the discretion of the Hearing Examiner.

4. Notice of Facts. The Hearing Examiner may take notice of judicially cognizable facts but shall do so on the record and with the opportunity for any person to rebut.

5. The Burden of Proof. Any route or site proposer must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden.

6. Weight of Testimony. Oral testimony received without benefit of oath or affirmation and written submissions that are not subject to cross-examination shall be given such weight as the Hearing Examiner deems appropriate.

F. The Record.

1. Preparation of Record. Pursuant to Minn. Stat. § 15.0418, the Office of Hearing Examiners, upon certification of the official record of the case by the Board to it, shall prepare and maintain the official record in each proceeding.

2. Contents of the Record. The record in a hearing shall contain:

a. All pleadings, motions and orders;

b. Evidence received or considered;

c. Offers of proof, objections and rulings thereon;

d. The Hearing Examiner's findings of fact, conclusions and recommendations;

e. All memoranda or data submitted by any person and considered by the Hearing Examiner in connection with the case;

f. The transcript of each hearing, if any.

3. The Transcript.

a. Reporter. Unless the Chief Hearing Examiner determines that the use of a court reporter is more appropriate, an audio-magnetic recording device shall be used to keep a record at any hearing which take place under this chapter.

b. Transcription. The verbatim record shall be transcribed if requested by a person or in the discretion of the Chief Hearing Examiner. If a transcription is made, the Chief Hearing Examiner may require the requesting person and other persons who request copies of the transcript from him to pay a reasonable charge therefor. The charge shall be set by the Chief Hearing Examiner, and all monies received for transcripts shall be payable to the State Treasurer and shall be deposited in the State Office of Hearing Examiners account in the State Treasury.

4. Environmental Documents. Any draft Environmental Impact Statement (in the case of routes) or any draft Environmental Report (in the case of sites) required to be prepared by rules of the Board shall be entered into the record at a point during the hearing process which will allow all persons an opportunity to review and comment on the material. In addition, all comments and responses to

comments which the Board desires to consider shall be entered into the record promptly after they are received.

G. Continuances. During a hearing, if it appears in the interest of justice that further testimony should be received, the Hearing Examiner, in his discretion, may continue the hearing to a future date and such oral notice on the record may be sufficient.

H. Motions. No motions shall be made directly to or be decided by the Board subsequent to the appointment of a Hearing Examiner and prior to the completion and filing of the Hearing Examiner's report unless the motion is certified to the Board by the Hearing Examiner. Uncertified motions shall be made to the Hearing Examiner and considered by the Board in its consideration of the record as a whole subsequent to the filing of the Hearing Examiner's report.

I. Prefiled Testimony. All direct testimony to be offered by any party proposing a route or site shall be prepared in advance in question and answer form and shall be filed 14 days prior to the first hearing date in the following manner:

1. The original and one copy with the Hearing Examiner;
2. One copy with the Board;
3. One copy with each party; and
4. One copy at a place in each county where a hearing is to be held pursuant to statute at a location designated by the Board for public review.

Said testimony will be part of the record in each proceeding as if read, but all of the witnesses shall be available for cross-examination and questioning at each and every hearing subject to the provisions of HE 413.B. Objections to such direct testimony may be made

by any person, any time during the hearings conducted pursuant to this chapter. Five copies of the prefiled testimony of each witness shall be made available for the review by the public at each hearing.

At the hearing, the party presenting the testimony may, if it deems appropriate, briefly summarize the prefiled testimony prior to start of cross-examination.

Nothing contained herein shall be deemed to foreclose any party from presenting rebuttal testimony or from presenting testimony in response to reasonably unforeseen areas, both without the necessity of prefiling.

J. Disruption of Hearing.

1. Cameras. Television, newsreel, motion picture, still or other cameras shall be operated in a manner as not to disrupt the hearing. The Hearing Examiner may limit operation if disruption occurs.

2. Other Conduct. Pursuant to and in accordance with the provisions of Minn. Stat. § 624.72, no person shall interfere with the free, proper and lawful access to or egress from the hearing room. No person shall interfere with the conduct of, disrupt or threaten interference with or disruption of the hearing. In the event of such interference or disruption or threat thereof, the Hearing Examiner shall read this rule to those persons causing such interference or disruption and thereafter proceed as he deems appropriate.

HE 414 The Decision.

A. Basis for Determination.

1. The Record. No factual information or evidence, except tax returns and tax reports, which is not a part of the record shall be considered by the Hearing Examiner or the Board in the determination of a hearing.

2. Administrative Notice. The Hearing Examiner or the Board may take administrative notice of general, technical or scientific facts within their specialized knowledge in conformance with the requirements of Minn. Stat. § 15.0419, subd. 4.

B. Hearing Examiner's Report. Following the close of the record and the completion of the transcript, the Hearing Examiner shall make his report pursuant to Minn. Stat. § 15.052, subd. 3, and, upon completion, a copy of said report shall be served upon all parties by First Class mail. A copy of the report shall also be filed at places designated for public review pursuant to HE 413 I.4.

C. Board Decision. Following receipt of the Hearing Examiner's report, the Board shall proceed to make its final decision in accordance with Minn. Stat. Ch. 15 and Ch. 116C.

HE 415 Rehearing. A rehearing pursuant to Board order shall be commenced in the same manner as set forth for commencement of proceeding in HE 404. The rehearing shall be conducted in the same manner prescribed for a hearing.

HE 416 Emergency Procedures. Any hearings held pursuant to section 116C.57, subd. 3, to determine if an emergency exists shall be governed by the contested case procedures contained in Chapter Two of the Rules of the Office of Hearing Examiners. If the Board finds that an emergency does exist, then any hearings on the designation of a site or route shall be governed by the rules contained in this chapter (Chapter 4), provided however, that the Hearing Examiner, in his discretion, may modify any time limits contained herein if he finds that such modification is needed to expedite the hearings.

HE 417 Severability. If any provision of these rules is held invalid, such invalidity shall not affect any other provisions of the rules which can be given effect without the invalid provision, and to this end, the provisions of these rules are declared to be severable.

APPROVED AS TO FORM AND LEGALITY

APR 7 1978 19____

WARREN SPANNAUS, ATTORNEY GENERAL

/s/ Michael B. Miller

BY_____

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
APR 13 1978

Joan Anderson Growe
Secretary of State

10:30 AM

ADMIN 1000

STATE OF MINNESOTA

DEPARTMENT OFFICE OF HEARING EXAMINERS

Office Memorandum

TO : MICHAEL B. MILLER
Special Assistant
Attorney General

DATE: March 15, 1978

FROM : DUANE R. HARVES
Chief Hearing Examiner

PHONE: 8100

SUBJECT: HEARING EXAMINERS - RULES RELATING TO PROCEDURES FOR HEARINGS RELATING TO POWER PLANT SITING OR HIGH VOLTAGE TRANSMISSION LINE ROUTING

On March 13, 1978, you returned the above-referenced rules without having been filed for several reasons. I am resubmitting these rules to you without changes and for the following reasons:

1. Rules 403 A and B make reference to barrier free buildings. The rules do not require that hearings be conducted in barrier free buildings. Rather, this is advisory only. Minn. Stat. § 15.052, Subdivision 3, specifically provides that the very first duty of the Hearing Examiner is to advise an agency as to the location at which and time during which a hearing should be held so as to allow for participation by all affected interests. You will note that the Hearing Examiner's duty is advisory only. If we are to comply with our statutory mandate, we must have all available information to comply. As indicated, nowhere does the rule have an absolute requirement that all hearings be conducted in barrier free facilities.

2. In Rule 413 F.3, you indicate that the Hearing Examiner's Report recommended deleting the words "from him". If you will refer to the Hearing Examiner's Report, you will note that the Hearing Examiner recommended adding those words to the rule, which recommendation was adopted.

3. You indicate that Rule 410 B was not amended as recommended by the Hearing Examiner. I would refer you to the Findings of Fact, Conclusions and Order Adopting Rules signed by me on January 31, and more specifically, Finding number five at page three. You will note that I made a specific finding that the Hearing Examiner had recommended certain words be added but that his recommendation was for 410 B and that it more properly belonged in 410 A. The recommended language was added to HE 410 A.

4. I have reviewed rules 413 A.1.a.(1) and (2). The term "persons" is the appropriate word to be used in these rules. The statutory mandate in the Power Plant Siting Act was for the procedural rules

to provide for the widest possible citizen participation. Therefore, in reading the rules as a whole, you will note that we are allowing all persons to present evidence and to cross-examine witnesses without the necessity of becoming a formal "party".

5. Rule 405 allows persons to be represented by anyone they choose. Whether or not this permits the unauthorized practice of law would, of course, relate solely to whether or not the person representing another person or group is receiving a fee. If not, it would not be the unauthorized practice of law. Therefore, I find nothing illegal about the rule as proposed for adoption. The record reflects considerable testimony from all groups and associations appearing at our hearing relative to this rule. At every hearing date and site, persons commented on the rule and asked that the language as finally proposed for adoption or other similar language be included.

As indicated, I would ask that you please reconsider the rules.

DRH:sh
Enc.
cc: J. Michael Miles

Agency Exhibit No. 4
File No.
Date

STATE OF MINNESOTA

OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE RULES OF THE OFFICE OF HEARING EXAMINERS RELATING TO RULEMAKING PROCEDURES AND CONTESTED CASES AND THE ADOPTION OF PROCEDURES FOR HEARINGS RELATING TO THE ROUTING OR SITING OF LARGE ELECTRIC TRANSMISSION FACILITIES.	))))))	CERTIFICATE

I hereby certify that the attached 12 sheets, containing 493 mailing labels, constitute the complete list of persons, associations, and other interested groups who as of 2:00 o'clock P .m., this 30th day of August, 1977, have requested that their names be placed on file with the Secretary of State for the purpose of receiving notice of public hearing on the proposed rules on the subject captioned above.

JOAN ANDERSON GROWE
Secretary of State

By Randall W. Sawyer

Agency Exhibit No. 5
File No.
Date

STATE OF MINNESOTA

OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE RULES OF THE OFFICE OF HEARING EXAMINERS RELATING TO RULEMAKING PROCEDURES AND CONTESTED CASES AND THE ADOPTION OF PROCEDURES FOR HEARINGS RELATING TO THE ROUTING OR SITING OF LARGE ELECTRIC TRANSMISSION FACILITIES.	AFFIDAVIT OF MAILING

JoAnn Cervantez, being first duly sworn, deposes and says:

That on the 7th day of September, 1977, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Hearing by depositing in the Central Mailing Section of the Publications and General Services Division of the Minnesota Department of Administration at said City of St. Paul, a true and correct copy thereof, properly enveloped, to all persons and associations at the addresses listed on the Secretary of State's list as well as to all members of the Minnesota Legislature.

JoAnn Cervantez

Subscribed and sworn to before me
this 8th day of September, 1977.

Sandra A. Haven
Notary Public

SANDRA A. HAVEN
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires July 29, 1983

Agency Exhibit No. 3
File No.
Date

STATE OF MINNESOTA

OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE RULES OF THE OFFICE OF HEARING EXAMINERS RELATING TO RULEMAKING PROCEDURES AND CONTESTED CASES AND THE ADOPTION OF PROCEDURES FOR HEARINGS RELATING TO THE ROUTING OR SITING OF LARGE ELECTRIC TRANSMISSION FACILITIES.

AFFIDAVIT

Duane R. Harves, being duly sworn on oath, deposes and says:

1. That he is the Chief Hearing Examiner of the State of Minnesota;

2. That on the 30th day of August, 1977, he went to the Secretary of State's Office of the State of Minnesota and requested a current list of all representatives or associations or other interested groups or persons who had registered their names with the Secretary of State for the purpose of obtaining notices of public hearings relating to the promulgation of rules pursuant to Minn. Stat. 15.0412;

3. That on the 30th day of August, 1977, in response to the above request, the Secretary of State provided him with such a list.

Further affiant sayeth not.

Duane R. Harves
DUANE R. HARVES

Subscribed and sworn to before me
this 8th day of September, 1977.

Sandra A. Haven
Notary Public

SANDRA A. HAVEN
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires July 29, 1983

STATE OF MINNESOTA

OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE RULES OF THE OFFICE OF HEARING EXAMINERS RELATING TO RULEMAKING PROCEDURES AND CONTESTED CASES AND THE ADOPTION OF PROCEDURES FOR HEARINGS RELATING TO THE ROUTING OR SITING OF LARGE ELECTRIC TRANSMISSION FACILITIES.	NOTICE OF HEARING

Notice is hereby given that public hearings in the above-entitled matters will be held pursuant to Minn. Stat. § 15.0412, Subd. 4, at the following dates, times and places, and continuing until all persons have had an opportunity to be heard:

1. October 11, 1977, William Mitchell College of Law Auditorium, 875 Summit Avenue, St. Paul, Minnesota. At 9:30 a.m., the hearing will include the full, affirmative presentation by the Office of Hearing Examiners regarding amendments to the procedures for rulemaking and contested case hearings. At 1:30 p.m., the hearing will be solely for the presentation of the proposed rules of procedure for the routing of high voltage transmission lines and the siting of large electric power generating plants. At 7:00 p.m., the Office of Hearing Examiners will summarize the proposed power line/plant rules and allow persons to comment thereon.

   Note: At all of the following hearings which will begin at 7:00 p.m., a summary of the amendments to the existing rules and the newly proposed power line/plant rules will be presented by the Office of Hearing Examiners. Copies of the Statement of Need and Summary of Evidence will be available for review. The primary purpose of the hearings is to allow interested persons to comment on the proposals.

2. October 12, 1977: Council Chambers, City Hall, Duluth, Minnesota.

3. October 13, 1977: Hagg-Sauer Auditorim, Bemidji State University, Bemidji, Minnesota.

4. October 17, 1977: Vocational-Technical Institute Cafeteria, Alexandria, Minnesota.

5. October 19, 1977: Room P223, Plaza West Building, Rochester Community College, Rochester, Minnesota.

6. October 20, 1977: Centennial Student Union Conference Auditorium, Mankato State University, Mankato, Minnesota.

All interested or affected persons will have the opportunity to participate concerning the amendments to the existing rules and the adoption of the proposed new rules. Statements may be made orally and written material may be submitted, whether or not an appearance is made at the hearings, by mail to Allan W. Klein, Room 300, 1745 University Avenue, St. Paul, Minnesota 55104, telephone (612) 296-8114, either before, during or within 20 calendar days after the last hearing date.

NOTICE

All persons have the right to be notified of the date on which the Hearing Examiner's Report will be available, after which date the agency may not take any final action on the rules for a period of five working days. All persons have the right to be informed of the date on which the hearing record has been submitted to the Attorney General by the agency. If you desire to be so notified, you may do so by so indicating at the hearing or by written request sent to the Hearing Examiner prior to the close of the record.

Notice is hereby given that 25 days prior to the first hearing date, a Statement of Need and Summary of Evidence will be available for review at the Office of Hearing Examiners. Such statement has been prepared as a single document but in separate parts. The first part relates solely to the proposed amendments to the existing rules relating to rulemaking and contested case proceedings. The second part relates solely to the new proposed rules relating to procedures for hearings for power lines and power plants. Copies of these documents will be available for review at each hearing. These documents include the verbatim testimony intended to be presented at the hearing on October 11, 1977, justifying both the need for and reasonableness of the proposed rules. Copies of the statements may be obtained from the Office of Hearing Examiners by sending a written request, together with a check, money order or cash (no stamps) payable to: State Treasurer, Hearing Examiners Account, in the following amounts:

1. Rulemaking and Contested Case only: $3.55

2. Power line and power plants only: $2.05

3. Complete document: $5.60

Copies of the proposed amendments to the existing rules and the new rules are now available, and one free copy may be obtained by writing the Office of Hearing Examiners, 1745 University Avenue, St. Paul, Minnesota 55104. Persons desiring copies should indicate whether

they desire all proposals or which portions they desire in order to conserve costs. Copies will also be available at all hearings.

Statutory authority to adopt the proposed amendments is contained in Minn. Stat. § 15.052, Subd. 4. Statutory authority to adopt the newly proposed procedures relating to power lines/plants is contained in Laws of Minnesota, 1977, Chapter 439, Section 22.

The proposed amendments to the rulemaking procedures, if adopted, would clarify existing rules which have led to confusion; conform the rules to legislative changes; provide for better notice to the public of their statutory rights; insure that all hearings will be conducted in barrier-free facilities; provide for better notice; combine the Statement of Need and Summary of Evidence into a single document; provide a procedure for advance approval for incorporation by reference; delete the requirement of submitting all of the record to the Chief Hearing Examiner for his review for substantial change; and provide an effective date.

The proposed amendments to the contested case procedures, if adopted, would clarify existing rules which have led to confusion; conform the rules to legislative changes; insure that all hearings will be conducted in barrier-free facilities; combine the Order for Hearing, Notice of Hearing and Statement of Charges or Issues into a single document; provide for better notice of the results occurring from a default; provide for alternative notice procedures; clarify the procedures relating to the Notice of Appearance; provide for consolidation of similar petitons for intervention; broaden the extent of public participation; provide for automatic reassignment of a Hearing Examiner upon the filing of an Affidavit of Prejudice; provide a new rule relating to motions; change discovery procedures to recognize all privileged communications recognized at law and broaden discovery in general; a new rule protecting proprietary information; provide a new rule relating to an Offer of Proof; changing the rule relating to certification of motions to the agency; and provide that a copy of an agency final order shall be sent to the Hearing Examiner.

The proposed rules relating to power lines and power plants, if adopted, would be quite similar to the existing rules relating to contested cases but reflect the legislative mandate to provide for the broadest possible citizen participation. The rules provide a procedure whereby the direct testimony of all parties is to be prefiled at least 14 days before the hearing, not only with the Hearing Examiner, the Environmental Quality Board and all parties, but at a library or other location selected by the Environmental Quality Board in each affected county. Under the rules, the hearings would be conducted in two stages. The first stage would start with the cross-examination of the parties witnesses by other parties. The second stage will be solely for the purpose of allowing interested persons an opportunity to question witnesses and present their own testimony and evidence. Interested persons may give testimony orally or in writing, with or without benefit of oath, and may submit questions for the witnesses in written form,

to the Hearing Examiner. The Notice of Hearing will inform the public of the specific dates and places where each witness will be available for questioning and where the public participation will be started.

Please be advised that Minn. Stat. Ch. 10A requries each lobbyist to register with the Ethical Practices Board within 5 days after he commences lobbying. Lobbying includes attempting to influence rule-making by communicating or urging other to communicate with public officials. A lobbyist is generally any individual who spends more than $250 per year for lobbying or any individual who is engaged for pay or authorized to spend money by another individual or association and who spends more than $250 per year or 5 hours per month at lobbying. The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, phone (612) 296-5615.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

Agency Exhibit No. 1
File No.
Date

STATE OF MINNESOTA

OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE RULES OF THE OFFICE OF HEARING EXAMINERS RELATING TO RULEMAKING PROCEDURES AND CONTESTED CASES AND THE ADOPTION OF PROCEDURES FOR HEARINGS RELATING TO THE ROUTING OR SITING OF LARGE ELECTRIC TRANSMISSION FACILITIES.	ORDER FOR HEARING

IT IS HEREBY ORDERED that public hearings on the above-captioned rules be held in the following communities on the following dates and times, and continuing until all persons have had an opportunity to be heard:

1. October 11, 1977, William Mitchell College of Law Auditorium, 875 Summit Avenue, St. Paul, Minnesota. At 9:30 a.m., the hearing will include the full, affirmative presentation by the Office of Hearing Examiners regarding amendments to the procedures for rulemaking and contested case hearings. At 1:30 p.m., the hearing will be solely for the presentation of the proposed rules of procedure for the routing of high voltage transmission lines and the siting of large electric power generating plants. At 7:00 p.m., the Office of Hearing Examiners will summarize the proposed power line/plant rules and allow persons to comment thereon.

   Note: At all of the following hearings which will begin at 7:00 p.m., a summary of the amendments to the existing rules and the newly proposed power line/plant rules will be presented by the Office of Hearing Examiners. Copies of the Statement of Need and Summary of Evidence will be available for review. The primary purpose of the hearings is to allow interested persons to comment on the proposals.

2. October 12, 1977: Council Chambers, City Hall, Duluth, Minnesota.

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5. October 19, 1977: Room P223, Plaza West Building, Rochester Community College, Rochester, Minnesota.

6. October 20, 1977: Centennial Student Union Conference Auditorium, Mankato State University, Mankato, Minnesota.

IT IS FURTHER ORDERED that a Notice of Hearing be mailed to all persons or representatives of associations or other interested groups who have registered their names with the Secretary of State for that purpose.

IT IS FURTHER ORDERED that the Notice of Hearing be published in the State Register.

DUANE R. HARVES
Chief Hearing Examiner

Dated this 1st day of August, 1977.

Agency Exhibit No. 6
File No.
Date

STATE OF MINNESOTA

OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE RULES OF THE OFFICE OF HEARING EXAMINERS RELATING TO RULEMAKING PROCEDURES AND CONTESTED CASES AND THE ADOPTION OF PROCEDURES FOR HEARINGS RELATING TO THE ROUTING OR SITING OF LARGE ELECTRIC TRANSMISSION FACILITIES.	STATEMENT OF NEED AND SUMMARY OF EVIDENCE

Pursuant to HE 103, which requires both a Statement of Need and Summary of Evidence, this document will contain the verbatim affirmative presentation of facts necessary to establish the statutory authority, need for and reasonableness of the proposed amendments to existing rules and the proposed new rules.

As there may be those desirous of obtaining copies of this document but having an interest in only the amendments to existing rules or only the proposed new rules, this document is prepared in two sections, the first of which will address solely amendments to existing rules, and the second of which will address only the new rules.

I

Amendments to Existing Rules

These rules are proposed amendments to existing rules previously adopted by the Chief Hearing Examiner.

Statutory authority to adopt rules arises from Minn. Stat. § 15.052, Subd. 4, which reads as follows:

> "The chief hearing examiner shall promulgate rules to govern the procedural conduct of all hearings, relating to both rule adoption, amendment, suspension or repeal hearings and contested case hearings. Such procedural rules for hearings shall be binding upon all agencies and shall supersede any other agency procedural rules with which they may be in conflict. The procedural rules for hearings shall include in addition to normal procedural matters provisions relating to recessing and reconvening new hearings when the proposed final rule of an agency is substantially different from that which was proposed at the public hearing. The procedural rules shall establish a procedure whereby the proposed final rule of an agency shall be reviewed by the chief hearing examiner to determine whether or not a new hearing is required because of substantial changes or failure of the agency to meet the requirements of section 15.0412, subdivision 4."

The rules, as previously adopted and as now proposed to be amended, are needed to provide a procedural framework, uniform for all state agencies, within which the agencies will be able to fairly and expedi-

tiously promulgate and adopt rules and adjudicate contested cases and within which members of the public affected by agency action will be assured of due process of law.

The Office of Hearing Examiners has been in existence, as have the existing rules, for more than one and one-half years. During that time, the office conducted approximately 150 rulemaking hearings and 1500 contested cases, for over 75 agencies. This experience, as well as comments from the general public and other state agencies, coupled with legislative changes in the Administrative Procedure Act by the 1977 Legislature (Laws of Minnesota, 1977, Chapter 443), have led to the conclusion that amendments in a number of areas, some merely technical and others substantive, are essential to more efficiently carry out the aforestated purpose.

A Notice of Intent to Solicit input into these amendments was published in the State Register on May 9, 1977, at 1 S.R. 1600, noting a deadline for receipt of suggestions of June 15, 1977. Nothing was received prior to the deadline. The Department of Corrections (see Exhibit A) submitted a letter dated July 15, 1977. The Public Service Commission (see Exhibit B) submitted a letter dated August 1, 1977. While neither were received within the announced deadline, both were duly considered and, in some instances, as will be elaborated upon later, the suggestions are incorporated into these proposed amendments.

The need for and reasonableness of the proposed amendments are as follows:

Chapter 1, Rulemaking

Statement of Need

1. All rules within the chapter are to be renumbered to conform to the rules of the State Register so that the numbers will be as in the following example:

HE 101

A.

1.

a.

(1)

(a)

2. HE 102 (b). This rule will be renumbered as HE 102 B. The other amendments are merely technical and do not change the rule in any substantive manner. The changes are needed to clarify the rules so that agencies need not prepare documents entitled "Proposed Order for Hearing", etc. It was always intended that the agencies would submit a copy of the order they intended to issue. Some took the language literally, thus creating double work, which is really unreasonable.

3. HE 102 (c). Besides renumbering, this rule makes the same changes in language as were made in the previous rule for the same reasons. The Ethics Commission section is amended to change its name to conform to legislative change. We are repealing the part of HE 102 C. 6. which had the actual language to be used. The existing language no longer conforms to statute. We are not putting the new statutory language in the rule for two reasons. First, the APA forbids the repetition of statute in rules unless it is crucial to the person affected by a rule to comprehend its meaning and effect. Second, the legislature continues to amend Minn. Stat. Ch. 10A each session, which would require us to amend our rules each time the law is amended. It is our intent to require the statement which the Ethical Practices Board indicates is appropriate.

HE 102 C. 7. changes the time during which written comment may be submitted following the close of the hearing to conform to changes made by the 1977 Legislature. Such a statement is needed in the Notice of Hearing so that all persons, especially those not able to attend the hearing, will be advised of their rights.

The balance of the amendments to this rule are new, but are a direct result of changes made by the 1977 Legislature. New section eight requires a notice of the right of the public to be informed of the date on which the Hearing Examiner's report is available and of their right to be informed of the date on which the agency submits the rule to the Attorney General. New section nine requires notice that all persons have a right to review the Statement of Need and Reasonableness and when and where they can do so. While the 25-day prefiling requirement has always existed, the public was not aware of it. This notice is

thus needed and reasonable in order to fully inform the public of their rights. The argument that the increased length of the Notice of Hearing causes a cost increase to the agencies has been carefully considered and rejected because the right of the public to be given full and adequate notice of not only the agencies' proposals, but more importantly, the procedures available to them, far outweigh any minimal cost factor. New section ten is a direct result of legislative mandate.

4. HE 102 D. The amendments to this rule do several things. It has been found that many times an agency is able to accurately predict the length of time it will take them to present the agency position, but impossible to predict the length of time it will take for opponents to present their positions. This has created some difficulty in scheduling for our office. A new part of this rule is needed to ensure that the Office of Hearing Examiners will not violate Executive Order No. 148 which requires that all meetings of state agencies will be held in barrier-free facilities. The next new requirement of this rule is a direct result of proposed amendments to the notice section of these rules. If an agency gives notice in addition to that as required by statute, it will be required to notify our office. The need for such advance notice arises from several instances in the past where persons have called our office just prior to the hearing complaining about the fact that they were not given notice. With this advance notice to our office, we will be better able to fully answer such questions. If the agency does give such additional notice, it is not unreasonable for them to let us know. The need for and reasonableness of this "other" notice will be discussed in detail later. The final new sentence in this rule merely puts into the rule what has been the practice of our office since its inception. The APA requires a pre-review of all cases by the Hearing Examiner and provides that the Hearing Examiner shall inform the agency of the date, time and place a particular hearing should be held in order to afford all interested persons an opportunity to be heard. While we have not had a case where an agency has not taken our advice, there have been several times when we have had lengthy discussions with a couple of agencies before they set their hearing times and places. This last sentence merely puts into the rule the

exact statement we have made in those situations. It should be pointed out that the language is a discretionary "may" rather than a mandatory "shall". Not only is it reasonable, but it is a requirement of the APA that all statements of general applicability and future effect shall be promulgated as a rule. It is felt that this policy should therefore be in the rule itself to give advance notice to the agencies of the potential results in their failure to provide a time, date and place for all interested persons to participate in the rulemaking process. In this way, it is hoped that all state agencies will give due consideration to those whom they regulate, where those persons are located in the state, and what hours of the day they can reasonably be available to participate in this most important process.

5. HE 103. This is an entirely new rule which, after stating that agencies must give the notice required by statute, encourages them to give notice to other persons, groups or associations they know will be interested, or, more importantly, directly affected by the proposed action. This office has no statutory authority to invoke more stringent notice requirements than are enumerated in statute. However, it is hoped that this rule will encourage agencies to once again stop and think of those persons most directly interested in or affected by the proposed action. Of the entire population of this state, there are only slightly more than 500 persons who have registered with the Secretary of State to be informed of all rule hearings. The general public cannot afford the cost of a subscription to the State Register. The public is simply not aware that they can receive such notices.

We would cite one example of an instance where those directly affected by a rulemaking proceeding had no notice. We could cite several more so no person should assume, from the example, that only one agency is being singled out. Rather, you should only assume that it was the most recent. The case used is the Department of Natural Resources' rules on the caging of wild animals in other than public zoos. The rules were directly "aimed" at some "roadside zoos" or tourist attractions located throughout the state. All of these businesses were licensed by DNR as "Game Farms". None were registered with the Secretary of State. None subscribed to the State Register.

The hearing was conducted in St. Paul. Most of the affected persons are in northern Minnesota. The rules, if adopted, would have shut down most, if not all, of the existing businesses. In fact, a witness for DNR stated, on the record, at the hearing, that the foregoing was their intent.

Perhaps a legislative change is necessary. We would hope that state agencies would voluntarily try to notify those it knows will be affected by their action. We do not intend, by this rule, to mandate that unreasonable notices be sent. It would be totally unreasonable to expect Securities Commissioner John Larson to send notices to more than 17,000 real estate brokers and salespersons. It would not be unreasonable to expect him to give such notice in his monthly Real Estate Newsletter which is sent to every real estate broker. We would hope that agencies would work with our office, such as the Insurance Division has over the past several months, in developing a list of persons or associations known to it to be affected by their proposed action and the manner of notice to be sent to them. We have found that the statutory notice requirements are inadequate in many instances. However, we also recognize that any rule or law requiring all licenses of a particular agency to be notified of all rulemaking of the agency would be unreasonable. Therefore, the addition to this rule is aimed solely at getting state agencies to use their own good common sense, and to attempt to utilize every vehicle available to give reasonable notice to those they regulate. Without such action, we feel fairly confident that legislation will be forthcoming.

6. HE 104. This is an entirely new rule which does two things. First, it combines the prior Statement of Need and Summary of Evidence. The Summary of Evidence is later proposed to be repealed. Both documents were previously required to be filed. It has been found, through practice, that there is no need for two separate documents and further, that combining the two makes for a more efficient, effective, and better notice to the public of the evidence to be proposed by the agency in support of its action.

However, except for the Summary of Evidence, there was no statement relating to the content of the documents. Construing the statutory

mandate of the 1975 legislation amending the APA, the Office of Hearing Examiners required much more than the prior practice of merely stating that the need for the rules arose from a statute. Confusion has existed for some time. The Chief Hearing Examiner met with members of the Attorney General's staff in mid-1976 in an attempt to explain how our office interpreted statutory language, and what we envisioned the documents should contain.

Therefore, the new rule, as proposed, contains the guidelines for the information which must be included in this document. As substantiation for the need for and reasonableness of the requirements of this rule, we would cite the record of the first two hearings on these procedural rules. In those hearings, and the Findings of Fact relating thereto, it is evident that the purpose behind this new rule is to provide the public an opportunity, well in advance of the public hearing, to review all of the evidence and argument the agency proposes to present at the hearing. By providing this advance opportunity to review the agency's case, there can be no justifiable reason for any person to request that the hearing be continued in order for them to review the agency's evidence and prepare rebuttal. Testimony at our initial hearings indicated that many wished the adoption of a rule allowing for such continuances. The 25-day pre-filing requirement was the result of that testimony.

The proposed new language provides for a recessing and reconvening of the hearing in the event direct testimony not alluded to in the document is presented by the agency at the hearing. In the past, when this has occurred, agencies have voluntarily asked for another hearing date in order to allow time for the public to react. We would cite the Energy Agency as one good example of an agency which has shown concern for the rights of the public in this regard. Authority to promulgate such a provision regarding the recessing and reconvening is inherent in the language found throughout Minn. Stat. § 15.052 whereby the Office of Hearing Examiners is created, told to promulgate procedural rules, and directed to ensure that all interested persons have an opportunity to be fully heard. Unless such persons are given an opportunity to digest "surprise" testimony, they cannot be said to have had an opportunity to be "fully heard".

The last new section of this rule allows the agency to include all of the testimony they intend to present in this document. We have had many instances where all persons appearing at the hearing have reviewed the pre-filed documents in detail and it was then admitted into the record as if read. This has saved considerable time and expense where it has occurred.

7. HE 105. This rule, formerly HE 103, contains technical and clarifying amendments. It should be noted that it is not necessary to introduce a copy of the Secretary of State's list, merely the appropriate affidavits. Much confusion has existed over this list. In discussions with the Attorney General's staff, they have agreed to propose to delete that requirement from their rules. HE 105 D. is amended to clarify what affidavit is required. HE 105 E. is amended to conform to the new HE 104. HE 105 H. is amended so that if a witness cannot appear for one reason or another, there is no question regarding a failure to comply with these rules. Questions have arisen on several occasions concerning what consequences would result if a named witness failed to appear. None was ever intended and it is hoped that this amendment clarifies that intent. HE 105 (i) is repealed as this summary of evidence will now be included under new HE 104.

8. HE 106. This rule was previously HE 104. HE 106 A. is amended to provide that it is the responsibility of the Hearing Examiner to provide the registration sheets. This is needed to provide uniformity. It is further amended to provide specifically for a space for persons to indicate their desire to be notified of the availability of the Hearing Examiner's report and the date when the rules are submitted to the Attorney General.

HE 106 B. is amended to conform to statutory changes. HE 106 C. is amended to refer to the entire chapter of state law which contains the lobbyist reporting requirements rather than a single section of that law. We have observed that the legislature tends to amend this law quite frequently. By citing the entire chapter, we will not have to amend this rule should the legislature amend the section and renumber.

9. HE 107. This rule was previously HE 105. The amendments to this rule are needed in that the existing rule did not include all of

the items which were actually part of the official record in each case. The amendments also reflect the statutory change which states that a transcription of the hearing is not necessary unless requested by the agency, the Attorney General or the Hearing Examiner. The rule further provides that any person may obtain a copy of the transcript, upon request, for a reasonable charge and further that any person can request to be notified of the date the transcript is completed. These amendments are needed so that persons can have a procedure for obtaining a copy of the transcript or reviewing it at the agency or the Office of Hearing Examiners. As these amendments create no increased demands on anyone other than the Office of Hearing Examiners, they are reasonable. The APA requires the Office of Hearing Examiners to operate on a revolving fund and to charge for its services; charging for copies of transcripts is therefore necessary and reasonable.

10. HE 108. This is an entirely new rule that reflects changes in the APA made by the 1977 Legislature. The law allows for incorporation by reference under certain circumstances, with the approval of the Chief Hearing Examiner. This rule is needed to provide a procedure for the agencies to obtain approval of the proposed incorporation by reference. By providing for approval prior to publication in the State Register, the agency is saved time, and thereby expense, in that should the Chief Hearing Examiner disapprove such incorporation, the agency would have to republish and possibly re-set the hearing date. The last sentence in the rule provides that the agency must maintain a copy of the material incorporated. This is needed to ensure that there will always be a copy of the incorporated material, as it existed on the date of incorporation, while the rule is in effect. A rule which incorporates a federal law or rule, with the added proviso: "...as it may be amended from time to time," would be an unlawful delegation of authority.

An example of a proper incorporation can be found in the rules of the Securities Division of the Commerce Department. In its securities rules, the division incorporated by reference: "S.E.C. Rule 144 as it exists on the effective date of these rules." Rule 144 has subsequently been amended by the SEC but the Securities Division properly

applies the rule as it existed in June of 1975. It is only reasonable that they maintain a copy of the rule as it existed at that time.

11. HE 109. This was formerly rule HE 106. The amendments to this rule are needed to clarify existing practice and to delete language which merely repeats the statute, a practice virtually prohibited by the 1977 Legislature. The first amendment requires the Office of Hearing Examiners to transmit the complete record to the agency at the time the Hearing Examiner's report is issued. The other amendments change the responsibility of making a copy of the Hearing Examiner's report available to the public from the agency to the Office of Hearing Examiners. There is a problem that occurs when a person demands a copy of the report and the agency has no explicit authority to charge the requesting person a reasonable fee for the reproduction, thus asking all Minnesota taxpayers to pay for the single request. The Office of Hearing Examiners, being on a revolving fund, has specific authority to charge for its services. Nothing contained in this rule should be interpreted as prohibiting any person from requesting an opportunity to review the Hearing Examiner's report at no cost either at the Office of Hearing Examiners or the agency where such report is public record.

12. HE 110. This was formerly rule HE 107. The amendments to this rule delete unnecessary statutory language. Additionally, it provides that rather than requiring the agency to resubmit the entire official record in the case to the Chief Hearing Examiner, only copies of certain specified documents need be submitted. It has been found that only rarely does the Chief Hearing Examiner have need of any documents other than those enumerated in the amendments. Further, transferring the official record of the case from one party to another increases the chances that part of the record could be lost or destroyed. Actual experience has shown that it is not needed.

13. HE 111. This was formerly rule HE 108. The only amendment to this rule is needed in order to have the rule conform to statute. The APA provides for reconvened hearings if the agency has failed to comply with all requirements of law and rule. Our rule did not include the reference to the law.

14. HE 112. This was formerly rule HE 109. The amendment is needed in order to give some certainty with respect to which hearings these rules, if adopted, will apply. It is anticipated that the rules will be duly adopted prior to 12/31/77. It is obvious that in the event these amendments are not effective, by law, by that date, that such effective date must, by law, be no sooner than five working days following publication in the State Register.

Chapter 2, Contested Cases

Statement of Need

1. All rules within the chapter are to be renumbered to conform to the rules of the State Register so that the numbers will be as in the following example:

HE 201

A.

1.

a.

(1)

(a)

2. HE 202. The first proposal in this rule is to delete the definition of the term "commencement". The term is not used within the rules except in HE 204, which in itself, defines commencement. Therefore, it has been determined that the definition is not necessary. It should be noted that throughout these rules, wherever the words "appoint" or "appointment" appear as they relate to the Hearing Examiner, they have been changed to "assign" or "assignment". The APA speaks in the latter terms. The amendments are thus necessary to conform these rules to the statute. The amendments to HE 202 B. are needed for clarification purposes only. The rule as it presently is written would appear to call a person a "party" just if that person petitions to intervene, regardless of whether intervention is granted or not. HE 202 D. is amended to conform these rules to actual practice. The Department of Administration provides mail pick-up and delivery for all state agencies. To require state agencies to make special trips to the postal boxes, and to maintain a supply of stamps or petty cash,

is neither needed nor reasonable. Having cash or stamps on hand in offices fully accessible to the public could lead to theft. That fact is one of the underlying reasons for the state maintaining its Central Mailing Section.

3. HE 203. Besides the renumbering amendments and the term "appointment" changed to "assignment", the first amendment to this rule is identical to the changes in HE 102 B., that being to clarify that the Chief Hearing Examiner needs only the documents as they propose to issue them rather than an actual document entitled "Proposed Notice..." etc. The second amendment is more substantive. The rule as proposed to be amended, would provide for a single document entitled Notice of and Order for Hearing. This amendment is needed to reduce the number of documents, thus saving both time and money. Several agencies, with our approval, have utilized such a document. Others are issuing three separate documents: an Order for Hearing; a Notice of Hearing; and a Statement of Charges. Separate documents can also lead to confusion for the person receiving them.

The next substantive amendment to this rule provides that the agency must assure the Office of Hearing Examiners that the facility chosen for the hearing complies with Executive Order No. 148 relating to barrier-free facilities. This amendment is needed as the Office of Hearing Examiners may not be familiar with the facility chosen and thus could be guilty of violating the Executive Order. This provision, along with the Executive Order, is reasonable in that our statutory directive mandates that all hearings be conducted at a place where all interested persons have an opportunity to be heard. Senior citizens and handicapped persons are not second-class citizens. They most certainly must be included in the phrase "all interested persons".

HE 203 C. 8. is proposed to be amended to allow the Hearing Examiner to call witnesses where it is necessary to make a complete record. This proposal was submitted by the Public Service Commission (hereinafter "P.S.C."). They had proposed the additional requirement that the Hearing Examiner obtain prior approval of the agency before calling additional witnesses as they felt that witness costs would have to be borne by the agency for whom the hearing was being conducted. This latter proposal was not included in our proposed amendments for several reasons. First of all, there was no showing that there would be

any witness expenses. Secondly, and most importantly, the time delay in getting such approval could, in many instances, cause undue delay in the hearing process. Thirdly, all of the present Hearing Examiners and the Chief Hearing Examiner believe that the authority to call witnesses to make a complete record already exists in HE 203 C. 11. This rule is necessary because the Hearing Examiner, as the fact finder for the agency, may find that the witnesses sponsored by the existing parties have not sufficiently explored or analyzed in their testimony an issue of particular significance in the hearing. The Examiner may also find that issues which are important to the resolution of the case have been ignored or neglected by existing parties and that the parties are unable or unwilling to present testimony on that issue. In such situations, the Examiner, as the trier of fact, should have the latitutde to call and examine witnesses while providing the parties with an opportunity to cross-examine those witnesses.

4. HE 204. Amendments to this rule arise from a number of sources. These include changes necessary due to changes in other rules, experience of the Hearing Examiners, comments heard from the general public on various occasions, and the P.S.C. In 204 A., the amendments are needed to conform to previously discussed amendments relating to a single document. Also, it has been found, through experience, that several agencies have specific statutory authority to issue orders for hearing other than as provided in these rules. Our rules cannot supersede laws duly enacted by the legislature. Therefore, the new prefatory language is needed to clarify this situation.

HE 204 A. 5. is proposed to be amended to clarify existing practice. Other than the existing prohibition against the unauthorized practice of law (representing another, for a fee), the Office of Hearing Examiners has no authority, nor does any other state agency, to prevent any person from choosing any other qualified person from representing them in an administrative proceeding. This amendment was proposed by the P.S.C. This rule is necessary because many groups or associations are unable or unwilling to be represented by legal counsel, and it is necessary to make clear that they may designate a representative who is not an attorney in Minnesota in the hearing. As the rule

is presently written, it indirectly implies that a party may be represented pro se or through legal counsel, but not otherwise. This creates complications for groups and associations and unduly limits the preference of an individual to have the representation of his choice. Examples of such non-lawyer representation were expressed at our original hearings on these rules by Paul Goldberg of AFSCME who felt that the rule would prohibit union officials from representing state employees in disciplinary proceedings, and informally from Elmer Berglund who represents the interests of railroad workers in all hearings relating to requests for variances from clearance requirements for railroads. These are but two of many examples we could give of instances where highly qualified individuals have appeared in a representative capacity in our hearings wherein they have played a very effective role and have assisted the Hearing Examiner in making a complete record.

It should be noted that this is the first rule wherein the phrase: "wherein the agency is a party" or "where the agency is not a party..." appears. These terms are needed to clarify situations where the agency is purely neutral and thus not an actual party and those wherein the agency actually is the initiating party, or in other terms, the one who really causes the contested case to be commenced by some overt action such as a licensing board seeking to discipline one of its licensees.

HE 204 A. 8. amends the timing of the filing of the Notice of Appearance and also is an attempt to clarify the purpose of the document itself. The original rule requiring the Notice of Appearance was adopted to provide notice to the various agencies of which hearings would actually be contested so that they would not have to have all of their witnesses present when a default proceeding was anticipated. Much confusion has arisen from this rule. The amendments are needed to clarify the rule to require such notice only in those instances where the agency is an active party as opposed to those where the agency sits in a purely neutral capacity. The rule was primarily designed for hearings such as license revocations.

HE 204 A. 9. adds new language which is needed for clarification purposes. It also adds the requirement that the agency must also tell the parties receiving the document of the potential results of a

default, such as their particular professional license being revoked or suspended. This is needed because most persons receiving such notices are not lawyers and could very easily not understand the ramifications of the allegations being taken as true.

HE 204 B. is amended in several ways. First, the prefatory phrase "unless otherwise provided by law" is added to make it clear that these rules cannot supersede duly enacted statutes. There have been several instances where agencies were confused. The remaining changes are needed again for clarity. The requirement that a copy of the Notice be served on the Hearing Examiner is deleted as it is unnecessary since the Hearing Examiner already has a copy and, in actual practice, the original, with an Affidavit of Service, is introduced at the hearing or sent to the Hearing Examiner prior to the hearing.

HE 204 (c) and (d), in the existing rules, are proposed to be repealed. First, (c) is now contained in the proposed amendments to HE 205 and is not needed here. Second, since we have clarified HE 204 B., the existing rule (d) relating to publication, is no longer necessary. Additionally, it has led to some confusion and has proven, by experience, to really not be necessary anyhow. HE 204 C., formerly (e), contains only amendments reflecting the single document approach.

HE 204 D. is entirely new and was proposed by the P.S.C. This rule is necessary because there are state agencies with a large number of similar cases which have developed more flexible and effective procedures for notifying parties and other interested persons of the hearing to be held which substantially comply with the requirements in Minn. Rule HE 204 A. Where the Hearing Examiner determines that the rights of existing and potential parties will not be prejudiced by utilizing well-established substitute procedures, those procedures should be allowed instead of, rather than in addition to, the requirements of this rule.

The Public Service Commission endeavors in many cases to notify personally all subscribers of a public utility company of a hearing which is to be held and also prints and distributes a weekly calendar listing all hearings underway and to be held in the near future. The usefulness of providing additional notice through an order for hearing

is marginal in view of these alternate procedures. The use of the order for hearing instead of the established and widely circulated notices used by the Department would be unduly burdensome and may, in fact, restrict the wide publicity of public hearings held by this agency.

5. HE 205. This rule is amended in two ways. First, the time for filing the Notice of Appearance is changed from 10 days prior to the hearing to 20 days of the date of service of the Notice and Order for Hearing. For hearings wherein 30 days notice is being given, this would be no change. The amendment is needed, especially in cases involving many parties and diverse issues where a prehearing conference is anticipated, and where the hearing date is 45-90 days away. It assists everyone involved in the hearing to have advance notice of who will be appearing for themselves, who will be represented and by whom. Those who do not intend to appear can also then be subpoenaed by other parties if their testimony is needed to make a complete record. In short, it is needed to make the process work more fairly and smoothly. The second amendment adds the repealed language of HE 204 (c).

6. HE 206. The amendments to this rule were previously alluded to when we discussed the amendments to HE 204 A. 5., and the comments there are adopted here as further evidence of the need for the amendment. In fact, as alluded to previously, this clarification merely states what the practice has been since the office became effective.

7. The P.S.C. recommended an amendment to HE 208 which would have had the Hearing Examiner assess hearing costs to intervenors who fail to appear at a hearing and where, but for their intervening, a hearing would not have been necessary. Their point is very well taken. However, the Chief Hearing Examiner lacks statutory authority to adopt such a rule.

8. HE 209. This amendment was proposed by the P.S.C. The reasons stated for the amendment are as follows and are adopted as our own:

> "This rule is necessary to bring it in conformance with Minnesota District Court Rule of Civil Procedure 6.01. The deletion of this sentence from the existing District Court Rule causes unnecessary confusion to attorneys and others accustomed to computing time in the method required by Minnesota Rules of District Court. No compelling reason is known to the Commission why a different time computation method should be used in administrative proceedings."

9. HE 210. This rule contains several amendments. First, the words "and the agency if the agency is not a party" have been added several places. This is needed to ensure that the agency will always know what is going on in the process. It has been found, much to our surprise, that in cases wherein an agency is in a neutral capacity, parties have failed to send copies of motions, requests for continuances, etc. to the agency. It has caused considerable confusion. It is hoped the amendments will end the confusion.

HE 210 C. is amended to provide the Hearing Examiner with some flexibility when several petitions to intervene are filed having similar interests to protect. Under the present system, theoretically he may choose only one, the rest being denied because their interest is already being protected. This amendment, allowing consolidation of such petitions, will allow all to participate but will keep the number of actual participants at a manageable level. Deleted from the existing rule are the provisions allowing the Hearing Examiner to limit the form of participation an intervenor may enjoy. As best we can find, the language was "pirated" from other rules in existence at the time our rules were first adopted. Experience has shown that the limitations are not needed, serve no practical purpose and further, that it does not make sense to allow a "person" to become a "party" without full "party" status. A further deletion from the existing rules are the provisions of HE 210 D (1) and (2). The first section is not necessary because the right to intervene in any case has absolutely nothing to do with the status of the agency. Therefore, this section was merely repetitious. The second portion, (2), was an attempt to recognize an existing practice at the Commerce Department which allowed for "comparative" hearings when more than one application had been filed for authority to operate a financial institution in the same locality. Their rule has never been repealed. Therefore, it is unnecessary for our rules to attempt to include this provision. Again, the rule is repititious as such persons would have this right regardless of the status of the agency. The rule as proposed to remain would thus only provide for agency staff intervention, a practice employed by several agencies. I would point out that our experience to date

under this rule has, in most cases, proven to be very effective and beneficial to the Hearing Examiner in making a full and complete record.

HE 210 E., our rule on public participation, is proposed to be amended in two ways. First, the prefatory words, "Regardless of the status of the agency" serve no useful purpose and have led to confusion. The rest of the amendments are aimed primarily at our continuing effort to "open up" the administrative process to the public, a mandate given the Office of Hearing Examiners by the legislature when it was created. Our experience in conducting more than 1500 contested case hearings since January 1, 1976, shows that people do not understand the somewhat complicated "hoops" they must jump through in order to participate at hearings. We have been allowing participation exactly as the new language would allow and have found that the public reaction has been very positive. The requirement that these persons be sworn is very offensive to many in rural Minnesota who truly live by their word. Further, most public testimony is argument rather than evidence, and no question of truth is involved. Persons desiring to give testimony without benefit of oath will be informed of the provisions of HE 217 B., as proposed to be amended, which provides the testimony not subject to oath will be given such weight as the Hearing Examiner deems appropriate. The procedures provided for in this amended rule have been utilized in every case involving the routing of high-voltage transmission lines and has created no problems. Rather, it has proven to be a very effective procedure which also keeps down the number of petitions to intervene and thus the number of parties, which leads to a more manageable hearing process. The last provision allows parties to question persons giving testimony. This is needed and reasonable in order that parties not be given "second-class" status since the public may be allowed to question witnesses of the parties. It should be pointed out that this participation is discretionary with the Hearing Examiner.

10. HE 211. The only amendment proposed in this rule is to provide at HE 211 C. 1., that petitions for severance are to be served on all parties and the agency. Leaving this provision out of the existing rule when adopted was oversight. The rule is needed so that any other

party or the agency may have an opportunity to object to the petition if they choose. As all other motions and petitions are required to be served on all parties and the agency, it is only reasonable for this petition to be served in the same fashion.

11. HE 212. During our first 19 months of operation, on only two occasions had affidavits been filed against a Hearing Examiner. The first was not really an Affidavit of Prejudice but rather an affidavit requesting that another Examiner be assigned to a particular case because the one assigned had never handled the type of case involved. It was heard and denied! The second was one that stated that the party felt that the Hearing Examiner was actually prejudiced against them and that they felt that they could not get a fair hearing. In that case, before any decision had to be made or a hearing held, the Examiner voluntarily asked to be withdrawn, stating that he did not feel that our procedures should be any different than those in our judicial branch. The Chief Hearing Examiner agrees!

Appearing before an administrative agency, especially in a disciplinary proceeding, (which make up a majority of our contested case hearings) is traumatic enough for an individual without also burdening him with the thought that the Examiner may have some prejudice. A concern that these amendments will create scheduling problems within our office due to our relatively small size may be legitimate. However, experience to date does not substantiate this concern. Should the new procedures create actual difficulties, sufficient evidence will then be available in order for the Office of Hearing Examiners to make an affirmative presentation of facts showing the need for and reasonableness of changing the rule back to its present form.

The concern expressed regarding scheudling is a potential problem. Therefore, additional amendments are included to provide for a hearing on any second filings or where another party objects to the affidavit. Also, the time for filing of the affidavit has been increased from five days prior to the date set for hearing to 15 days prior. This is necessary to allow other parties to object, a hearing to be conducted on the affidavit if necessary, and sufficient time for the newly assigned Hearing Examiner, if any, to familiarize himself with the case.

The new proposal relating to the procedure for objecting to the affidavit is needed for several reasons. First, if any party feels that the filing is merely for delay or, in the case of an agency, would cause a severe burden on its budget and thus the taxpayers, it must have an opportunity to present its objections. Second, in cases wherein there are multiple parties, a sequence of affidavits could potentially be filed, creating undue delay. With the provision that any party can object to an affidavit, it is thought that this potential problem will be alleviated in that if one party is satisfied with the first Examiner assigned, that party will voice objection to any affidavit filed. Their failure to do so would most certainly carry some weight with the Chief Hearing Examiner in any subsequent hearing following a second filing. It should also be pointed out that any such filings must be made "in good faith". Therefore, it appears to be implicit in the rule that the affiadavit contain sufficient information in order to enable the Chief Hearing Examiner to make an educated judgement on the issue of "good faith".

In summary, the proposed amendments are needed and reasonable in that they conform to the same procedural rules available in all courts of law, relieve a person subjected to an administrative proceeding of the additional trauma of feeling that a particular Examiner may be prejudiced in some fashion, yet provides methods by which others may object to such filings when the filings may be inadequate, inappropriate, or made for purposes of delay.

12. HE 213. Other than technical amendments needed for clarity, the only amendment to this rule is the inclusion of a new section relating to motions. Our experience has shown that confusion exists relating to motions to the Hearing Examiner. The proposed amendment is copied from the Rules of Civil Procedure for the District Courts of the state, modified to fit these rules. None of the Office of Hearing Examiners rules provide for ex parte motions. Therefore, that provision of the court rules has been excluded. The rule is needed due to confusion which has existed and which has been expressed to the Chief Hearing Examiner by state agencies, members of the Attorney General's staff, legislators, lawyers, and the Hearing Examiners.

The amendment is phrased in a manner that allows the Hearing Examiner the discretion to conduct a hearing on the motion or to allow written motions. This section is really needed as a supplement to our rule on discovery. Our discovery rule is written in a fashion that it is self-executing, requiring a motion only where discovery is refused by a party. Through experience, it has been found that a hearing on such motions is not necessary in most instances. Such hearings also increase the cost to the agencies. However, the rule as drafted leaves the question of calling for a hearing to the discretion of the Hearing Examiner.

13. HE 214. The first amendment to this rule is found at HE 214 C. The new language is necessary in order to align administrative practice more closely to civil practice. The first sentence is needed to alert all persons that the Hearing Examiner will recognize, in addition to work product, all other privileges recognized at law. We have been recognizing all such privileges but some have thought we would not as it was not spelled out in these rules. Hearing Examiners cannot act contrary to the law establishing such privileges, but, because there has been some confusion, it is necessary and reasonable to restate the principle.

The second sentence in this first amendment is needed to provide for more means of discovery, but with the requirement that the party requesting the discovery must obtain an order from the Hearing Examiner. One purpose of establishing the Office of Hearing Examiners was to provide for fair and expeditious hearings. Fairness requires opening new means of discovery for all parties. However, in order to conduct all hearings in an expeditious manner some control must be available. We have had numerous examples over the past year and one-half of cases which have had to be continued several times due to discovery being dragged along. Both the state agencies and the bar have been equally at fault. It is reasonable for parties to have their right to an expeditious hearing protected and this rule is aimed at that right. Further, many contested cases involve issues or amounts that are not significant enough to justify extensive discovery. Many persons find that it is not worthwhile to hire an attorney to write answers to

extensive interrogatories. In these cases it is necessary for the Examiner to balance the competing interests.

HE 214 D. is an entirely new provision which was proposed by the P.S.C. and is a direct result of a case our office conducted for them. Proprietary information may be protected in court. This rule is necessary because there is no provision in the existing rules on this subject, despite mention in HE 214 (c) of "work product". The Examiner should have explicit authority to determine what are legitimate proprietary information and trade secrets, and to make the necessary protective orders at the request of any party. Although this authority may be considered to be included under HE 203 (c)(10), explicitly recognizing this exception would eliminate questions of whether such information must be produced in administrative proceedings upon threat of default by the requested party.

14. HE 216. Laws of Minnesota, 1977, Chapter 443, Section 9, provides that the Chief Hearing Examiner may issue subpoenas. Previously, this rule on subpoenas only applied when the agency for whom the hearing was conducted had such subpoena authority. What has occurred is that parties other than the state agency had to request the subpoenas but the state agencies would merely issue its own subpoenas without informing anyone, thus giving themselves an unfair advantage. The proposed new language is needed and reasonable in order to put all parties to the proceeding on equal footing. Fundamental fairness requires such a rule. The rest of the amendments are needed to ensure, once again, that the agency is aware of the subpoena request if it is not a party, and to be sure everyone knows who is going to be subpoenaed so that they will be able to tell whether or not they wish to move to quash the subpoena. Further, the names of persons to be subpoenaed are needed in order that the Chief Hearing Examiner can fill out the subpoena. The Chief Hearing Examiner will not issue blank subpoenas.

15. HE 217. The first amendment is needed as a result of the amendments to HE 210 E., the rule on public participation, wherein the public will be allowed to testify without necessity of oath. It is reasonable to allow the Hearing Examiner to give such unsworn testimony

the weight he deems appropriate as he is able to observe the witness's demeanor, and knows all of the other evidence in the case which may either support or refute the evidence presented.

HE 217 C. 7. is an entirely new rule relating to the allowance of offers of proof. While all Hearing Examiners have always allowed such offers, some of the Hearing Examiners indicated that they would be more comfortable with a specific rule on the subject. The allowance of an offer of proof in our proceedings is extremely important since the Hearing Examiner, except in Human Rights and OSHA cases, merely makes recommendations. Should he disallow some testimony and the agency disagree upon its final review, the case would have to be remanded for further hearing which would cause additional delay and expense. Likewise, even if the agency agrees with the Hearing Examiner and does not consider the evidence, should the District or Supreme Courts, on appeal, disagree, the case would not have to be remanded.

HE 217 D. is amended to conform the rule to statutory amendments made by the 1976 Legislature. Those changes require the agency to send the official record to the Hearing Examiner at the time of commencement of the case, the Hearing Examiner to maintain it during the process and to return it upon completion, and for the agency to maintain it thereafter. The second amendment adds the statement that the transcription of the hearing, if one was made, is also part of the official record. It has always been considered as such and its absence from the existing rules was merely through oversight. The third amendments are needed to give notice that any person may request a transcription of any hearing. This amendment conforms the rule to present practice. It would be unreasonable to prohibit persons who were not actual parties to the proceeding from obtaining the transcript because the transcript is normally part of a public record and must be made available to the public. If the record is non-public by law, these provisions will not apply.

HE 217 F. contains an amendment proposed by the P.S.C. relating to the certification of motions to the affected agency. This rule is necessary because of the need to obtain the agency's decision on certain questions in hearings before they are concluded. Because the

Hearing Examiner does not make a final decision in any sense, the decisions of the Hearing Examiner must be considered by the parties to be preliminary only. If a motion is decided adversely to a party which necessitates additional time and expense by that party, such as a motion that a certain area of testimony is relevant to the hearing, the party should have available to it the opportunity to have that question finally decided and thus be relieved of the obligation to present additional testimony or take other action. In addition, many state agencies conduct hearings which require a final decision before a certain statutory deadline, and there is special urgency in those proceedings that the hearing proceed as expeditiously as possible, and that subjects not be considered at the hearing upon the ruling of the Hearing Examiner only to be finally determined irrelevant in the agency's final decision. Such situations occur infrequently and it is not envisioned that a large number of motions would be certified to the agency during the course of a hearing.

The factors mentioned and the specific language used in this proposed amendment are paraphrased from the federal rule, 28 U.S.C. § 1292, which contains a large number of interpretive decisions which can be considered applicable in administrative proceedings, thus providing guidance to parties contemplating a request to certify.

HE 217 G. is amended in three ways. First, prefatory language is inserted at the start to allow the Hearing Examiner to deviate from the strict procedural guidelines in certain cases. This amendment is necessary as it has been found that in many cases, small, uncontested matters can be disposed of much more efficiently and effectively by the use of a more informal hearing process. This is especially true where parties are not represented or where the need to allow public participation is great. Formal procedures "scare out" some members of the public who would otherwise be willing to come forward with what is many times found to be very relevant and important evidence.

The second amendment to HE 217 G. was proposed by the P.S.C. The amendment is a result of experience in conducting numerous cases of a technical nature, for that agency. This rule is necessary to allow the practice of examination of witnesses by more than a single person.

In many complicated cases, a single witness testifies on a number of different subjects, and it is a burden on the representative of the party to conduct cross-examination on all areas of a witness' testimony. This is especially true in hearings in which expert witnesses present testimony. The rule as amended will allow cross-examination on behalf of a party by a number of different persons, but seeks to prevent repetitive examination or harassment of a witness by a number of different questioners. The Hearing Examiner is given express authority to limit the cross-examination if it becomes necessary to accomplish cross-examination in an orderly manner.

The third amendment is, once again, needed to correct an oversight in the existing rules. Many cases have the official record close at the end of testimony. However, many cases require the filing of briefs, proposed finds, etc. for a period following the end of the hearing itself. This amendment merely clarifies the different items, the receipt of which will close the record.

16. HE 218. The first amendment to this rule is needed for the same reason as HE 202 D, to conform the rules to the actual practice of utilizing the Department of Administration's mail pick-up and delivery. The same reasons as stated for HE 202 D are incorporated here. The last amendment to this rule would require the agency to send the Office of Hearing Examiners a copy of their final order. Many agencies do this at present. The rule is needed for two reasons. First, we attempt to maintain uniformity in decisions of the various Examiners and do rely on previous decisions. If an agency has taken a position which differs from the Examiner, we will generally follow that precedent unless we are in clear disagreement over statutory interpretation or over the facts themselves. Second, as we tape record 70% of our hearings, we must maintain the tapes, when no transcript has been prepared, until the eventual action of the agency has become final, with no appeals. At that point we can erase the tapes and use them again. It is therefore necessary that we know when the agency has made its decision.

17. HE 222. This amendment makes the rules effective on a certain date and is needed to give some certainty with respect to which hearings these amended rules, if adopted, will apply. Of course, if the rules have not been published in the State Register by that time, they cannot be effective until five days after publication.

II

New Rules

These proposed rules are not amendments to existing rules but are all new rules which apply solely to hearings to be conducted for the Environmental Quality Board relating to the siting of large electric power generating plants and the routing of high voltage transmission lines under the provisions of Minn. Stat..Ch. 116C.

The statutory authority and the need to adopt such a separate set of rules arises from legislative mandate found in Minn. Stat. § 116C.66 as amended in 1977, which reads in part as follows:

> "The chief hearing examiner shall, prior to January 1, 1978, adopt procedural rules for public hearings relating to the site and route designation process and to the route exemption process. The rules shall attempt to maximize citizen participation in these processes."

The rules are needed to provide a procedural framework within which hearings can be conducted in an orderly, expeditious and cost-efficient manner, yet allowing for the widest possible citizen participation.

That same Act, in Section 26, authorized the Office of Hearing Examiners to adopt temporary rules within 30 days after the Act was signed by the Governor and filed with the Secretary of State. Prior to adoption of those temporary rules, a Notice of Intent to Solicit Outside Opinion was published in the State Register at 1 S.R. 1600, May 9, 1977, which contained a deadline for submissions of June 15, 1977. One letter was received from Ms. Pat Schwartz of Belle Plaine, Minnesota (see Exhibit C). Additionally, several utility companies and members of the Minnesota Environmental Quality Board staff and its assigned Assistant Attorneys General requested an opportunity to present their suggestions to the Chief Hearing Examiner personally. Pursuant to their request, the Chief Hearing Examiner allowed the requesting parties such opportunity. An audio-magnetic recording of the meeting was made and a transcript prepared at the direction of and by members of the Chief Hearing Exmainer's staff (Exhibit D). Written proposals were also submitted at this meeting by Northern States Power Company. Additional comments were received from Northern States Power Company (Exhibit E), Minnesota Power and Light Company (Exhibit F) and Roger Miller, counsel for United Power Association (Exhibit G).

All of the suggestions presented, especially those of Ms. Schwartz, were duly considered and most, if not all, were incorporated in the temporary rules, which are the same rules we now seek to permanently adopt.

Before presenting the statements relating to the need for and reasonableness of each rule, we will discuss the general concepts contained in these rules.

First of all, it must be pointed out that these rules apply solely to the conduct of the public hearings required to be held and not to the criteria for designation of sites and routes. The rules provide for the way by which persons or associations may actually become a "party" to the proceedings (a concept which will be discussed in detail later), or may fully participate without the necessity of going through the formal, procedural "hoops". These rules do not apply to the public informational meetings held prior to the "official" hearings conducted by our office.

Prior to the actual hearings, all "parties" will be required to prepare, in question and answer form, all of the direct testimony they intend to present at the public hearings. This "prefiled" testimony will then be available for review at county libraries prior to the hearings so that all persons will have an opportunity to fully review all such testimony.

The rules then provide for a two-stage hearing process. In the first stage, "parties" will begin immediately with the cross-examination and questioning of the witnesses of all parties. This stage may require more than one evening. The second stage of the hearings will be limited solely to the public's participation, which may include the questioning of witnesses of all of the "parties", the presentation of witnesses, exhibits and other testimony. The public may present their views and questions orally or in written form, and with or without the benefit of oath or affirmation.

At this point, it is important to differentiate between participation in the proceedings as a formal "party" or merely as an interested person. In order to become a "party", one must propose a route or site to the Board, which must accept the proposal pursuant to its rules,

or petition to intervene pursuant to these rules as will be discussed later. A "party" is required to participate in any pre-hearing conferences; pre-file all direct testimony, providing copies to all other parties and the Board; be present at all hearings; and have its witnesses available for questioning.

The major differences between a "party" and an "interested person" is that a "party" is entitled to present argument to the Board if it is aggrieved by the Report of the Hearing Examiner. It has absolutely no effect on the ability of any person to appeal the final decision of the Board to the district courts. Minnesota law provides that any person aggrieved by a final decision of a state agency may appeal to the courts. The same law provides that only "parties" have the absolute right to present argument to the Board if they are aggrieved by the recommendation of the Hearing Examiner.

Lastly, it should be pointed out that the rules, as proposed, are an attempt to provide for the fullest possible public participation, as mandated by the legislature. They have been purposely drafted in a manner which, hopefully, gives the Hearing Examiner enough flexibility to allow every conceivable manner of public participation presently known. They have been drafted in a manner which provides that those persons who may not otherwise participate in the process through fear of public speaking or, as was presented in testimony to the legislature, fear "humiliating, cross-examination by highly trained lawyers of the utilities", may be heard.

These rules are not "drafted in concrete", in that any reasonable changes will and must be considered. As evidence of our concern for the public's wishes, it should be noted that most, if not all, of the proposals presented by Ms. Schwartz have been incorporated into these proposed rules. Should your suggestions for change represent "substantial changes" in the rules as proposed, it would require a new hearing in order to give all interested persons a full opportunity to study and react to them. The legislature has directed that these procedural rules be in effect by January 1, 1978. Therefore, the proposed rules, or the proposed rules as amended subsequent to these hearings, will be adopted and in effect at that time. However, should reasonable suggested changes be proposed, which cannot be adopted because they would be "substantial changes", an additional hearing will be conducted in

order to amend any rules adopted following this proceeding.

The need for and reasonableness of the proposed rules are as follows:

1. HE 401. This rule is needed to indicate, with specificity, the kinds of hearings to which the rules apply. As the legislature did not include the revocation or suspension of a site certificate or construction permit within the rulemaking authority, it is necessary to indicate that for those hearings the contested case procedures contained in Chapter Two of the Rules of the Office of Hearing Examiners apply.

2. HE 402. This rule is needed to supply definitions of terms that are used throughout these rules and which are not defined in the Administrative Procedure Act. It is necessary to define "party" since the definition in this chapter is different than in Chapter Two. This is necessary to conform the definition to its usage in Minn. Stat. Ch. 116C. Likewise, the term "person" is defined differently than in Chapter Two.

3. HE 403. First of all, wherever the words "appoint" or "appointment" are used, we propose to amend to change the words to "assign" or "assignment". This amendment is needed as Minn. Stat. Ch. 15 speaks in those terms rather than the existing words. The rule is necessary to provide a method whereby the Board may obtain the assignment of a Hearing Examiner, once the agency decides to order a hearing. The rule also sets out specifically the duties which the Hearing Examiner has authority to perform in the course of the hearing procedure. The rule sets up a 10-day time frame during which the Chief Hearing Examiner must assign an Examiner to hear the case. This is needed to assure that the hearing process begins promptly so that the process can be completed within the deadlines imposed by Minn. Stat. Ch. 116C.

4. HE 404. This rule is needed to set out the procedure the Board must follow in setting a particular proceeding on for hearing. The rule sets out the items which must be included in the Notice of Hearing in order to give all persons the basic information needed to make a decision on whether or not to participate in the process, and

how such participation may be secured. Several of the items required to be included are mandated by Minn. Stat. Ch. 116C, at various sections. Most of the sections are needed to ensure that all persons reading the Notice will know exactly what they must do in order to participate in the process, and who to call in order to obtain further information.

5. HE 405. This rule is needed to make it clear that anyone has the right to be represented by an attorney during the course of the proceedings and, as written, ensures that a person need not be represented by an attorney.

6. HE 406. This rule is needed to supply definiteness concerning computing periods of time in connection with the proceedings and to allow additional time to persons in certain instances where the use of the mail for service may create a small delay. These rules are adapted from the Rules of Civil Procedure of the State of Minnesota District Courts and are needed to settle time problems that arise in the course of hearing proceedings.

7. HE 407. This rule is needed in order to provide for the fullest possible public participation, yet still being able to maintain order. The rule is generally needed to fulfill the legislative mandate quoted previously. This rule is needed to directly answer the concerns of the public as expressed before the legislature during the past session, those expressed to Hearing Examiners who have conducted such hearings, and as expressed by Ms. Schwartz in her letter previously alluded to. It is necessary to list, in these rules, the ways in which all persons may participate so that such persons can have a place to find out how they can participate, and then properly prepare. Many people have not participated in prior hearings due to a fear of being subjected to cross-examination or because they simply cannot speak before large groups of people. It is therefore necessary to allow them to submit written testimony or written questions.

8. HE 408. This rule is needed to provide a procedure for those persons desiring to propose a new route or site, or those desiring to participate as a formal party, to actually become a party, yet allowing the Hearing Examiner to maintain control of the proceedings. It is needed to provide a mechanism by which persons who are not parties at

the time of the initiation of the action, but whose legal rights, duties, or privileges may be affected, may become a party. The rule provides that any party may object to a petition which is needed so that those having an honest and good-faith objection may have a procedure whereby they can state their case. The rule also provides that the Hearing Examiner can consolidate similar petitions, which is needed to hold down the number of parties.

9. HE 409. This rule is needed to provide a means by which any person may call to the Chief Hearing Examiner's attention any alleged bias, or to provide a means by which the Hearing Examiner may disqualify himself on his own motion. The provision that the Chief Hearing Examiner determines all such matters is needed to provide fairness and an adequate remedy for persons should the assigned Hearing Examiner not voluntarily withdraw. The five days is needed to ensure that a newly assigned Examiner will have sufficient time to familiarize himself with the proceeding and to prevent someone from coming in on the day of the hearing with an affidavit as occurred in a recent hearing in Duluth.

10. HE 410. A prehearing conference rule is needed to provide a means, prior to the hearing, to shorten the hearings. The hearings can be shortened by the use of stipulations, especially with respect to foundation for exhibits.

11. HE 411. This rule is needed to allow persons to introduce testimony by deposition at the hearing where the witness has good cause for not being able to attend the hearing on the date scheduled.

12. HE 412. Laws of Minnesota, 1977, Chapter 443, gives the Chief Hearing Examiner authority to issue subpoenas. Therefore, a procedure for obtaining such subpoenas is necessary. In order to ensure that the issuance of a subpoena is necessary, the rule requires disclosure of the name of the person to be subpoenaed, the relevance of the testimony, and specific identification of documents sought. This is also needed to prevent a mere "fishing expedition". It is necessary to provide a means by which the person subpoenaed or any other person to object and move to quash, in the event the Chief Hearing Examiner was not aware of certain facts at the time the subpoena was issued.

13. HE 413. Generally, the rule is needed to spell out exactly what will occur at the hearings themselves. It is necessary so that all persons will know, in advance, what to expect at the hearings. Section 413 A. 1. a. is needed to ensure that the Hearing Examiner will inform all persons present at the start of the hearings what the procedures will be, and when they will be allowed to ask questions and present their own testimony. HE 413 A. 1. b. is needed so that the Hearing Examiner can maintain control and conduct an orderly hearing.

HE 413 A. 2. a. places an 11:00 p.m. "curfew" on all hearings but provides that it can be dropped. This rule is needed in that hearings conducted in the past have run as long as 4:00 a.m. Such lengthy hearings were sometimes necessary as the Board had neither the time nor the resources to schedule additional hearings. This has been corrected, to a certain extent, by the new law. Experience has shown that very little, if any, good evidence is presented as the night stretches into morning and that the later it gets, people become tired and edgy, and that is when tempers can flare. The rule as proposed provides that the Hearing Examiner may go beyond the 11:00 p.m. deadline. This is needed so that if the hearing is nearly completed or a witness will finish all of his testimony, a reconvened hearing is not necessary, something which would be time consuming and costly.

HE 413 A. 2. b., c. and d. are needed to establish the two-staged hearing process. Such a proposal was brought forth in written comment received from Ms. Pat Schwartz of Belle Plaine. Previously, an interested person would have had to attend every hearing in order to hear and question all of the witnesses. As she stated: "Then the utility should present its 'entire' case at the first and, if necessary, second scheduled public hearings. This procedure should be known by the public in advance and would then give all interested citizens an opportunity to hear and question all of the 'expert testimony' the utility is submitting." This rule also is needed to establish the procedure by which the direct testimony of the witnesses of all parties will be introduced into the record as if read and then to begin immediately with cross-examination.

The requirement of the prefiling of all direct testimony is contained in HE 413 I. That requirement, coupled with the two-stage

hearings, is necessary for two reasons. First, it will shorten the hearings themselves in that lengthy direct testimony will not be given at the hearing itself. Secondly, the general public will have an opportunity to review all of the testimony to be presented in advance of the hearing dates thus enabling the public a better chance to prepare for the hearings. This procedure has worked very well in cases we have heard for other agencies. It was also proposed by Ms. Schwartz, along with the requirement that such testimony be available at public libraries along with other relevant data.

HE 413 A. 3. is needed in order for the Hearing Examiner to maintain control and is a direct result of actual experience. It is needed so that several persons from the agency will not "double-team" witnesses or otherwise interrupt the hearings as they see fit.

HE 413 B. is needed to ensure that the witnesses who have offered prefiled direct testimony will be available for questioning by all other parties and interested persons. Because many times it is either unnecessary or financially burdensome to have a witness at each hearing, the rule provides a vehicle whereby a witness will be excused but in that event, the public must know when and where the witness will be present for their questions.

HE 413 C. spells out the rights which will be afforded to all persons in compliance with both the legislative mandate and the intent of the rules in general, as previously alluded to.

The balance of HE 413 is needed to provide the rest of the general framework for the hearings. They are needed in order that all persons will know well in advance of the hearing, exactly what they may or may not do. The rules safeguard the rights of all persons by requiring that only that evidence submitted on the record will be considered. The burden of proof section is needed as it signifies who must carry the burden and what type of burden is to be imposed.

In HE 413 F., we propose to amend sections 2 and 3 to correct an oversight when the rules were originally typed. In 2, add a new section f. to read exactly as presently appears at 3. Then, 3 should read simply: "The Transcript." This entire section is needed to point out who prepares and maintains the record in each case, what it will

contain, how persons may obtain copies of the transcript, and to provide for submission of the Environmental Impact Statement early enough so that all persons will have an opportunity to review and comment on it.

The rule relating to continuances is needed to ensure that there can be additional hearings and to provide the authority to the Hearing Examiner to order such additional hearings.

The rule on motions is needed to ensure that once the Office of Hearing Examiners has received the case, it will maintain jurisdiction until the Hearing Examiner's report is issued and so that persons who may disagree with any particular ruling of the Hearing Examiner will not run to the Board for a ruling. There is a provision in this rule for certification of motions to the Board during the proceedings, which is needed for several reasons. First, a time may arise when the Hearing Examiner needs to obtain an agency decision on a point before the hearings are concluded, since the Hearing Examiner makes recommendations only. Second, in the event a person or a group desires to propose a new route or site, the Hearing Examiner may desire that the Board take a look at the new proposal to determine if evidence on it should be included.

The rule relating to the prefiling of direct testimony by all parties has been discussed previously. It is needed to shorten the process, allow all interested persons an opportunity to review the evidence prior to the hearing, to provide how it is to be filed, when and where, and to ensure that copies will be available for review at each hearing, and to ensure, by rule, the right of any person to object.

The rule relating to disruption of hearings is needed to ensure that the Hearing Examiner will be able to keep control of the hearings at all times.

14. HE 414. This rule spells out the basis on which decisions will be made by both the Hearing Examiner and the Board. It is needed primarily to indicate to the public the statutory provisions which must be followed by the Hearing Examiner and the Board in the course of arriving at decisions. However, I must point out that the rule, for the most part, duplicates statutory language and I cannot state that it is crucial to the ability of a person affected by the rule to com-

prehend its meaning and effect, and I would therefore propose to withdraw the rule unless there is objection or unless someone can convince the Hearing Examiner that it is crucial.

15. HE 415. This rule on rehearing is needed to provide a procedure in the event the Board, upon its own motion or in response to a petition, determines that further hearings are necessary. In such event, it is only reasonable that the same notice requirements of HE 404 be followed to ensure that all interested persons receive notice.

16. HE 416. This rule was proposed by the staff of the Board. They stated that it is needed to point out to people that the Board's rules and not the Office of Hearing Examiner's rules will apply where a site or route is to be picked under situations as described in Minn. Stat. § 116C.57, Subd. 3, and thus such emergency procedures are unaffected by these rules. That is their position, but no longer ours! While it is clear that these rules, as proposed, simply do not fit the type of hearing contemplated by Minn. Stat. § 116C.57, Subd. 3, nevertheless, the language contained therein very clearly mandates that a hearing is to be conducted. However, the hearing mandated by that section is not to choose a route or a site, but to determine whether or not an emergency exists. As the law requires that a hearing is required, after which specific parties, here utilities, rights are to be determined, there can be no question that such a hearing would be a contested case under the definition contained in Minn. Stat. Chapter 15. Therefore, Chapter Two of the Rules of the Office of Hearing Examiners would apply. Based upon this analysis, the rule is withdrawn. I would note at this point that we have informed the staff of the Board that we would be withdrawing this rule so that they would have sufficient notice should they desire to protest the withdrawal and perhaps change our mind or that of the Hearing Examiner that to do so would be a substantial change.

17. HE 417. This severability statement is thought to be needed to declare the intent that the rules are severable in the event that one should be held invalid. It may be that Minn. Stat. Ch. 645 has provisions relating to statutory construction and severability could be construed to pertain to rules also. Until we have been shown a

Supreme Court decision or an official Attorney General's opinion on the subject, we do not believe that it would be unreasonable to fully express intent in these rules.

18. HE 418. As published in the State Register, these rules were effective as temporary rules on July 1, 1977. This section will no longer be needed as the statutory language indicates that the temporary rules are ineffective upon final adoption of these rules or January 1, 1978, whichever occurs first. Therefore, we propose to withdraw the rule as unneeded.

19. The last rule proposed was as published in the State Register at 2 S.R. 382, September 6, 1977, and relates to barrier-free facilities for hearings. The Office of Hearing Examiners does not make arrangements for hearing facilities. Executive Order No. 148 provides that all state meetings, hearings, etc. must be conducted in such facilities. Absent such assurance from the Board, the Office of Hearing Examiners could be placed in the position of conducting a hearing in contravention of the Executive Order. Additionally, the Chief Hearing Examiner is charged, by statute, with informing every agency of the place at which each hearing should be conducted in order that all interested persons will have an opportunity to be heard. Handicapped and senior citizens are within the class of potential interested persons and should not be precluded from presenting their views. This rule is needed to give advance notice to the Board of the Chief Hearing Examiner's advice as to where hearings should be conducted.

Dated this 7th day
of September, 1977.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE OFFICE OF HEARING EXAMINERS

In the Matter of the Proposed Amendments to the Rules of the Office of Hearing Examiners Relating to Rulemaking Procedures and Contested Cases and the Adoption of Procedures for Hearings Relating to the Routing or Siting of Large Electric Transmission Facilities.

PARTIAL REPORT OF HEARING EXAMINER

The above-entitled matter was heard by Allan W. Klein on the following dates and at the following places:

October 11, 1977 William Mitchell College of Law
St. Paul, Minnesota

October 12, 1977 - Duluth City Hall
Duluth, Minnesota

October 13, 1977 - Bemidji State College
Bemidji, Minnesota

October 17, 1977 - Vocational-Technical Institute
Alexandria, Minnesota

October 19, 1977 - Rochester Community College
Rochester, Minnesota

October 20, 1977 - Mankato State University
Mankato, Minnesota

This report is only a partial report in that it deals only with the proposed rules relating to the routing or siting of large electric transmission facilities, proposed HE 401 - 418. This report does not deal with the proposed amendments to the rulemaking and contested case procedures, proposed HE 101 - 112 and HE 201 - 222. Those amendments will be the subject of a later report. Two reports are issuing because on January 1, 1978, the temporary rules, which had been in effect for power line routes, expired. There is no such expiration date for the rulemaking and contested case rules, the present versions of which will continue in effect until the adoption of amendments.

Duane R. Harves, Chief Hearing Examiner, and J. Michael Miles, Assistant Attorney General, appeared on behalf of the Office of Hearing Examiners (hereinafter referred to as the "Office"). Approximately 85 people attended the hearings and signed the register. Each hearing session continued until all interested groups

and persons had an opportunity to be heard.

Pursuant to Minn. Stat. § 15.0412, subd. 4 (1976), as amended by Laws of Minnesota 1977, Chapter 443, § 2, this Report shall be available to all affected persons upon request for at least five working days before the Office takes any final action on the proposed rules. If the Office proposes to adopt the rules, either as originally proposed or as recommended to be amended by this Report, it shall submit the complete record to the Chief Hearing Examiner no sooner than five working days following receipt of this Report. It shall include the rules as originally proposed, and as proposed for adoption in final form. The Chief Hearing Examiner shall complete his review and submit his Report to the Office of the issues of substantial changes in the rules and compliance with Minn. Stat. § 15.0412 within ten calendar days. Thereafter, the Office will be responsible for filing the rules with the Attorney General.

Based upon the transcript of the hearings, the exhibits and the comments received both before and after the hearings, the Hearing Examiner makes the following:

FINDINGS OF FACT

Historical Background and Procedural Requirements.

1. On May 9, 1977, the Office, aware that it was likely to be required to adopt special procedural rules for power plant siting and power plant routing, published in the State Register (1 State Register 1600) a Notice of Intent to Solicit Outside Opinion. This Notice invited persons interested in such rules to submit data or views by June 15, 1977.

2. On June 3, 1977, the anticipated amendment to the Power Plant Siting Act, Minn. Stat. Ch. 116 C., became effective. Section 26 of that amendment (Chapter 239, Laws of Minnesota 1977), directed the Chief Hearing Examiner to promulgate temporary rules, within 30 days, establishing procedures for public hearings relating to the designation and exemption of routes for high voltage transmission lines.

3. After considering the comments of interested persons received pursuant to the Notice of Intent to Solicit Outside Opinion

(which were received as Pub. Exs. A-F in this hearing), the Office published in the State Register, on July 9, 1977, the temporary rules (2 State Register 85-91). In that publication, the Office stated that since it had been directed by the legislature (Chapter 239, Laws of Minnesota 1977, hereinafter referred to as the "'77 Amendment") to adopt permanent procedural rules for both power line routes and power plant sites by January 1, 1978, it was publishing rules which related to both routes and sites, but that only the rules for routes would become effective as temporary rules at that time.

4. On September 6, 1977, the Office published a Notice in the State Register (2 S. R. 382) that it intended to propose for adoption as permanent rules all of its previously published temporary rules, with one addition. It also published a Notice of Hearing, setting forth the dates and places for public hearings on its proposal to permanently adopt the temporary rules.

5. On September 7, 1977, the Office mailed copies of the Notice of Hearing to all persons and associations who had registered their names with the Secretary of State for the purpose of receiving such notices.

6. On September 9, 1977, the Office filed the following documents with the Hearing Examiner:

(a) The Order for Hearing;
(b) The Notice of Hearing as mailed;
(c) The Affidavit of Receipt of the Secretary of State's list;
(d) The Secretary of State's Certificate and list;
(e) The Affidavit of Mailing;
(f) The Statement of Need and Summary of Evidence;
(g) The names of personnel who would be representing the agency;
(h) A copy of the State Register in which the Notice of Hearing was published.
(i) A copy of the rules proposed for adoption;
(j) All materials received in response to the Notice of Intent to Solicit Outside Opinion, including a transcript of a two-day meeting held to discuss the proposed temporary rules.

All of the above documents were available for public inspection at the Office of Hearing Examiners from the date of filing to the date of the first hearing.

7. As was announced at each of the hearing sessions, the record remained open through November 9, 1977. The last trans-

cript of the hearings was received on November 16, 1977. Some 22 comments were filed following the hearing, roughly half of which dealt with the proposed permanent adoption of the power line and power site rules.

STATUTORY AUTHORITY

8. There are two statutory sections which authorize the Office to adopt these rules. The most relevant is § 22 of the '77 Amendment which reads in part as follows:

> The chief hearing examiner shall, prior to January 1, 1978, adopt procedural rules for public hearings relating to the site and route designation process and to the route exemption process. The rules shall attempt to maximize citizen participation in these processes.

The second is Minn. Stat. § 15.052, subd. 4 (1976), which states in relevant part:

> The chief hearing examiner shall promulgate rules to govern the procedural conduct of all hearings, relating to both rule adoption, amendment, suspension or repeal hearings and contested case hearings. Such procedural rules for hearings shall be binding upon all agencies and shall supersede any other agency procedural rules with which they may be in conflict.

Proposed HE 401: Scope and Purpose

9. This rule sets forth the types of contested case proceedings which are to be governed by these procedural rules (hereinafter the "Chapter 4" rules) as opposed to those proceedings which are governed by a different set of rules, the traditional contested case rules (hereinafter the "Chapter 2" rules). It is needed to inform interested persons of which set of rules will be followed for any given proceeding. Because of the very substantial differences between the two sets of rules, it is vital that people know which set will apply.

During the hearing process, a comment was received from the Power Plant Siting Staff (hereinafter "PPSS") suggesting that the rule, as originally proposed, needed modifications (Tr. 5-80). Under the original proposal, route exemption hearings would be governed by the Chapter 4 rules. The suggested change would have route exemption hearings governed by the Chapter 2 rules. The reason given for the change was that an exemption hearing is not a proceeding where one route is selected from a number of

alternative routes, but rather is a proceeding to determine whether one specific route will cause such harm or environmental impact that it ought not to be followed. An examination of the statute authorizing the exemption of a route from the usual hearing procedures (which usual procedures would be governed by the Chapter 4 rules) indicates that the utility-applicant may propose just one route. Under the usual procedure, the utility has to propose at least two different routes. The most fundamental difference between the exemption procedure and the usual procedure is that in the exemption procedure, affected persons (including landowners) are notified of the utility's proposed route, and unless someone objects to the proposed route within 60 days of the Board's receipt of the application, the Board may decide, without any public hearings, whether the line may be built. If someone does object, then the Board must either deny the application for exemption, or else hold a public hearing. The issue raised by this comment is whether that public hearing should be governed by Chapter 2 procedures or Chapter 4 procedures.

Throughout the '77 Amendment, regular designation hearings and exemption hearings are mentioned together, and in particular, § 116C.58, which mandates an "open" procedure for public participation, lump the two together. The distinction drawn by PPSS, while true, is not enough of a reason to support their proposed change to Chapter 2 proceedings. If anything, the public deserves more protection at an exemption hearing, with its more limited scope, than at a regular hearing. The proposal of the PPSS is recommended for rejection.

As discussed more fully in the finding relating to proposed HE 416, hearings conducted pursuant to Minn. Stat. § 116C.57, subd. 3 ("Emergency Certification") involve two different hearings. The first, to determine whether an emergency does exist, is governed by the Chapter 2 rules. If an emergency is declared to exist, the subsequent hearings on the application are governed by Chapter 4 rules. The Office may desire to include a reference to emergency certification procedures in HE 401. This could be done by simply referring the reader to HE 416 or by spelling out

the procedures in HE 401. It is the option of the Office to include such a reference in HE 401, or not to do so.

With or without the possible addition noted above, the rule as proposed by the Office should be adopted. It is needed to explain to persons which hearings will be governed by these rules, and as discussed above, it is reasonable.

Proposed HE 402: Definitions

10. The purpose of this rule is to define certain terms used throughout the remainder of the rules. The definitions are all straightforward and received no real criticism, except for one - - the definition of a "party."

The original proposal for the definition of "party" included the applicant, any other persons proposing sites or routes which the Board orders to be considered, and intervenors. There was no criticism of those. The proposal also included the Board and citizen committees appointed by the Board, both of which did evoke criticism. The Power Plant Siting Advisory Committee (hereinafter "PPSAC") felt that citizen committees ought to be excluded because they would be forced to prefile any testimony they might want to give, and this prefiling would prevent them from incorporating into their report facts and opinions elicited during the hearing. The Chairman of the Committee felt that each individual committee ought to have the option of deciding whether to intervene or not depending upon the facts of each particular case. A member of the committee felt that the committee ought to be a party, but that it ought not to have to prefile. The Minnesota Energy Agency (hereinafter "MEA") felt the committees ought to be exempted from the status of a party because the time deadlines for prefiling lead to hasty decisions, but that their report ought to be made available early enough in the process to enable other participants an opportunity to review and comment upon it, including cross-examination of its contents. A Minnesota Power & Light Company (hereinafter "MP&L") representative stated that the report ought to be prefiled, permitting others to comment on it, but thought a draft copy, rather than the final, would be satisfactory.

The question of whether the committees should be parties in all cases should not be decided by questions of the availability of their report. That issue can be dealt with separately. This Examiner is persuaded by the argument that citizen committees, in at least some cases, depend on the information elicited through the public hearings in formulating their final report. Since prefiling of the final report would prevent them from using this information, that is undesirable. There may be other cases, however, where the citizens' committee has already decided on its final position before the hearings begin, and are not going to be moved by anything that appears during the hearings. Flexibility is the best way to accommodate these varying situations. The committees should not have to become a party unless they elect to, or unless they intend to propose a route or site through the proper procedure. Therefore, it is recommended that "citizen committees appointed by the Board" be deleted from HE 402 C.

The second proposed inclusion in the definition of "party" that drew criticism was the inclusion of the Board itself. MEA, Minnesota/Wisconsin Power Suppliers Group (hereinafter "MWPSG"), and PPSS all argued that the Board, itself, as the decision-maker, ought to be neutral during the proceedings, and it would be inappropriate for it to be a named party. MWPSG, MP&L and PPSS, however, felt that any staff (including the Power Plant Siting Staff) which intended to propose, or advocate, a particular site or route, should be treated like any other group and be required to bear the burdens of a party. There were several predictions that the staff might be more active in the proceedings as a result of the recent Supreme Court decision, No Power Line, Inc. et al v. Minn. Environmental Quality Council, et al., _____Minn. ____, _____ N. W. 2d _____ (September 30, 1977). If the staff does, in fact, intend to propose or advocate a particular site or route, there is no basis in the record for their not being treated as a party. To the extent that they do not play such an active role, there is no reason to automatically include them as a party, although automatic inclusion was recommended by MP&L.

A similar question was raised regarding EQB member agencies by MWPSG, and the same logic would apply, even with the understanding that the agencies are mandated by statute (116C.61, subd. 3) to participate. Such participation should not necessarily require the status of a party.

It is recommended that HE 204 C. be modified to read as follows:

> C. Party. Party means the applicant, persons proposing routes or sites which the Board orders to be considered pursuant to Minn. Stat. Chapter 116C and rules adopted thereunder, and persons granted permission to intervene pursuant to HE 408. State agencies or participating department staff, citizen committees appointed by the Board, shall intervene if they are to formally advocate one route or site in preference to another.

The only other proposed modification to HE 402 was suggested by PPSS, and it would have 402 E., the definition of "Proceeding", be modified by substituting "This hearing process" for "The hearing process." The purpose for this change is to indicate that there may be a number of different hearing processes for any one site or route. PPSS argued that the Certificate of Need hearings, the EIS hearings, and these designation hearings are known to be separate by those few who are frequently involved in them. But to the majority of persons who are rarely involved, the multiplicity of proceedings is confusing, and anything which would clarify one from the other is desirable. It is recommended that the suggestion be adopted. With the modifications recommended above, the rule is found to be both needed and reasonable.

Proposed HE 403 "Hearing Examiners"

11. This rule sets forth the duties and powers of the Hearing Examiner as well as some unrelated procedural matters.

HE 403 A. At the hearings, the office proposed to substitute the words "assign" or "assignment" for "appoint" or "appointment" in both 403 A. and B., in order to be consistent with the statute. This is a minor change and is recommended. The only other change suggested for A. came from PPSS which recommended that the word "draft" be inserted before the words "Notice of Hearing" to clarify the fact that this is only a proposed Notice. They argued that since the notice contains so many items, it was likely that one or more would be changed prior to issuance. It

is recommended that the words "a draft of the" be added between the words "with" and "notice" near the end of 403 A.

403 B. was the subject of a great deal of discussion because the Office has proposed that the temporary rule be amended by adding the following language to the end of 403 B.:

> The request shall include a statement by the Board that the facilities where the hearings are to be conducted are free of mobility barriers in accordance with Executive Order No. 148.

There is nothing in the proposed rules which indicates what would happen if a negative statement were supplied (i.e., the facilities are not barrier free).

The record contains a number of statements questioning the Office's statutory authority to adopt the rule, its reasonableness, and the applicability of the Executive Order to hearings.

Statutory authority to adopt the proposed addition is alleged to exist in two places: The most relevant is § 15.052, subd. 3 (1976), which states in part as follows:

> It is the duty of the hearing examiner to. . . advise an agency as to the location at which and time during which a hearing should be held so as to allow for participation by all affected interests. . . [and] conduct only hearings for which proper notice has been given. . . .

The second alleged source of authority are the two statutes cited in Finding No. 8, which empower the Office to adopt "procedural rules" for hearings.

This Examiner finds that it is unnecessary to decide the statutory authority question in the "all or nothing" manner suggested by some because the use of the word "advise" implies concurrent authority, shared by the Agency (in this case, the Board) and the Office, to set hearing locations and times. It does not vest the Office with exclusive authority in those areas, nor does it deprive the Office of any authority. This is reflected in the past practices of this Office, which in the vast majority of cases has not questioned the locations or times selected by the agencies. Agencies have generally scheduled hearings at appropriate times and places. There have been a few abuses, however, which were cited in the record.

Given this concurrent authority, is the proposed rule reasonable? In the power line or plant site hearings, it would not be reasonable if the Office were to penalize an agency solely for failure to comply with the Executive Order. The record is replete with testimony indicating that there are many communities, and perhaps whole counties, which do not have suitable barrier-free facilities. Senator Wayne Olhoft, who strongly favored the spirit of the proposed addition, stated that in several towns in his district, there simply are not any barrier-free facilities. He, and others, argued that a balance had to be struck between effectively denying some access to a hearing due to barriers, and effectively denying others access to a hearing by holding it in a barrier-free facility located many miles from the affected area.

It is recommended that HE 403 B. be amended to read as follows:

> Within ten days of receipt of a request pursuant to HE 403 A., the Chief Hearing Examiner shall assign a Hearing Examiner to hear the case and the Hearing Examiner shall advise the Board as to the location at which and time during which a hearing should be held so as to allow for participation by all affected persons. In advising as to location, the Hearing Examiner shall consider the nature of the hearing, the location of affected persons, and the barrier-free characteristics of available facilities.

HE 403 C. received only a few comments. The Sierra Club recommended that 403 C.1. be more specific about what kinds of discovery were available, and procedures for their use. It was recommended that language be added specifying appropriate discovery methods, limiting discovery to formal parties, and allowing discovery without prior approval of the Hearing Examiner. Although it was stated that such additional language would not be a "substantial change," this Hearing Examiner cannot agree. There were only two comments advocating unlimited discovery [except for some preliminary discussion between attorneys for the Board, members of the PPSS and utility representatives (see Public Ex. D)], and it would be wholly inappropriate and undesirable for this Examiner (or the Office) to adopt language in response to these comments without the benefit of additional input from affected per-

sons. When later revisions of these rules are made, experience may well have shown the need for such changes, but they should be left for that future date. See also the discussion on proposed HE 411.

The other comment with respect to 403 C. dealt with subpoenas and the procedures for handling them. It is more appropriate to discuss those comments in the context of HE 412.

With the modifications recommended above, the rule is found to be both needed and reasonable.

Proposed HE 404 - "Commencement"

12. This rule essentially lists the various items which must be contained in the Notice of Hearing. Indeed, MEA suggested that the title should be changed to "NOTICE" to more appropriately reflect the content of the rule. The change is recommended.

The proposed rule evoked a number of suggestions. The rule, as a whole, was criticized as being so inclusive [MP&L, MWPSG, Cooperative Power Association (hereinafter "CPA"), and even PPSS] as to invite inadvertent violation. On the other hand, the Office argued that specifying a "laundry list" of items which must be included gave certainty to the Board in compiling an adequate notice. The objectors felt that such specificity, and the inevitable (in their opinion) violations, would only give a spurious basis for appeal to those seeking to delay action after the Board's final decision. They recommended, at the least, that there be some exculpatory language regarding inadvertent errors or omissions. They cited as an example the provision of § 116C.57, subd. 5, whereby the failure to give mailed notice to a property-owner or defects in the notice does not invalidate exemption proceedings so long as there had been a bona fide attempt to comply with the exemption notice requirements.

Another solution to this same problem was suggested by MEA. Their recommendation was to explicitly provide for amendments to the Notice as subsequent events required. Not only would this allow for noticing new facts not known at the time of the original notice, but it would also permit curing any defects in the

original notice. There is no question that such subsequent notices will be required, because modifying traditional procedures in response to the legislative mandate to maximize citizen participation has resulted in a more complex set of rules. Therefore, rather than using the exculpatory language suggested by various objectors, it is more efficient to adopt the MEA proposal, placing all of the existing material in 404 under a section A entitled "Notice of Hearing", and then adding a new section to read:

> B. Subsequent Notices. The Hearing Examiner may issue subsequent notices as he deems appropriate containing corrections of earlier notices and additional information available after issuance of earlier notices. Such subsequent notices shall be disseminated in the same manner as the original notice, unless the Hearing Examiner, for good cause shown, orders some other method of dissemination.

There were also numerous objections to specific items proposed to be required in the notice. Perhaps the most fundamental of these was a suggestion by PPSS that the prehearing conference be held prior to the issuance of the Notice. They argued:

> The prehearing conference, although optional under these proposed rules, is critical to the smooth efficient functioning of these hearings. It is at this conference that the parties can sit down with the hearing examiner and chart out specifically who will testify and when and where such testimony will occur. In effect, this conference should be used to determine that which will be listed in the notice of hearing as required by HE 404 K., M., and O.
>
> Thus, this prehearing conference should occur prior to the notice of hearing being published but it would occur subsequent to the deadline for the acceptance of route proposals from citizens pursuant to the new proposed Board rules. Therefore, all route and site proposals would be available for this conference. The only problem would be the fact that certain intervenors might miss the prehearing conference. However, the advantage gained in having a much more adequate notice of hearing with a better planned process outweighs this problem.

While there is much to recommend the suggestion, the judgment made in the last sentence is not in keeping with the legislative mandate or the suspicions expressed by some citizens that "all the important decisions are made at the prehearing conferences that we never know about." While experience may show that potential citizen intervenors will only rarely come to the prehearing conferences, they nonetheless should not be foreclosed from doing so by holding the conference before the Notice is issued. It is

therefore recommended that 404 J. not be deleted, and that prehearing conferences be noticed as originally proposed by the Office.

Another section which drew suggestions for change was 404 E. relating to the right to counsel. It is recommended that it be modified to read:

> E. Notification that all persons may be represented by legal counsel, but that such representation is not required.

It is recommended that the words "and function" be added to 404 G. so it would read:

> The name, address, telephone number, and function of the Public Advisor. . .

One of the most widely discussed subjects at the hearings was the timing of petitions for intervention and the differences between a party and a person. While these matters will be discussed more fully in connection with HE 408, some changes will be required in 404 I. to conform it with the changes recommended in HE 408.

A number of persons testified that it would be difficult, if not impossible, to describe the rights and responsibilities of an intervening party as opposed to those of a non-intervening participant. PPSS suggested that there are questions of factual estoppel and res judicata which are in a state of flux, and that trying to describe standing under the Minnesota Environmental Rights Act (Chapter 116B) in the context of a party vs. non-party in these Chapter 116C proceedings would be extremely complicated. CPA suggested that almost any attempted compliance with this rule will result in legal challenges. CPA suggested that the Office amend the rule to specify what the statement should contain. While this Examiner is the first to admit the difficulty of drafting such a statement, the Office has shown the need for, and reasonableness of the proposal. However, to alleviate this problem, the Office should make its expertise available to the Board in an attempt to fashion a meaningful, yet brief, description of the differences. With this recommendation, it is suggested that the rule be modified to read as follows:

I. A statement advising all persons of the right to intervene, the procedures which must be complied with, and a summary description of the rights and responsibilities intervening parties have as opposed to other persons wishing to participate.

The next portion of HE 404 which evoked reaction was 404 M. which requires a "timetable" for various portions of the hearing process. PPSS and MEA had minor wording changes, but CPA recommended deletion of the section arguing that it would be impossible to adopt a schedule so far in advance of the hearings and actually adhere to it with any degree of success. This problem (and it must be admitted by all to be such) should be substantially alleviated by the earlier recommendation that subsequent notices be issued. In addition, it is anticipated that the Board will exercise some foresight in setting the schedule, leaving certain times "open" to permit testimony which could not be accommodated in the scheduled time slot. The proposed rule is an innovation and only experience will show whether it is workable or not. As with other innovations in these rules, should it prove to be too cumbersome, then it can be deleted. It is recommended that 404 M. be amended to read:

A statement of the commencement times and places of the public hearings where cross-examination . . .

The final section that drew criticism was 404 O. Like 404 M. above, it relates to an innovation which only experience can tell is wise or foolish. HE 413 B. essentially requires that all witnesses who offered prefiled testimony be present for cross-examination at each hearing unless excused for cause. 404 O. requires the Board to list those witnesses who have been so excused, and list of the dates and places when they will be available for questioning. As with 404 M., CPA argued that it was impossible to know, in advance, when a witness would, or would not, be available. MEA suggested that the rule be modified to include therein the last date for requesting excused absences. For reasons discussed more fully in connection with HE 413 B., the MEA proposal is undesirable and the rule is recommended for adoption without modification.

With the changes recommended above, HE 404 is found to be needed and reasonable.

Proposed HE 405: Right to Counsel

13. This brief rule was designed to inform persons that they may be represented by legal counsel, but that they need not be so represented if they choose. There were two distinct lines of comment on the rule. The first supported the general concept but recommended different wording to express it. The second opposed the general concept.

MWPSG urged the Office to consider carefully the potential difficulties and prejudice that could result from permitting non-lawyers to represent persons or parties. They referred to earlier testimony which raised the problems of non-lawyers having all of the privileges accorded lawyers, yet none of the ethical or officer-of-the-Court restraints and obligations. MWPSG argued that non-lawyers could overlook the legal rights of their "clients" (by failing to protect the record, for example), and their lack of knowledge in procedure could lead to delays.

While it would be desirable to have every person, let alone every party, represented by a competent attorney, learned not only in administrative law and procedures, but also in the subject matter of the issues in the hearing, such a situation is clearly an impossibility. The legislature has mandated that the foundation of these rules be the maximization of citizen participation. Requiring legal counsel is contrary to that directive, and thus must yield to it.

The other area of concern was the wording of the proposed rule. The Sierra Club, PPSAC, PPSS, Karen Carlson, and MEA all suggested that the statement be made more "positive". During the hearings, the Office stated that its proposed language was not intended to preclude a non-lawyer from representing a person. While choosing between the various alternatives is somewhat a matter of style, it is recommended that the rule be modified to read:

> All persons may be represented by legal counsel, or by a person of their choice, or they may represent themselves.

This gives the widest latitude to persons or groups to choose their representative. Such freedom, while perhaps undesirable

from the standpoint of efficiency, should maximize participation.

With the modification suggested above, the rule is found to be needed and reasonable.

Proposed HE 406: Time

14. HE 406 was one of the least controversial rules. It is needed to supply definitions of computations of time such as days. While essentially based upon the Rules of Civil Procedure for the state's District Courts, and Minn. Stat. Chapter 645, it is found to be crucial to an understanding of the time limits under which all persons, lawyers and non-lawyers, must abide in these proceedings.

PPSAC and MEA both suggested that the concept of calendar days be explicitly included in the rule. MEA's suggestion is recommended for adoption so that the last sentence of 406 A. would read:

> The last calendar day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the next working day shall be deemed the last day of the period.

With this addition, the rule is found to be reasonable and needed to give a clear understanding of time limits.

Proposed HE 407: Public Participation

15. This rule, and the one which follows (HE 408: Intervention) represent a major innovation in modifying traditional procedures to permit the public greater participation.

One of the more difficult areas to deal with is the question of whether or not all evidence ought to be required to be submitted under oath and be subject to cross-examination. Because of the nature of the testimony on these points, these two topics (oath and cross-examination) will be treated together. During the hearings, the Office stated that persons testifying before the Legislature had stated that they had not participated in public hearings (although they had attended) because of fear of "humiliating cross-examination by highly trained lawyers of the utilities." In an article appearing in the Mankato Free Press of February 17, 1977, Gary Haden, after attending a hearing, compared

members of the public testifying at hearings to the ancient Christians of Rome who were "fed" to the lions (attorneys for the utilities) through the process of cross-examination. He wrote:

> In the modern gladiatorial struggles, those against power lines try to speak out, but they are nervous . . . ill prepared for such battle . . . they speak from the heart and with emotions, but hearts and emotion have little effect on lions.
>
> Lions make short work of such inexperienced prey . . . they use the weapons of legal jargon and cross-examination.
>
> The goal of the lions and of the hearing examiner is not to humiliate those who come to protest power lines, but that is the result. (Public Ex. C)

In response to the Notice of Intent to Solicit Outside Opinion, Pat Schwartz, a citizen, stated that there were persons who were frightened of testifying in public and suggested that there be some provision to permit a citizen to submit a written notarized statement into the record. In a later letter (written after the hearings), she stated that there ought to be some provision for the submission of testimony not sworn and not subject to cross-examination. Verlin Marth, also a citizen, testified that at a previous power line hearing, requiring persons to testify under oath was used as an intimidation tool. He strongly urged the adoption of the "no oath" proposal", but the deletion of the corollary proposal that the Examiner be allowed to determine the weight accorded non-sworn statements. He felt that the threat of sworn statements was the "biggest abuse" in previous requirements for public testimony. Harold Hagen, representing CURE (Counties United for Rural Environment) stated:

> . . . I would say that the most important part of [the hearing process] is the citizen input. In fact, one might say it is the citizen's input, the whole hearing process.
>
> * * *
>
> . . . As I think of the process, my recommendation to the hearing officer would be this: That every conceivable method should be used to magnify the citizen input. At times, it would probably be wise to be almost ridiculous in your effort to relinquish restraint on citizen testimony.

PPSAC recommended that the proposal to permit testimony not under oath be deleted. Although they recognized the inhibitions that the oath caused for some persons, as well as the imposing

formality which it created in the hearings, they believed that there were more problems created by leaving it in than by going back to the "old" system of requiring all witnesses to be sworn. The problem, in their opinion, arose from the HE 413 E. discretion given the Hearing Examiner to weigh the testimony depending on whether it was sworn or not, and the suspicion that would be created by the two provisions taken together. They did, however, recommend that persons be permitted to make statements (as opposed to offering testimony) without having to be sworn, with the Hearing Examiner announcing that such unsworn statements would be permitted, but that if the person wanted to have the statement considered as evidence, then it would have to be made under oath. They offered no precise definition of the difference between a statement and evidence.

PPSS also felt that the "without benefit of oath" provision ought to be deleted because the public could be misled [unless they were aware of HE 413 B.] by believing that the testimony would be given full weight. They also argued that, in their experience, requiring the oath had not inhibited public participation. They felt that public participation ought to mean that equal weight be given to all testimony and that 413 B. mitigated against that equality.

CPA also favored deletion of the language. They argued that these hearings typically involve serious and substantial rights of persons, both utilities and landowners, and that the citizen who would be adversely affected by a site or route on his or her land would not permit the utility to make its case by unsworn witnesses. CPA predicted the reaction would probably be the same if adverse testimony were offered by another citizen, and recommended that all testimony be sworn.

Related to the question of whether persons should be sworn is the question of whether persons ought to be allowed to offer testimony in written form at or following the hearings, and if so, whether they ought to be subject to cross-examination. If they are not subject to cross-examination, then should their testimony be given the same weight as testimony from persons who

do subject themselves to cross-examination? SCARE raised the question of whether non-parties would be able to file briefs, and the Chief Hearing Examiner stated that they would, under 407 B., so long as they filed a brief, arguing from facts already in the record, rather than a presentation of new evidence after the hearings had concluded. The distinction made in this response is a problem in that HE 407 B. states that any person may offer direct testimony in written form at or following the hearings.

PPSS recognized this problem when they suggested that 407 B. be modified to clearly indicate that written submissions which are not subject to cross-examination shall be given such weight as the Hearing Examiner deems appropriate. They were aware that 413 E. would cause the same result, but felt it ought to be set forth in 407 to avoid misleading the public.

CPA objected to the absence of any requirement that the utility (and other parties) be served with copies of any written submission. They stated that it was their experience that some written testimony had not been brought to their attention until it was too late for them to respond.

Should an oath be required? Should testimony be allowed without cross-examination? Weighing all of the testimony and comments, the approach suggested by the Office in its proposal is the most reasonable. If people do want to testify without oath, or if they do want to submit evidence not subject to cross-examination, then they must pay the penalty, if any, of having their testimony "discounted" by the Hearing Examiner. If they want to assure that their testimony is given full weight, then they must be willing to be cross-examined and testify under oath.

There were some suggestions for improvements in the wording of the rules which should be considered. PPSAC and PPSS recommended that the introductory statement be made more positive. They also recommended the addition of "or affirmation" after the word "oath" wherever it appears. MEA had some minor changes to improve clarity. Taken together, these changes result in the recommendation that the rule be revised to read:

HE 407 Public Participation

At all hearing conducted pursuant to this chapter, all persons will be allowed and encouraged to participate without the necessity of intervening as parties. Such participation shall include, but not be limited to:

A. Offering direct testimony with or without benefit of oath or affirmation and without the necessity of prefiling as required by 413 I.

B. Offering direct testimony or other material in written form at or following the hearing.

However, testimony which is offered without benefit of oath or affirmation, or written testimony which is not subject to cross-examination, shall be given such weight as the Hearing Examiner deems appropriate.

C. Questioning all persons testifying. Any person who wishes to cross-examine a witness but who does not want to ask questions orally, may submit questions in writing to the Hearing Examiner, who will then ask the questions of the witness. Questions may be submitted before or during the hearings.

One final comment is in order. There is no reason why cross-examination needs to be a humiliating experience. Hearing Examiners should be alert to any attempt to humiliate a witness, and put a stop to it.

Proposed HE 408: Intervention

16. There was almost unaminous opposition to the crucial portions of this proposal. He 408 A. would limit intervention to those who had filed a petition for intervention prior to a "cut off" date which would be specified in the Notice of Hearing. It was contemplated that this date would be prior to the start of the hearings. The Sierra Club, Karen Carlson, SCARE, MP&L, PPSS and Lawrence Downing all opposed this provision, while MWPSG was the only supporter of it. The major reason for opposing the cut off date was that there would likely be people who would want to intervene once they understood the impact of the proposed site or route on their property. Those people, it was argued, might not be fully aware of this impact until the cut-off date had passed. A second reason for opposition was the fact that Chapter 116 B, the Minnesota Environmental Rights Act, provides a mechanism giving any state resident the right to intervene in any

administrative proceeding by alleging that the proceeding involves conduct that is likely to cause pollution, impairment or destruction of natural resources, including air, water, or land. There is no indication of when such a petition for intervention must be filed. While it certainly could be argued that the proposal for an early cut-off date would not be inconsistent with Chapter 116 B, it could also be argued (as it was by some commentators) that the two were inconsistent, in which case the Act would supersede the rule. The prospect of having a line or site proceeding declared fatally defective, resulting in having to go back to hearings, is enough to require that the proposal be modified. The Chief Hearing Examiner recognized these problems and moved that the proposal be modified to permit intervention at any time, giving the Hearing Examiner discretion to determine timeliness based upon the facts of each case. The proposed amendment is recommended for adoption.

The cut-off date was included in 408 A. Other portions of 408 also drew comments. The Sierra Club suggested that in some situations there would be no objection to intervention, and thus, if all parties agreed to intervention on the record, there was no need to require a written petition. Verlin Marth went further, suggesting that intervention be automatically granted as a matter of right, without any need for a petition, nor any provision for objection by other parties. Wendell Bradley, a citizen, opposed the proposed standards for intervention, such as having to show that one's rights may be affected by the hearings. PPSS went the farthest, suggesting that in these proceedings there should not be any intervenors at all.

Although the proposed rules have minimized the benefits of intervention by providing very substantial rights to all persons, whether or not they have intervened, the broader statutory scheme of Chapter 15 still retains the distinction between a party and a non-party, and PPSS's suggestion that there be no intervention is unworkable at this time. Given the fact that the concept of intervention must be retained, should there be any limits placed on it? Reasonableness demands that there be. Efficiencies of cost

and time are maximized by having as few parties as possible. On the other hand, due process (and perhaps Chapter 116 B) demand that persons actually affected should have the right to intervene if they choose to. Balancing these two factors leads to the conclusion that the standards for Intervention proposed by the Office are reasonable. Therefore, it is recommended that 408 A. be adopted as proposed, with the second sentence (relating to the cut-off date) deleted, and the following sentence inserted in its place:

> Timeliness will be determined by the Hearing Examiner in each case based on circumstances at the time of filing.

To provide for flexibility in situations where all parties agree, on the record, that a person may intervene, the following sentence should be added to HE 408 A. as a final sentence:

> The Hearing Examiner, with the consent of all parties, may waive the requirement that the petition be in writing.

Finally, one other suggestion should be adopted. PPSS pointed out that a statutory right to intervene may not be the exclusive legal basis for intervention: common law may also provide such a right. They recommended the addition of the words "or case law" to the last sentence. It would seem preferable, however, to substitute the term "legal right", which would include both a statutory and a common law right to intervene. The Office may prefer to use both terms, however, for clarity. It may choose.

SCARE (Society Concerned About a Ravaged Environment) recommended that the procedure of HE 408 B. for objecting to a petition for intervention be eliminated, arguing that if a petitioner can meet the standards of HE 408 A., no person should be able to object to their intervention. The Chief Hearing Examiner pointed out that due process may require such a procedure. In addition, the objection may bring out facts which would assist the Hearing Examiner in making a correct ruling on the petition. The procedure is both needed and reasonable.

HE 408 C., drew criticism from the Sierra Club, which, while generally supporting the concept of consolidation, recommended

that consolidation should be voluntary, with intervenors having the option of deciding whether they are to be consolidated together or not. The Club argued that although their interests may be similar, considerable acrimony could arise because of a lack of trust in the ability of another person to represent the joint interests, as well as differences in interest which could arise after consolidation.

Verlin Marth suggested that consolidation was essentially a gimmick to shorten the hearings and exclude testimony. PPSS, in the context of making an arguement against any intervention, pointed out that since most intervenors will be attempting to protect their own land, such intervenors probably cannot be consolidated simply because of some superficial similarity of interest (land ownership, for example) when, in reality, the issue may be which parcel of land will be crossed by a line. The Office's Statement of Need and Summary of Evidence justifies the proposed rule as needed to allow the Hearing Examiner to maintain control of the proceedings and hold down the number of parties. A number of people commented that an excessive number of parties would result in increased costs, many of which ultimately would be paid by the utility's customers or the state's taxpayers. The proposed rule is reasonable.

A number of persons pointed out that the reference to HE 407 A. is incorrect - it should be changed to HE 408 A.

HE 408 D. includes, in a final phrase, a reference to prefiled direct testimony. For reasons set forth in the discussion of 413 I., that entire phrase should be deleted. Otherwise, the rule was acceptable to all commentators, and the Office did justify it as necessary to inform persons that intervenors do have both rights and responsibilities.

In summary, the rule is found to be needed and reasonable with the modifications recommended above.

Proposed HE 409: Disqualification

17. This rule provides a procedure for disqualification of a Hearing Examiner. Although there were few comments, the comments were diametrically opposed.

The rule provides that a Hearing Examiner must disqualify himself at any time if he deems himself disqualified. It also provides a procedure whereby any person may apply to the Chief Hearing Examiner for the disqualification of a Hearing Examiner provided that the person file an affidavit of prejudice no later than five days before the first hearing date. It was this five-day limit that drew criticism.

The Chief Hearing Examiner argued that the five-day limit was needed and reasonable because of the prehearing work of the Hearing Examiner and the need for a newly-assigned Examiner to familiarize himself with the issues. The Chief Hearing Examiner argued that in order to be able to conduct the first stage of the two-stage hearing process proposed in HE 413 A., a newly-assigned Examiner would need time to review the prefiled testimony. In addition, the Examiner would have to review the application, the environmental data, and other materials in the file.

Senator Olhoft recommended that the five-day "cut-off" requirement be eliminated because persons would not know, in advance of the hearings, whether the Examiner was biased, but probably would be able to detect prejudice after an evening or two. Senator Olhoft would prefer to have people be able to file a petition after the hearings had started, although he admitted there would be problems with the new Examiner not having observed the first witnesses and not having had time to acquaint himself with the file.

On the other hand, MP&L argued that five days was too short a period for the new Examiner to properly prepare for the hearings, and that it ought to be lengthened to at least ten days, and preferably 15. They argued that only with a longer time period could the hearings commence as originally scheduled and noticed.

MP&L's concern with possible delays is consistent with a fear of delay expressed by the Chief Hearing Examiner. Not only would there have to be a Subsequent Notice issued, but he pointed out that the EQB operates under statutory time limits and deadlines, and that a delay resulting from the need to prepare a new

Examiner could force the Board to miss a deadline.

The Office more than adequately justified its five-day proposal. While it would be desirable to adopt Senator Olhoft's proposal, in light of the time pressures inherent in these hearings, five days is perhaps the shortest possible period which would permit the hearings to proceed as originally scheduled.

The only other comment raised in connection with this rule came from MWPSG. They recommended that the right to file an affidavit of prejudice be limited to parties. They argued that even if the overall objective of these rules is to open the process up to broad public participation, that does not mean that "each and every person" needs to have the right to file an affidavit.

MWPSG has alluded to the main argument against this proposal: The legislative mandate requiring these rules to maximize citizen participation. In light of the arguments recited earlier regarding timing of intervention, it is entirely possible that a potential intervenor would not have its petition granted in time for it to be a party prior to the five-day cut-off. That cut-off date is enough of an inhibition to potential petitioners, and when balanced against the legislative mandate, the Office's proposal permitting any person to file an affidavit is reasonable and the proposed rule is recommended for adoption in its original form.

Proposed HE 410: Prehearing Conference.

18. This rule, as proposed, gives the Hearing Examiner discretion to hold a prehearing conference and to require parties to file prehearing statements. The purpose of such a conference is set forth, as are procedures which shall be followed. The prehearing statement is an innovation proposed by the Office to enable the Hearing Examiner to promote a useful prehearing conference.

MEA recommended that HE 410 A., entitled "Purpose", be expanded to include scheduling. They also recommended a minor wording change. Their recommendations are well taken because of the complex scheduling procedure which has been recommended for adoption.

It is quite probable that changes in the originally noticed schedule will have to be made, even before the hearings begin (to accommodate intervenors, for example), and the prehearing conference would provide a logical forum for such changes. HE 410 A. is recommended to read:

> A. Purpose. The purpose of the prehearing conference is to simplify the issues to be determined, to obtain stipulations to foundation for testimony or exhibits, to discuss schedules for hearings and other procedural events, and to resolve other matters that may be necessary or appropriate.

Paragraph B. of the rule deals with procedures for the prehearing conference. PPSS recommended that conferences be required in all cases, rather than at the discretion of the Hearing Examiner. This suggestion would remove the flexibility that may well be needed in presently unforeseen circumstances where time does not permit a prehearing conference, and for that reason, it is not recommended.

MP&L suggested that the conference be held in the area of concern, rather than in St. Paul, because in the past, citizens have felt that "everything was decided down there" [St. Paul] before the hearings began. MP&L did not recommend that this be added to the rule, but rather that it should be a "guideline" for Hearing Examiners. The Office did not present testimony in opposition to the proposal, and in light of the legislative mandate, and the oft-expressed desire to "open up" all portions of the process, it is recommended that it be included in the rule, either as a mandatory statement, or if there is fear of a "substantial change" problem, as a directory statement.

An earlier discussion related to holding the prehearing conference before the Notice of Hearing was issued. One of the arguments put forth in rejecting that proposal was that intervenors would be prohibited from attending the conference. In light of the comment by MP&L that such conferences have engendered suspicion, it would be appropriate to indicate, in these rules, that any interested person, especially potential intervenors, may attend the prehearing conference. Not only would this encourage potential intervenors to make known their scheduling needs, but

it would also enable any with suspicions to observe the proceedings. It is recommended that language similar to the following be inserted in HE 410 B. or 404 J.

> Potential intervenors, and other interested persons, may attend the prehearing conference.

The final comment regarding HE 410 came from the Sierra Club. It agreed with the requirement that, when requested, all parties file a prehearing statement, but disagreed with earlier oral statements to the effect that all parties would be required to participate in the prehearing conference and would be required to be present at all hearings. The Club noted that those requirements were not contained in the rules, and was concerned that if they were imposed, they would have a "chilling effect" on intervention. The Club believed it appropriate to make all parties aware of all occasions where participation is appropriate, but that parties should have the discretion to participate or not, as they see fit. The exercise of such discretion, it was noted, would be at their own risk, i.e., they could be prejudiced to the extent they do not brief an issue, for example, and the Hearing Examiner, based upon the briefs that were filed, decides the issue contrary to their interests.

There is no requirement in the rules that a party must attend every hearing or brief every issue. However, as the Club noted, to the extent that one or more parties elects not to participate fully, they must bear the consequences. There is no need for a rule to tell them this.

With the changes recommended above, the rule is found to be both needed and reasonable.

Proposed HE 411: Depositions to Preserve Testimony

19. As proposed, this rule permits the use of depositions to preserve the testimony of a witness if it is shown that the testimony is relevant and that the witness will be unable or cannot be compelled to attend the hearing or other good cause is shown. The Sierra Club commented that it thought the rule appropriate but that it ought to be modified in two ways.

The Club first recommended that the rule clearly indicate

that such a deposition would be admissible only if adverse parties had been afforded the right to cross-examination. Its second recommendation was that the rule require sufficient notice of the proposed deposition be given to the other parties to enable them to object to the timing of the deposition if, for unavoidable reasons, they could not attend on the proposed date.

Both of these problems are obliquely met by a reference in the proposed rule to the effect that depositions shall be taken "in the manner prescribed by law for depositions in civil actions." This requires reference to the Rules of Civil Procedure for the District Courts of Minnesota. Unfortunately, few laymen would find those rules easy to understand, and only an experienced person would be able to utilize them effectively. If there are to be depositions, then there must be groundrules. What the Sierra Club is suggesting is that two of the most important (in its opinion) of those groundrules be set forth explicitly in the Office's rules. However, a review of the District Court rules indicates myriad other rules which could be considered important. To recommend the explicit inclusion of two, without mentioning the others, perhaps equally important, disturbs this Examiner.

The Office has had a similar rule, HE 215, in effect for contested cases since December 31, 1975, and experience has shown the deposition procedure to have been very rarely used.

Because of the problems which would arise from specifying some groundrules and not others, especially in light of the rarity with which the procedure has been used, it is recommended that both of the Club's suggestions not be adopted.

The only other comment raised in connection with HE 411 came from PPSS which recommended an addition to the existing rule which would state that discovery in these hearings shall be conducted in the manner prescribed by law for discovery in civil proceedings. This would not replace the proposed deposition rule, but would be a separate, additional section of HE 411.

This proposal is enigmatic as written. Since it is suggested for inclusion as a separate section, rather than as a replace-

ment for the Office's deposition proposal, is it intended to open the door to all types of discovery permitted under the District Court rules? If so, it would certainly be a "substantial change" requiring additional input. If, on the other hand, it is recommended solely to reinforce the language contained in the deposition rule, then it is unnecessary. This proposal was not mentioned in PPSS's oral presentation, and appeared for the first time in its written comemnts which were submitted on the last day for submissions. The arguments contained in that written comment indicate that this addition was intended to be a "general rule on the use of discovery," which suggests that it was intended to "open the door" to all forms of discovery permitted by the District Court rules. As stated above, this proposed addition would constitute a "substantial change" and thus is not recommended for adoption.

In summary, the rule is recommended for adoption without change from its original form, but with one minor wording change suggested by MEA: The word "relevancy" should be replaced by "relevance."

Proposed HE 412: Subpoenas.

20. This rule, based upon new subpoena authority given to the Office by the legislature, sets forth procedures for, and standards governing, the issuance of subpoenas. Such subpoenas could be used to compel persons to appear at the hearings as witnesses, to compel the production of documents, or both. The rule also provides a mechanism permitting the Hearing Examiner, upon timely motion, to quash the subpoena if it is found to be unreasonable or oppressive.

The rule requires that in order to obtain a subpoena, a request must be made to the Hearing Examiner, setting forth the potential relevance of the testimony or evidence sought, and if the request is for documents, the proposal requires that they be described "with specificity." This procedure for obtaining subpoenas was disputed by the Sierra Club which suggested that it was unnecessary. It preferred the mechanism used by the District

Courts whereby a person can simply obtain blank subpoenas from the clerk without having to disclose the purpose of the subpoena, or even the person to whom it will be directed.

The Chief Hearing Examiner argued against the Club's proposal essentially on two grounds. He pointed out that the statutory authority for the issuance of subpoenas granted by the '77 Legislature requires that written application for subpoenas be made to the Chief Hearing Examiner. The original bill, he stated, provided that subpoenas could be issued by each Hearing Examiner. That bill was amended, and as ultimately enacted, provided that only the Chief Hearing Examiner could issue them, and then only upon written request.

The second reason for not following the District Court procedure was stated to be a desire to avoid "fishing expeditions" whereby persons would be subpoenaed and forced to either move to quash the subpoena or appear at the hearing, even though they had nothing of relevance to offer. He cited a recent example where just such an abuse had occurred, resulting in a waste of time and money.

The Office's original procedure should be retained.

PPSS suggested that there ought to be some standard included in the rule to provide guidance to the Hearing Examiner in determining whether or not to issue the requested subpoena. They argued that such a standard would diminish the likelihood that the Hearing Examiner could be accused of an arbitrary or capricious decision in refusing to grant a subpoena. The Sierra Club also expressed a desire for some standards. The only such standard suggested was one based on relevance. The suggestion is well taken and logically follows from the requirement that the person requesting a subpoena demonstrate the potential relevance of the testimony or documents sought. The language for such a standard, proposed by PPSS, is recommended for adoption as the final sentence of the introductory paragraph of HE 412:

> The Hearing Examiner will grant the request for subpoenas only upon a finding of such relevance.

MEA suggested that all references to "the Hearing Examiner"

be changed to "the Chief Hearing Examiner" for consistency with the statutory change noted above. MEA also proposed a rewording of the introductory paragraph in order to make it clearer. It is found that the MEA wording is roughly as clear as the Office's language and either may be adopted. In response to the MEA's suggestion that the word "Chief" be inserted in front of the words "Hearing Examiner," it is noted that while technically correct, the suggestion would result in wasted time and effort. First, a person so requesting (or moving to quash) would apply to the Chief. The Chief would, in all likelihood, consult with the Hearing Examiner actually assigned to the case before he made any decision. The Examiner would then have to acquaint himself with the issues and then advise the Chief of his opinion. While, by statute, the ultimate authority to issue or quash a subpoena rests with the Chief, it is more efficient and easier for the public to make their petitions and motions to the Hearing Examiner, rather than the Chief. The suggestion should be rejected.

The only change suggested for HE 412 B. came from MEA. It pointed out that the Office's proposal does not explicitly give the [Chief] Hearing Examiner the right to quash or modify a subpoena on his own motion. Rather, the Office's proposal appears to require that someone else make the motion to quash. MEA also suggested that the subpoena be quashed if found to be "unnecessary." It was suggested that HE 412 B. be modified to read as follows:

> Upon motion by any person or on his own motion at or before the time specified in the subpoena for compliance therewith, the Chief Hearing Examiner may quash or modify the subpoena if he finds that it is unnecessary, unreasonable or oppressive.

For the reasons given above, the word "Chief" is recommended for deletion. However, there is still a problem with the suggestion.

While the authority of the issuer of a subpoena to quash or modify on his own motion may be implied in his authority to issue the subpoena, the public nature of these hearings makes it desirable to have such authority clearly stated if, in fact, it does exist. The MEA proposal would place a great deal of power in the Hearing Examiner who not only could decide whether or not to issue

the subpoena, but also could decide, on his own, that it ought to be quashed or modified. In attempting to contemplate the manner in which such a situation would arise, it is impossible to foresee an instance where the motion could not also be made by some person other than the Hearing Examiner except for the case where, after first deciding to issue the subpoena, upon reflection he decides it was a bad decision. This would be rare. More probable would be the case where the person subpoenaed, or another adversely affected person, would contact the Examiner and ask that the subpoena be quashed or modified for one reason or another. Why shouldn't that same person make a motion to quash or modify, stating his reasons therefor, rather than asking the Examiner to make the change on his own motion? The only difference between the two procedures would be that if the motion were made by another person, the fact that it had been made and the reasons given would be disclosed to all parties. While it is unlikely to happen, permitting the Examiner to do it on his own motion could result in keeping the request and the reasons for it known only to the Examiner and the person who requested it. This is undesirable, as it could give the whole procedure the appearance of secrecy and would, therefore, unnecessarily raise questions of prejudice. It is far better to utilize a marginally less efficient procedure rather than raise the spectre of improper appearances. If someone objects to the subpoena, let him come forward for all to see and move that it be quashed or modified. It is recommended that the MEA proposal for HE 412 B. be rejected.

Another suggestion from MEA would eliminate the "prompt" time limit in which a motion to quash or modify could be made. No reason was given for such a change, and while it may be vague, retention of the word will permit an Examiner to prohibit abuses of the process by those who intentionally delay making such a motion to avoid timely response to the subpoena. The word should be retained as originally proposed.

The final change proposed by MEA would be the addition of the word "unnecessary" to the list of bases on which a motion

could be granted. While it appears that "unnecessary" may be nearly synonymous with "unreasonable" or "irrelevant", in this situation it is possible that a party could argue that a subpoena was unnecessary because the person or document would be voluntarily produced, and therefore, no subpoena was necessary. Such a promise, especially coming from a person who went to the effort of moving to quash or modify, should give rise to some suspicion in the mind of the other party. While there certainly would be sanctions for breaking such a promise, if the testimony or evidence is relevant and producing, it cannot be opposed on the grounds of unreasonableness or oppressiveness, then why should the motion be granted? All it would accomplish, should there be some failure to perform, would be delay and acrimony, both of which are undesirable in these proceedings. It is recommended that the MEA's proposed addition not be adopted.

In summary, the only changes recommended for HE 412 are the addition of the sentence on relevance to the introductory paragraph, and, at the option of the Office, the rewording of that paragraph (with the additional sentence on relevance added) proposed by MEA.

With those changes, the rule is found to be needed and reasonable.

Proposed HE 413: Hearings.

21. This lengthy rule sets forth a variety of procedural and substantive provisions regarding the conduct of the hearings themselves, standards of evidence, use of cameras, and numerous other matters.

HE 413 A.1.a. contains three procedural rules which the Hearing Examiner is to recite at the beginning of the hearing. PPSS, and others, recommended that the language regarding right to counsel be modified. The same language recommended for HE 404 E. is also recommended for substitution here, for the reasons given earlier. It is also recommended that between the words "including" and "the" there be inserted the following: ", but not limited to," to enable the Hearing Examiner to announce such other procedural rules as he feels are necessary to facilitate the proceeding.

HE 413 A.1.b. received only one comment, from the Sierra Club, which was one of support for its retention in its present form.

HE 413 A.1.c. deals with the date of closing of the hearing record. MWPSG, while supporting the concept, felt that it ought to be supplemented with language which would require the Hearing Examiner to furnish all parties with copies of written submissions received during the period between the last hearing and the close of the record. They argued that many times the utilities are unaware of comments filed after the hearings and thus have no opportunity to respond to them. It should be noted that while it was often stated during the hearings that parties (as opposed to non-party participants) had the duty to serve all other parties with copies of all materials submitted to the Hearing Examiner, including post-hearing submission, that responsibility is not contained anywhere in the rules. Rather, it is assumed, it could be one of the items noted in the summary statement of HE 404 I. MWPSG's suggestion is unreasonable, for the reasons set forth in the discussion of HE 407 B. PPSS and MEA both suggested that the language of the proposal be modified. The PPSS suggestion would have it read as follows:

> c. The record of the hearing shall be closed at a date to be set by the Hearing Examiner. Such date will correspond to a specific number of working days beyond the close of the last hearing date. Written comment will be accepted if postmarked no later than the date set by the Hearing Examiner.

PPSS argued that this language was clearer than the Office's proposal. It is recommended for substitution with two changes. The first is the substitution of the word "calendar" for the word "working". The second is the addition, at the end of the same sentence, of a reference to 406 A., such as ", computed pursuant to HE 406 A." MEA essentially recommended a 20-day maximum time limit for posthearing submissions because it felt such a maximum in the rule would expedite the hearing process. This would be the result of adopting its proposal; however, it would remove flexibility which could be useful in unusual circumstances. The MEA proposal is not recommended for adoption.

HE 413 A.2.a. would require all hearings to conclude by 11:00 p.m. unless the Hearing Examiner determines that some other hour would better serve the public interest. The Office's Statement indicated that some hearings had gone on until 4:00 a.m., and argued that such experiences had shown that very little good evidence was adduced at such hours. The concept of a "curfew" was widely supported by those who testified and/or submitted written comments. However, a number of suggestions for improved language were received. PPSAC suggested that the word "adjourn" should be replaced by the word "recess" to indicate that those still waiting to be heard at 11:00 p.m. would be heard at another session. PPSAC also suggested that the rule be shortened by substituting "continuing" for "adjourning" and deleting the last six words. Representative David Fjoslien recommended that 11:00 was too early and that midnight, or 1:00 a.m., would be preferable. PPSS recommended 11:30 p.m., and also recommended that the wording be clarified.

There is no question but that the concept of a curfew was justified in the record. Whether 11:00 p.m. is too early is difficult to know. It was supported by a majority of those commenting on the rule and thus is recommended for retention. If experience demonstrates it to be too early, then it can be changed at a later date. The PPSS' suggestion for clarifying language does appear to be the clearest of the alternatives, and HE 413 A.2.a. is recommended for adoption as follows:

> All hearings shall recess at 11:00 p.m. unless the Hearing Examiner determines that the public interest will best be served in any given hearing by continuing the hearing beyond 11:00 p.m. The Hearing Examiner may, in his discretion, order a time and place for a continuance of that hearing.

HE 413 A.2.b., c. and d., contain a major departure from past practices. This innovation was commonly described as the "two-stage process." Coupled with the requirement contained in HE 413 I that certain testimony be filed in advance in depositories (usually libraries) in each county where a hearing is to be held, the two-stage process is designed to shorten the hearings and enable the public to know what that testimony will be

and that on a given evening, they will be allowed to testify and question witnesses. According to the Office's Statement, in the past it was necessary for an interested person to attend every hearing in order to hear and question all witnesses. Pat Schwartz suggested and supported the two-stage process, arguing that it would

> . . . provide for an orderly presentation of evidence in such a manner that all parties involved will be able to adjust their schedules accordingly. It will also allow for the general public to hear all evidence prefiled in one or two sessions eliminating the necessity of attending the whole series of public hearings.

Essentially, the two-stage process begins with the prefiling, in depositories, of certain testimony so that people can read it in advance of the hearings. When the hearings begin, the first sessions will be devoted to introducing the prefiled testimony into evidence and permitting parties (as opposed to persons) to cross-examine those witnesses who had prefiled. The Office's proposal would explicitly allow non-parties to be present at this first stage, and, if time allowed, they could cross-examine the witnesses after the parties had done so. The second stage of the hearings would be used for all persons to present their direct testimony and to question all witnesses.

Because of the change that this proposal would create, it drew a large number of comments. The Sierra Club, MEA, MP&L and PPSS all suggested that the process ought to be made more flexible so that the Hearing Examiner could use different procedures in those cases where they would be more appropriate. The Club also suggested that there are situations where the public would need to know certain things from a witness in order to properly prepare their cross-examination of that witness, and thus, it would be desirable to permit the public to ask witnesses "clarifying questions" during stage 1 in order to permit them to effectively cross-examine the witness during stage 2. If, for example, an expert had made certain assumptions in reaching a conclusion, the Club believed that it would be helpful for the public to know those assumptions when preparing their cross-examination. It thought the public ought to be able to ask for those assumptions at stage 1.

PPSAC suggested that the "should time allow" condition for public questioning during stage 1 ought to be eliminated. They argued that the procedure should either allow no public questioning or unlimited public questioning, and they favored the latter.

Verlin Marth objected to the two-stage process because he thought it would be used to exclude the public from stage 1, which he felt would be "the most important stage". This concern was also raised by Wendell Bradley. Marth also feared that the stage 1 hearings would be held in St. Paul, rather than in the area of concern, and he strongly recommended that they be held in the affected area. He also objected to the prefiling concept without an oral presentation of that prefiled testimony because farmers do not have time to read prefiled testimony and they ought to be able to hear it at the hearings. It appears that Pat Schwartz also contemplated that the prefiled testimony would be presented orally as well.

Harold Hagen, on the other hand, supported the two-stage process because it would enable citizens to know, in advance what the utility's experts would be saying and also know when they could question those witnesses.

MWPSG believed that the proposed process would not work without modification. They felt that the applicant should have the option of presenting at least a portion of its direct case orally at each session. They also believed that direct testimony concerning particular local features should be presented in the affected locality, not in St. Paul.

PPSS had a number of proposed changes. They wanted to include state agencies in the first stage so that the public would know where it stood early in the process. PPSS pointed out that this had been recommended by two Hearing Officers who had conducted line routing hearings (Public Ex. M and N). PPSS also recommended striking the word "sole" from the middle of HE 413 A.2.c. because it would create a great deal of inconvenience if parties were not allowed to use stage 2 sessions to supplement their testimony. This is needed, they argued, because the cross-examination will inevitably raise issues unforeseen by the parties

and they will have to fill in those gaps with additional direct testimony.

In written comments, the Sierra Club suggested that there be at least some oral explanation of the technical grounds for the applicant's preference for a particular site or route, as well as an explanation of the applicant's reasoning. It was argued that this would not only enable the public to clearly understand the reasoning, but it would also enable the Hearing Examiner to observe the demeanor of the witness on direct, as well as cross-examination. However, the Club felt that at either stage, the first priority should be public testimony by interested citizens who would be otherwise inconvenienced by waiting.

The Chief Hearing Examiner stated that it was his intent to permit the applicant to summarize the prefiled testimony at each session.

In response to these comments, it is recommended that HE 413 A.2.b., c. and d. be modified as follows:

1. The first sentence of HE 413 A.2.b. should have the "shall" replaced by "may".

2. At the end of HE 413 A.2.c., a sentence should be added:

   However, at the discretion of the Hearing Examiner, the applicant and other parties may present a brief summary of the prefiled direct testimony at the beginning of each session.

3. HE 413 A.2.c. should include the following sentence, placed after the first sentence:

   The Hearing Examiner may give priority to those members of the public desiring to ask questions which would enable them to better prepare for cross-examination during subsequent stages.

4. The word "sole" contained in HE 414 A.2.c. should be changed to "primary".

HE 413 A.3. is designed, according to the Office's Statement, to avoid an agency's "double-teaming" witnesses by having more than one person representing the agency. In addition, the Statement asserts that actual experience has shown that multiple representation has resulted in interruptions of the hearings, and the rule is intended to give the Examiner greater control over the proceedings. Both MP&L and the Sierra Club generally supported the rule, but suggested that it be modified to require that

if the agency were a party, then its counsel should be its representative. If the agency were not a party, then either its counsel, or some other designated person could represent it. An alternative, both said, would be a blanket rule which would simply state that an agency may participate only through one representative.

PPSAC suggested that the proposed rule be modified by changing "representative" to "representatives", to permit special experts within agencies to participate directly, rather than through an attorney. If necessary, it stated, there could be a limitation based upon special expertise.

MP&L supported the proposal but followed the first of the Club's suggestions.

At one of the hearing sessions, PPSS argued that the rule ought to permit participation through more than one representative. The Chief Hearing Examiner responded by stating that the intent of the rule was to restrict the number of persons who called witnesses for the agency, made objections for the record, and questioned other witnesses. It was not intended to limit the number of witnesses which an agency could use to present evidence. The purpose of the exception at the end of the proposal was to permit agency experts to cross-examine witnesses if the agency's counsel felt that it would be more appropriate for the expert to do so, but that the counsel would have to request leave of the Hearing Examiner to use the expert.

Interstate Power Company generally supported the rule but recommended that an agency be permitted to use its counsel and one other representative to cross-examine witnesses.

In light of the past abuses cited by the Office, it is appropriate to have some rule. It would seem that the proposed rule is best designed to meet the problem, especially in light of the explanation given by the Chief Hearing Examiner to the effect that if the agency's counsel desired to utilize some other person to conduct cross-examination, that could be done pursuant to the last sentence of the proposal. It is recommended for adoption as proposed, with one clarifying change. The title

would be clearer if it were to read "Representation of State Agencies."

HE 413 B. essentially requires all witnesses whose testimony has been prefiled to appear at each hearing session unless an exemption has been obtained in advance of the issuance of the Notice of Hearing. The Office's Statement indicates a concern for the financial burden the proposal would place upon the party presenting the witness, but suggests that the public's right to know when and where the witness will be available for questioning outweighs the financial burden.

The Sierra Club argued that the proposal was too formal and cumbersome, especially the exemption procedure, and suggested that the Hearing Examiner have the flexibility to informally arrange a schedule of witness appearances to meet the needs of those who desire to question the witness. There was no mechanism proposed, however, to implement this suggestion. SCARE and Robert Palmer both indicated a satisfaction with more informal past practices, and SCARE believed the procedure contained in the proposal to be "a bit much." Wayne Olhoft supported the Office's proposal because it would, in his opinion, avoid having people drive to a distant hearing only to find that, unbeknownst to them, a particular witness would not be available for questioning. Pat Schwartz thought the basic requirement of having all witnesses at all hearings was desirable in that members of the public would be able to question a witness at a hearing held in their own geographic area.

The utilities almost universally opposed the proposed rule. MP&L suggested that the rule be deleted and replaced with one which would permit the Hearing Examiner to order that a given witness appear for additional cross-examination if cross-examination was desired when the witness was not present. MP&L argued that the proposed rule would require so many exemptions that the whole notice system would collapse. MWPSG suggested that the exemption procedure be modified to permit exemptions to be granted after the Notice of Hearing had been issued. They favored language which would require a request for exemption be made "at

the earliest practicable time that such unavailability becomes known." They argued that the Office's proposal was so inflexible as to be unworkable, because of the many contingencies which will arise during the course of a lengthy hearing. Interstate Power Company suggested that witness scheduling be finalized at the prehearing conference to the satisfaction of all parties, and then be noticed to the public. They argued that having all witnesses at all hearings would be tremendously costly, both to utilities and citizen groups.

PPSS suggested that the proposal be modified in minor ways, but generally supported the basic concept. MEA, on the other hand, felt the proposal was too rigid. They suggested that there may be witnesses whose testimony was of only limited interest to the public, or whose testimony related only to a limited geographic area. Not only would the Office's rule be time-consuming and expensive, but it would result in parties not advancing witnesses. The proposal would, they argued, impose a greater burden on citizens' groups than on utility-applicants, and thus discourage citizen groups from actively participating in the process. In light of these arguments, MEA recommended that the rule be amended to permit the Hearing Examiner to exempt a witness "for good cause shown" upon the filing of a "timely" request.

Balancing the arguments, the Office's proposed rule is needed and would be reasonable with one modification. The rule is too inflexible in that it contains no provision for emergency exemptions requested after the Notice of Hearing has been issued. It would be most expeditious to include a provision enabling the Hearing Examiner to grant exemptions, when necessary, in the event of unforseeable circumstances. It is recommended that the following sentence be added to the first paragraph:

> The Hearing Examiner may also grant exemptions, at any time, upon a showing of need due to unforseeable circumstances. The same notice and objection procedure may be followed if circumstances permit, or the Hearing Examiner may utilize any other procedure if he deems it more appropriate. A subsequent Notice of Hearing shall issue reflecting any such exemption granted by the Hearing Examiner.

HE 413 C. sets forth the right of all persons to cross-examine witnesses, present evidence, rebuttal testimony and argument.

The rule is based in part upon Minn. Stat. § 116C.58 and clearly sets forth the rights of all persons. MEA and SCARE supported the rule, and the only proposal for change came from MEA, which suggested that the phrase relating to cross-examination be placed as the first item in the list of rights. The proposal is recommended for adoption in its original form.

HE 413 D. received no comments except for two references to the fact that the citation to HE 408 is incorrect -- it should be HE 407. As with HE 413 C., it does serve the purpose of clarifying the rights of the general public. In both cases, persons may be unsure of their rights, and these two rules are needed to avoid unnecessary fears and questions.

HE 413 E. contains various rules of evidence and procedure. The first of these, HE 413 E.1. concerns standards for the admission of hearsay, protection of privileges and exclusion of irrelevant or repetitious testimony. Verlin Marth suggested that there be no exclusion of irrelevant or immaterial testimony. He argued that such rules had, in the past, been used as "gag rules" and that it was far better to let people talk, without restraint, because of the serious impact of these proceedings on affected landowners. Harold Hagen, although not specifically mentioning this rule, urged that the Office go to "almost ridiculous extremes" to eliminate restraints on citizen input. Wayne Olhoft supported the standard for admission of hearsay because people do rely on it in making decisions. This particular paragraph of the rule is taken, verbatim, from the contested case rules where it has been used since the inception of the Office. Examiners do have experience using it, and it has generally proved workable. However, Marth and Hagen have also seen a similar standard used, and they felt it to be a restraint. These hearings are indeed serious matters, and it is a basic standard of American law that decisions must be based upon facts in the record, and that only facts which are relevant and material to the issues in dispute will be considered. Although people may feel better about a proceeding if they have been allowed to vent their emotions, they are being misled if they believe that such testimony alone is

going to influence the outcome of the proceedings. If their goal is to significantly influence the outcome of the proceedings, then they must devote their time to presenting facts which are relevant to the issues. It would be a sham and a fraud upon the public to encourage them to spend their time in presenting irrelevant testimony, and to remove these "restraints" would be doing just that. The first section of the rule is recommended for adoption as proposed.

HE 413 E.2. generated a great deal of consternation because of the timing of these proceedings relative to the Environmental Impact Statement (hereinafter "EIS"). This subject will be fully discussed in connection with HE 413 F.4. Aside from this problem, there were no other comments on this rule. It is needed to inform persons of the fact that if they want to have their evidence considered, it must be part of the hearing record. Minn. Stat. § 15.0419, subd. 2 (1976), clearly states that no factual information or evidence other than that which is offered and made a part of the record shall be considered by an agency in determining a case. Again, it would be misleading to the public were they not informed of this standard, because they might not be otherwise aware of it.

HE 413 E.3. and 4. received no substantive comment. They are based upon Minn. Stat. § 15.0419, subds. 2 and 4 (1976), but they serve to clearly state that those strictures are imposed upon the Examiner as well. MEA suggested two wording changes for HE 413 E.4., but they are not recommended for adoption because the Office's proposal more clearly expresses the concept. The two rules are necessary as vehicles for informing the general public of the standards which the Examiner will folllow.

HE 413 E.5. defines the standard of proof and places it upon the route or site proposer. There were essentially two comments concerning this proposed rule. The first comment came from both the Sierra Club and MEA, who suggested deletion of the final phrase "unless the substantive law provides a different burden." The Club argued that retention of this phrase only created confusion because there was no other substantive law providing a

different burden. While the comment may be valid as to statutory law, there may well be developments through case law which would change the proposed standard. Retention of the phrase is recommended to accommodate such developments.

The second comment came from the Club and PPSAC. They were concerned about the use of the words "preponderance" and "substantive" as being too technical for the general public to understand. PPSAC suggested that the Hearing Examiner clarify and simplify the rule. MP&L opposed any attempt to simplify the two words because they are words which people have been wrestling with for years and have not been able to find any simpler substitutes. The Chief Hearing Examiner offered to consider a simpler substitute if anyone would propose one, but nobody did. PPSAC stated that they had tried to find some but were unable to do so. The words should remain in the rule. If, at some later date, acceptable substitutes are found, they may be incorporated at that time by amending the rule.

There is a final, unnumbered paragraph in HE 413 E. which drew some comment. The paragraph states that oral testimony received without oath and written submissions received without cross-examination shall be given such weight as the Hearing Examiner deems appropriate. Essentially, the substance of this rule has already been recommended for adoption in the discussion of HE 407 A. and B., and the only suggestion made for modification would be to number the paragraph and give it a title (such as "Weight"), so that persons are not misled by the title "Burden of Proof." Such a change, however, would be at the option of the Office.

HE 414 F. deals with the record of the proceedings - - who shall compile it, what it shall contain, the transcript and how to treat the EIS problem mentioned earlier. There were no comments with regard to HE 414 F.1. or 2., except that MEA suggested that the title of paragraph 2 should be changed to "Contents of the Record." The suggestion is recommended for consistency with the titles of other paragraphs.

Paragraph 3 did elicit comments. There is a typographical

error in the rule as proposed. The title for paragraph 3 should be "The Transcript." The line "The Transcript of each hearing, if any." should become subparagraph f. of paragraph 2. Proposed HE 413 F.3. provides that unless the use of a court reporter is deemed more appropriate, an audio-magnetic recording device (tape recorder) shall be used. The proposal further provides that a transcription of the record shall be made upon the request of any person, but that the Chief Hearing Examiner may require that person to pay a reasonable charge therefore.

The Sierra Club suggested that a transcript be prepared in all cases. It argued that these are highly controversial cases, and since the final decision is made by the Board, whose members do not normally attend all the hearings, a transcript should be prepared in all cases. Verlin Marth strongly suggested that there be both a court reporter and a tape recorder at all hearings because of the problems which arose in the UPA-CPA proceedings. PPSS suggested that there be a transcript in every proceeding because it is the policy of the Board to require transcripts in every case. SCARE commented that they believed that if the rules were really aimed at encouraging public participation, then the public should be able to know what went on at all the hearings by being able to read a transcript.

The Chief Hearing Examiner stated that Minn. Stat. § 15.052, subd. 5, was amended in 1977. The previous statute indicated a preference for the use of court reporters, but allowed tape recorders to be used if it was deemed more appropriate. The '77 amendment reversed the presumption, indicating a preference for tape recordings unless a court reporter was deemed more appropriate. The proposed rule reflects that reversal, but the Chief Hearing Examiner indicated that in large, controversial cases, a court reporter would be used. Because of the statutory change, HE 413 F.3.a. must be found to be reasonable as it was proposed, and is recommended for adoption. Whether a court reporter or tape recorder is used at the hearings is not really the crucial issue. More important is the question of whether a transcript will be prepared and who will pay for its preparation and distribution.

PPSS explained that in the past, they have ordered a transcript in each case and have then reproduced the transcript and distributed it to a substantial number of people. In one case, over 100 copies were distributed. This distribution has been made, PPSS explained, to assure that no interested person would be denied access to the transcript and because of the Board's policy of disseminating all project information to those people "in the hope that they will contribute their ideas, opinions and knowledge to the decision-making process." The PPSS went on to state:

> Since this is the Board's policy, and will continue to be its policy, the Board will always require a transcript, the distribution of which will be announced.

SCARE indicated a strong desire to have a copy of the transcript available in local depositories (usually libraries) near the affected area for public use.

The Chief Hearing Examiner indicated surprise at the past practice of the Board in distributing copies of transcripts. He stated that he was unaware of it. He feared that it might violate the terms of the contracts he had entered into with various private court reporters throughout the state. These contracts provide that when a state agency (such as the Board) orders a transcript, copies may be made for internal use only but not for distribution to the public. PPSS stated that they had informed court reporters of their distribution policy and had not encountered "much of a problem," although they did realize the financial loss this created for court reporters who would normally expect to sell additional transcripts were it not for the Board's distributions.

PPSS recommended that paragraph b. be modified to require a transcript in every case and that persons requesting a copy from the Chief Hearing Examiner may be required to pay a reasonable charge. Their suggestion sidesteps the conflict between their announced distribution policy and the court reporter's contracts. These rules are not the appropriate place to resolve the conflict. The conflict should be resolved by negotiation between the Board,

the Chief Hearing Examiner, and affected court reporters.

The question of whether there ought to be a transcript required in every case still remains. The Chief Hearing Examiner stated that there could be situations where the hearings were short and non-controversial, and no person would want to have to pay for a transcript to be prepared. This flexibility ought to be maintained, as it still gives the Board the option of continuing to order a transcript in every case should it so desire.

It is recommended that HE 413 F.3.b. be adopted as proposed, except the phrase "from him" be inserted between the phrases "of the transcript" and "to pay a reasonable charge therefore."

HE 413 F.4. would require any draft EIS or Environmental Report (hereinafter "ER") to be entered into the record at a time which would permit review and comment by all persons.

As noted earlier, there may be a timing problem. Before all the parameters of that problem are discussed, it is important to understand that the procedures for environmental review of routes and sites are different. In the case of a site, all that is required at the site designation stage is an ER. See Minn. Rule MEQB 25 G. [codified as 6 MCAR § 3.025(G)]. The final EIS for a site is not prepared until <u>after</u> the site has been designated by the Board. On the other hand, in the case of a route, the same MEQB rule <u>does</u> require preparation of an EIS at the route designation stage. The procedures for the two documents are essentially the same and create the same timing problem, but the documents have different names and different contents. The problem arises because § 116D.04, subd. 4, requires, for routes, that the preparation of the final EIS, including public comments, must precede the Board's final decision. Section 15.0419, subd. 2, requires that all evidence which the Board desires to consider in a contested case shall be offered and made a part of the hearing record, and no other factual information or evidence shall be considered in determination of the case. A route designation hearing is a contested case by virtue of § 116C.58. Therefore, reading the two sections together, it seems that for routes, the final EIS, including comments, must be made a part of the record in

a route designation case. For sites, the final ER must be treated similarly. Past experience, however, indicates this to be a virtual impossibility, at least in the case of routes. PPSS commented:

> The preparation of an EIS is a complex and timely process. . . . The EIS, at a minimum, requires 200 to 230 days for preparation and review. . . . Unfortunately, the final route proposals that are certified for hearing are not known until at least 105 days into the process. . . . Thus. . . the EIS process must move quickly in order to be completed before the one year routing process expires. In the past, the final EIS has never been available in time for the close of the routing hearings and will probably never be so available. (Emphasis added)

The solutions to solve the problem were extremely varied in approach. PPSS first suggested that the final EIS be treated the same way that § 15.0419, subd. 4, and proposed HE 413 E.2. treat tax returns. This, however, is impossible because while the Office can modify the proposed HE 413 rule, it cannot modify the statute. In a later submission, PPSS suggested that HE 413 E.2. be modified to permit the final EIS to be automatically made a part of the record after the Board's final review of the EIS. Although not explicitly stated, such a provision implies that this automatic addition would be made after the route designation hearings had concluded, and in some cases, after the Examiner had issued his Report.

The Sierra Club suggested that the hearing record remain open until the draft EIS, public comments on that draft, and staff responses to those comments were made available to the Hearing Examiner. In a dialogue with Larry Hartman of PPSS, the Club's spokesman, John Herman stated that it was his opinion that unless the record contained the final EIS, the Board could not consider it at all.

MP&L suggested deleting the proposed rule entirely, or in the alternative, the rule should provide that any draft EIS which the Board's Rules required to be prepared at the time of the hearings should be entered into the record.

A review of MEQC 25 (which itself was amended in early 1977 before passage of the '77 Amendment -- see 1 S.R. 1098-1101) indi-

cates that a site ER shall be prepared and distributed at least 30 days prior to the conclusion of the public hearings on the site application. The Board must respond to substantive comments received on the ER. The preparation and review of the ER must be completed within the statutory time limits for the issuance of a Certificate of Site Compatibility, and the Board must consider the ER before its final decision on the issuance of the Certificate. After designating the site, the Board then must determine whether to require an EIS. However, alternative sites are specifically not to be included in the EIS as they are moot once the Certificate has been issued.

In the case of routes, the rule is clouded because the corridor-route dichotomy (which existed in Ch. 116C prior to the enactment of the '77 Amendments) continues to exist in the rule. The rule provides that when an application for a corridor is received, the Board shall prepare a Corridor ER, including data on each alternative corridor considered for designation by the Board. This draft ER must then be made available for review and comment at least 20 days before the conclusion of the public hearings on the corridor application. The Board is to respond to substantive comments, and the ER must be completed within the time limits for the issuance of a Certificate of Corridor Compatibility, as the Board must be considered the ER before issuing the Certificate.

Under the old system, once a Corridor Certificate had been issued, designating a specific route within that corridor was the next process. The Board had the power to decide if an EIS was necessary for the routing stage. If it was deemed necessary, then the route EIS would discuss all of the alternative routes designated by the Board, but it would not discuss any routes outside the previously designated corridor. The draft EIS prepared by the Board was required to be made available to the public by filing in depositories and by introduction into the record of the public hearings on route designation. Unlike the site and corridor sections of the rule, the routing section does not require that the Board respond to substantial comments, but like the

other two, the route EIS rule does require that the final EIS be completed within the statutory time limits for the Board's designation of a route, that it be submitted to the Board before it designates a route, and that it be considered by the Board in designating a route.

While the Board has not amended its rule since the '77 Amendments to Ch. 116C became effective, the Board has published a Notice of Intent to Solicit Outside Opinion (2 S.R. 1083) for amendments to their rules, which is usually the first step in adopting amendments. Such amendments may well be responsive to the comments of the Supreme Court in the No Power Line case, supra, which essentially suggested that an adequate EIS should be required by an agency "at the earliest possible stage," but held that it was not reversible error when the agency had proceeded essentially as outlined in MEQB 25.

The content of any future changes to MEQB 25 is unknown. Thus, this Finding must be based upon what is known, which has been set forth above. The approach suggested by the Office should be modified so that the substance of what will be included in the final EIS or ER is available, although the document, in final form, may not be. That would require that the draft EIS or ER, public comments, and responses to "substantial comments", must be introduced into the record. This may create a hardship for the Board's staff by shortening the amount of time available to them in formulating their responses to the comments, but unless those responses are contained in the record of these proceedings, they cannot be considered by the Board.

It is recommended that HE 413 F.4. be amended to read as follows:

> 4. Environmental Documents. Any draft Environmental Impact Statement (in the case of routes) or any draft Environmental Report (in the case of sites) required to be prepared by rules of the Board shall be entered into the record at a point during the hearing process which will allow all persons an opportunity to review and comment on the material. In addition, all comments and responses to comments which the Board desires to consider shall be entered into the record promptly after they are received.

HE 413 G. and H. received no comment. Paragraph G provides for continuances when needed to receive additional testimony. Paragraph H. provides a mechanism for certifying motions to the Board if the Hearing Examiner deems it appropriate to do so. Both rules are needed to give flexibility to the proceedings, and both were justified based on past experience. They are recommended for adoption as proposed.

HE 413 I. contains the procedures for prefiled testimony. The whole subject of prefiled testimony received a great deal of comment, both pro and con, because of its relative novelty in these proceedings. Although only occasionally used in these proceedings, prefiled testimony has been used for many years by the Public Service Commission in its utility rate cases. The inclusion of the concept as a requirement for these hearings was apparently the idea of Pat Schwartz, who suggested that the new rules require the utilities to:

> . . . present its case in writing at least 30 days prior to public hearings [as] this would give interested parties time to review the testimony that will be entered into the record. This testimony could be displayed in all public libraries along with other relevant data.

In discussions prior to the promulgation of the temporary rules, the utility companies raised the question of whether citizen intervenors or route proposers would have to prefile testimony. There was general agreement among the few people present that all parties ought to be required to prefile. An example was raised where all the parties, including citizen intervenors, in a previous route case were forced to prefile, and one utility attorney felt that the prefiling by all was "quite helpful in shortening the hearing."

The proposal finally recommended by the Office would require all parties to prefile their direct testimony, in question and answer form, 14 days prior to the hearing, with the Hearing Examiner, the Board, all other parties, and in local depositories designated by the Board.

At the hearings, this proposal was the subject of a great deal of discussion. The Sierra Club suggested limiting prefiling

to the utilities and the Board's staff, or else eliminating it all together. It argued that a great deal of the information which will be brought out in direct testimony is already contained in available documents, primarily the application and the preliminary environmental documents. It believed prefiling to be onerous for the utilities and the Staff, but severely chilling for citizens. It would, it predicted, effectively prevent citizens from becoming parties. Advisory Committees, it feared, would not be able to take advantage of facts adduced at the hearings. The Club favored eliminating prefiling completely because it would not really add much to what is already available, and it would, if used as a substitute for oral presentation, effectively limit participation to those who had the time and ability to wade through volumes of testimony. But it was particularly concerned about the chilling effect it would have on those citizens who would otherwise choose to become parties.

MP&L suggested that the rule be modified to give the Hearing Examiner some discretion in altering the 14-day time limit because there could be situations where, for justifiable reasons, testimony would not be available in time. At the hearing, MP&L suggested permitting variances in the time period "for good cause shown." In a later written submission, MP&L expanded upon their proposal by suggesting language which would eliminate the 14-day period completely and permit the Hearing Examiner to set the time period in each case. There was also language proposed which would explicitly permit the Hearing Examiner to postpone the date for prefiling and allow prefiling during the course of the hearing, again "for good cause shown." Finally, MP&L suggested (as did Herman) that the prefiling parties be permitted to make a "reasonable, concise oral statement" at any hearing to give those persons who had not read the prefiled testimony an opportunity to hear the reasons behind the party's position. With those changes, however, MP&L generally supported the prefiling concept, stating that it was:

> . . . a good idea and will avoid extensive discovery. It will allow the parties to know the other party's case and thereby expedite direct testimony, rebuttal testimony and cross-examination.

Verlin Marth opposed the concept because persons who had to work would not have time to read the prefiled testimony. Wayne Olhoft thought the idea of prefiled testimony being available 14 days before the hearing was "excellent." Given a choice of having to read in the library or having to listen in St. Paul, he believed the library was far better.

Harold Hagen, representing CURE, felt that there should be prefiled testimony because citizens needed time to study, analyze and research technical information. When asked, however, whether he was willing to "pay the price" of having to prefile his direct testimony in order to be able to have the utility's testimony prefiled, he indicated that he would probably elect to participate as a person, rather than as a party. This lends credibility to the Club's fear that requiring citizens to prefile would inhibit their becoming parties.

MWPSG strongly opposed the prefiling proposal. They argued it was burdensome and unnecessary. They stated that the basis for their prefiled testimony was already available to the public in their application, and prefiled testimony would not add anything to what was already available. Perhaps their primary concern was that only the utility would have any incentive to adhere to a prefiling deadline, as time was usually crucial to their proposed projects. Others would not share this concern, they feared, and might find it in their best interests to seek extensions for prefiling for the primary purpose of delaying the proposed project. They suggested that if there were to be prefiling, it should be at the discretion of the parties and based upon an agreement reached at the prehearing conference. In the alternative, they recommended that if there were mandatory prefiling, it should be limited to the utility-applicant and perhaps the Board staff, because of the delays the proposed prefiling by all parties would engender.

MWPSG also urged that there be greater flexibility given the utility to present an oral "case," as well as their prefiled testimony, and, in addition, they strongly opposed the 14-day period as being unreasonably early. If there were to be prefiling, they

favored five days before the testimony would be given as a maximum. This, they argued, would ease the burden of prefiling not only for the utilities, but also for other groups which had to prefile. Their spokesman asked what penalty would be given for failure to prefile on time, and the Chief Hearing Examiner stated it had been his intention (although not contained in the rules) that the testimony would not be allowed at all. MWPSG thought that such a penalty would lead to legal challenges and that to avoid such challenges, the only feasible remedy would be for the Hearing Examiner to require the parties to prefile after the deadline and to delay the hearings. Because of the potential for delay, he reiterated his belief that if there were to be prefiling, it ought to be limited to the utility and the relevant Board staff.

Another problem raised with prefiling was MWPSG's fear that once a utility had prefiled, it would be "locked in" to that testimony and would be unable to present rebuttal. They also feared that as the first stage of the hearing progressed, unforeseen areas of concern would become apparent, and they would be unable to supplement their direct testimony by adding testimony to deal with those new areas.

PPSS endorsed the prefiling concept, but had several suggestions for changes in the proposal. They argued that the application alone was inadequate to permit the public to prepare. They suggested that prefiling be required ten days before the first hearing, rather than 14, in order to accommodate citizen groups who were not as able to prepare in advance as were the utilities. They opposed MWPSG's suggestion that the period precede the day of testimony rather than the day of the first hearing because the public would be required to make numerous trips to the depository to read the testimony.

PPSS's major suggestions included the exclusion of intervenors from the prefiling requirements. They had supported the recommendation made in HE 408 which would permit "timely" intervention and they recognized that if this were adopted, it would be probable that late intervenors would not be able to comply with

the prefiling requirement. They suggested that the Hearing Examiner be given discretionary authority to require prefiling "where practicable."

A second major PPSS suggestion was the addition of a new paragraph 5 to HE 413 I. which would permit the Examiner to allow direct testimony from parties, even though it had not been prefiled, if the party could show that such testimony "was not reasonably available" at the time when its prepared testimony had been prefiled. On the other hand, if the party could not meet that test, and the Hearing Examiner determined that the testimony had not been prefiled to avoid its proper disclosure, then the testimony would not be permitted at all. PPSS argued that this new paragraph would give the Examiner authority to control attempts to avoid prefiling, but would also enable him to admit testimony which had not been reasonably anticipated but was needed to meet unforeseen concerns.

MWPSG, after reviewing PPSS's suggestion, recommended that the new paragraph not be adopted. They stated:

> If there is to be a choice between severe penalties for not strictly adhering to any prefiling requirement or the development of a full and complete record, we must insist that the choice be for a full and complete record. The proposed suggestions by the staff would be harsh, to say the least, and would penalize and preclude the development of a full and complete record which, in our opinion, is in the best interest of everyone. The suggestion is a step backward, is unreasonable, unworkable, and would violate a proponent's due process, in our opinion.

Prefiled testimony would increase the public's ability to effectively participate in these hearings. However, the record does demonstrate that there were problems with the proposal. Some of them (such as the lack of any explicit means for permitting rebuttal testimony) are obvious and can be solved by clarifying the proposed rule. Other problems (such as the potential abuse of the rules for purposes of delay) are more speculative, and solutions to them are not easily found. The suggested benefits to the public were amply supported and the existence of problems does not overshadow those benefits. The problems do suggest a moderate implementation of the proposal so that exper-

ience may be gained without crippling the hearing process. MWPSG argued that while prefiled testimony may be appropriate in a very structured setting, such as a rate case, the hearings on routes and sites are far different in nature because of the broad spectrum of public participation which has been experienced in the past and which several commentators suggested would be significantly increased in the future.

It is recommended that the concept of prefiling be retained but that it be limited to the utility-applicant and the participating staff of the Board (if the staff does intervene). It is further recommended that the 14-day period be retained, and that the period be measured from the date of the first hearing. There should be some explicit provision permitting rebuttal as well as a provision permitting response to reasonably unforeseen areas of testimony. As recommended earlier, there should be means for permitting the utility and the staff to give a brief summary of the prefiled direct testimony to enable those who have not read the prefiled testimony to at least have an overview of what it contains. These recommendations should enable the Office to fulfill its legislative mandate to maximize citizen participation and avoid incurring the most substantial problems with prefiling raised on the record.

HE 413 J. deals with the use of cameras and other disruptive activities during the hearings. The proposed rule is taken from the existing contested case rule, HE 217(h). However, all those who commented on the rule thought that the portion dealing with cameras was unnecessarily negative in tone and ought to be reworded so as to make it more positive. Not only would they change the tone, but they would also change the thrust of the proposal. PPSAC, Verlin Marth, Wayne Olhoft and PPSS all urged that the rule permit cameras at hearings until their use becomes disruptive. PPSS suggested replacing HE 413 J.1. with the following:

> 1. Cameras. Television, newsreel, motion picture, still or other cameras shall be operated in a manner as not to disrupt the hearing. The Hearing Examiner may limit operation if disruption occurs.

PPSS's suggested language is recommended for adoption. The only support for the rule as proposed came from the Chief Hearing Examiner who cited an instance where a camera was operated so close to a witness that it effectively prevented the witness from testifying. PPSS's proposed language would enable the Hearing Examiner to deal with that problem but would also accomplish the goals of those who recommended that the tone of the rule be changed.

There were no suggestions for improvements to HE 413 J.2., and it is recommended for adoption as proposed. There is a need for some provision to control disruptions so that they do not effectively prohibit persons from participating in these hearings. The rule as proposed is a reasonable balancing of the rights of all persons.

In summary, HE 413 is recommended for adoption with the modifications suggested above. With those modifications, it is found to be both reasonable and needed.

Proposed HE 414: The Decision

22. This rule contains a number of provisions which essentially describe the manner in which the post-hearing process operates. In its Statement, the Office suggested that the rule was needed:

> to indicate to the public the statutory provisions which must be followed by the Hearing Examiner and the Board in the course of arriving at decisions.

The Statement went on to raise the question of whether the rule ought to be adopted or withdrawn, because of the prohibition against repeating statutory language contained in Minn. Stat. § 15.0412, subd. 1, as amended, which states:

> No agency shall adopt a rule which duplicates language contained in Minnesota Statutes unless the hearing examiner determines that duplication of the language is crucial to the ability of a person affected by a rule to comprehend its meaning and effect.

While it is not clear that the prohibition is aimed at rules such as HE 414, which merely describe procedures required to be followed by statute, a number of commentators argued in favor of retaining the rule because it was crucial to persons involved in these proceedings to understand what steps took place after the hearings

were over. William Dorigan, speaking as a member of the public, argued that he expected that these rules would be a primary source of procedural guidance to members of the public who were being encouraged by the legislature to participate in these proceedings and that having the information contained in HE 414 available to them in as many documents as possible, including these rules, was a good idea. He gave an example of a case in which the subject of administrative notice arose and said that the public did not know what administrative notice was. He thought that having the matter discussed in these rules would save a lot of time explaining such things. MP&L argued that the rule was needed to outline the complete process "from beginning to end." No person who commented thought the rule ought to be withdrawn.

MWPSG suggested that the reference to "regular mail" in HE 414 B. be replaced with "first class mail" because "regular" is too vague. This would be an improvement and is recommended. PPSS had a number of proposed changes. In the rule relating to administrative notice, it was suggested that the rule ought to explicitly provide for the taking of such notice by the Board because Minn. Stat. § 15.0419, subd. 4, specifically includes agencies, such as the Board. The suggestion is recommended for adoption by placing the words "or the Board" after the words "Hearing Examiner" in the first line of HE 414 A.2. For the same reason, PPSS suggested that the statutory references proposed for HE 414 C. be changed to "Ch. 15 and Ch. 116C." so that the Board's right to take such notice is clearly indicated. This suggestion is also recommended for adoption.

PPSS and MEA both recommended that the rule provide a 30-day deadline for the filing of the Hearing Examiner's Report. PPSS argued that the one-year deadline imposed upon the Board by statute could not be met if the Hearing Examiner's Report was delayed. MEA pointed out that the time required to prepare the Report was one of the few time periods in the whole process which was not limited by statute or rule and that to enable the whole process to function in a timely manner, it ought to be limited to

30 days. These suggestions are not recommended for adoption, at least in the forms proposed, because, as the timing of the issuance of this very Report demonstrates, the Hearing Examiner is not always in control of any time schedule. The court reporter who prepared some of the transcripts of these proceedings was involved in an automobile accident and hospitalized, which prevented her from completing the transcripts within the agreed-upon time schedule. The complexity of routing and siting hearings can vary tremendously and while the one-year requirement does not vary accordingly, it would be difficult to recognize these variances in a rule. The Chief Hearing Examiner disclosed, however, that he did have an internal policy which required reports to be completed within 30 days unless good cause for delays could be shown. His enforcement of that policy is the most manageable method to achieve the goals of MEA and PPSS.

MEA and PPSS also recommended that HE 414 B. require that the Hearing Examiner file a copy of the Report at places designated by the Board for public review pursuant to HE 413 I.4. They argued that participants who are not parties deserve ready access to the Report. Minn. Stat. §§ 15.0421 and 15.0422 contain a procedure for notifying parties of decisions and giving them a period to file exceptions and present argument to agencies such as the Board. The MEA-PPSS proposal would extend the notification provision to non-parties. The argument against such an extension would be the cost incurred by the Office; however, in light of the fact that the number of depositories will be limited due to the cost of duplicating prefiled testimony, this would be minimal when balanced against the desire to have the public informed of the facts and reasons underlying the Examiner's decision. It is recommended that the proposal be adopted by inserting the following sentence at the end of HE 414 B.:

> "A copy of the report shall also be filed at places designated for public review pursuant to HE 413 I.4."

The final change proposed by PPSS relates to the EIS/ER and their inclusion in the record and use by the Board. That problem was fully discussed in connection with HE 413 F.4., and

for the reasons given there, it is recommended that HE 414 A.1. not be modified as suggested.

In summary, HE 414 is needed, and its retention is crucial to developing an understanding of the complete hearing process. This is particularly the case in light of the nature of these hearings which involve persons for whom administrative proceedings are new and often confusing. With the changes suggested above, the rule is found to be reasonable.

Proposed HE 415: Rehearing

Proposed HE 417: Severability

Proposed HE 418: Effective Date

23. None of these received any comment, and for the reasons set forth in the Office's Statement, they are found to be needed and reasonable in their proposed forms, with one exception; HE 418, relating to the effective date of these rules, is not needed, and the Office's suggestion that it be withdrawn is recommended.

Proposed HE 416: Emergency Procedures

24. Minn. Stat. § 116C.57, subd. 3, provides for an expedited procedure for designation of a site or route in the event that the Board finds that an emergency situation exists. A reading of that section indicates that a hearing to determine if an emergency exists shall be held within 90 days from the filing of an application. The Board is required to issue a permit or certificate within 195 days after its acceptance of the application. Three questions were raised regarding emergency certification:

1. Would the hearing to determine whether, in fact, an emergency exists be governed by these (Chapter 4) rules, or would it be governed by the traditional contested case (Chapter 2) rules?

2. If the Board does find that an emergency exists, must there be further public hearings on the designation of a site or route?

3. If there are to be further public hearings on the designation, would they be governed by Chapter 4 rules or by Chapter 2 rules?

The proposed HE 416 does not answer these questions. It states that nothing in the Chapter 4 rules is intended to preempt or be in conflict with any rule or statute which would

operate in such an emergency situation. The Office's Statement, after analyzing the problem, states that HE 416 is proposed to be withdrawn. While it is the prerogative of the Office to withdraw any rule which it has proposed (unless such withdrawal would be a "substantial change"), comments at the hearing indicated a desire to have the questions surrounding the emergency certification issue settled rather than have them decided in the heat of a request for emergency action.

The Statement suggested that the first question (which rules should govern the hearing to determine whether an emergency does exist) is properly answered by declaring that such hearings would be governed by traditional contested case rules (Chapter 2 rules) because the Chapter 4 rules "simply do not fit" that type of hearing. Those hearings are not held to pick a site or route, and the issues to be decided are completely different from the question of whether Site A is preferable to Site B. The issues in an emergency determination hearing are more closely analogous to those in a Certificate of Need hearing in that the decision-maker is essentially forced to choose between "go" and "no go" - in this case, "emergency" or "no emergency." It is recommended that the first question be answered by explicitly indicating that the hearing held to determine whether an emergency does exist should be governed by the procedural rules for contested cases contained in Chapter 2 of the Office's Rules.

The second question, whether (after an emergency has been found to exist), the Board must hold any public hearings on the proposed site or route, is not directly answered by Chapter 116C. However, § 116C.58 states, in part:

> The board shall hold at least one public hearing in each county where a site or route is being considered for designation pursuant to section 116C.57.

The procedure for emergency designation is contained in 116C.57, and therefore, the designation process would be "pursuant to section 116C.57." George Durfee testified that emergency procedures were covered in proposed MEQB 77. He stated that as he understood the Board's proposed rules, hearings would be conducted, but that there would be no procedure for proposing addi-

tional routes or sites. In light of the emphasis placed upon public participation in the '77 Amendments, it would seem unusual for the legislature not to specifically exempt emergency designations from the hearing process if they had so intended. Therefore, it is recommended that the Office proceed under the assumption that hearings would be held on route or site designations, even after an emergency were declared.

The final question is which set of rules would govern the procedure for such hearings. Although, if Mr. Durfee is correct, there would be no procedure for proposing additional sites or routes in emergency situations, the issues in those hearings would be essentially the same as the issues in regular designation hearings, and so there is no reason not to follow the same procedures, those contained in Chapter 4.

The only addition which is recommended in emergency situations would be a provision permitting the Hearing Examiner to modify any time limits contained in these rules which he believed might be needed to expedite the process.

In light of the above, HE 416 is recommended for adoption in substantially the following manner:

HE 416. Emergency Procedures.

> Any hearings held pursuant to section 116C.57, subd. 3, to determine if an emergency exists shall be governed by the contested case procedures contained in Chapter Two of the Rules of the Office of Hearing Examiners. If the Board finds that an emergency does exist, then any hearings on the designation of a site or route shall be governed by the rules contained in this Chapter (Chapter 4), provided however, that the Hearing Examiner, in his discretion, may modify any time limits contained herein if he finds that such modification is needed to expedite the hearings.

CONCLUSIONS

1. Due, timely and adequate notice of the hearings on these proposed rules was properly served and published by the Office. All other substantive and procedural requirements of the statute and rules have been fulfilled.

2. The Office has demonstrated its statutory authority to adopt the proposed rules.

3. With the exceptions noted in the Findings, the Office has demonstrated the need for and reasonableness of the proposed rules.

RECOMMENDATION

It is recommended that the proposed rules be modified as suggested in the Findings, and that so modified, they be adopted.

Dated this 13th day of January, 1978.

Allan W. Klein

ALLAN W. KLEIN
Hearing Examiner

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE ADOPTION OF PROCEDURAL RULES FOR HEARINGS RELATING TO THE ROUTING OR SITING OF LARGE ELECTRIC TRANSMISSION FACILITIES.	FINDINGS OF FACT, CONCLUSIONS AND ORDER ADOPTING RULES

The above-entitled matter came on for hearing before Hearing Examiner Allan W. Klein on October 11, 12, 13, 17, 19 and 20, 1977. The record was closed on November 9, 1977.

After affording all interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having carefully considered all of the evidence adduced and the Report of the Hearing Examiner dated January 13, 1978, and upon the records, files and proceedings herein, the Chief Hearing Examiner hereby concurs with, adopts and incorporates the attached Findings of Fact, Conclusions and Recommendations of the Hearing Examiner in this matter except as specified in the following Findings and Conclusions:

1. HE 401. It is found and concluded that the Examiner's proposed addition to this rule should be adopted for the reasons stated in his Report and that, therefore, the following language should be added to the last sentence of the rule:

> ", as are the hearings conducted pursuant to Minn. Stat. § 116C.57, Subd. 3, relating to the determination of emergencies (see HE 416)."

2. HE 402 C. The Examiner has recommended amending this definition, which recommendation has been adopted. However, the Examiner has failed to discuss the concerns expressed by the Power Plant Siting Staff beginning at page 3 of their written submission relating to language alerting people that only parties can be legally assured of the opportunity to present argument to the Board prior to its decision. Such a statement, while having no substantive effect and thus merely a "non-rule", is found to be needed to alert people reading these rules of one of their rights which may be given up should they choose not to intervene as a party. As the staff stated: "Since these rules point out that

legal counsel is not necessary, the probability exists that some persons would miss this legal nuance, only to find that they cannot render a final argument to the Board." Spelling out to the public this limitation on the right to final argument helps eliminate this potential problem. Thus, it is concluded that the following language should be added to the Examiner's recommendation:

> "Notice is given that, pursuant to Minn. Stat. § 15.0421, only parties who could be adversely affected by the Report of the Hearing Examiner can be legally assured of the opportunity to present argument to the Board prior to its decision."

3. HE 403. In his Report, the Examiner indicates that the proposed amendment relating to barrier-free facilities was proposed for HE 403 B. At 2 S.R. 382, the language proposed merely indicated that it was simply HE 403. It is found that the language more properly should be added to HE 403 A. However, based on the Examiner's Findings and discussion of the issues involved, it is found and concluded that the language should more properly read as follows:

> "The request shall include a statement by the Board that the facilities where the hearings are to be conducted are free of mobility barriers or that no such facilities are either adequate or available in the community where the hearing or hearings are to be conducted."

With the above exception, the rest of the Examiners recommendation is adopted.

4. HE 404. The Examiner has recommended a provision for "Subsequent Notices" which will be adopted as modified herein. However, it is hereby found that the addition of this new provision, while needed, does not adequately answer the concerns expressed by many regarding the potential for spurious appeals on the basis that the notice, for example, missed one of the rights of a party versus a person. As indicated by numerous persons in both oral and written comment, the legislature recognized this fact in its 1977 amendments to the Power Plant Siting Act. The concern was raised at several of the hearings on these rules and there was no testi-

mony or comments adverse to the proposal. After due consideration of the provisions of Minn. Rule HE 108, it is the opinion of the Chief Hearing Examiner that adding such a provision would not be a substantial change to the rule as initially proposed. Therefore, the following language should be added to proposed rule HE 404 as a new section C:

> "C. Defects in the notices shall not invalidate the proceedings, provided a bona fide attempt to comply with this rule has been made."

With respect to proposed rule 404 H, the Examiner has not commented on the proposed rule nor to comments directed to it. It is found that the rule is needed and reasonable to alert all persons of the name of the person or persons who will be representing the Board at the hearings and where the person may be contacted. Comments presented by the Power Plant Siting Staff relating to this proposed rule (see Public Exhibit Z-2 at page 9) are found to be facts and conclusions sufficient to adopt their proposed language. Therefore, HE 404 H should read as follows:

> "H. The name, address and telephone number of the appropriate member of the Power Plant Siting Staff who will be representing the Board and the name, address and telephone number of the member of the Attorney General's staff who may be contacted for advice on matters dealing with Board procedures."

Lastly, the Examiner has recommended the addition of a new section entitled "Subsequent Notices". However, in the proposed language the Hearing Examiner is to issue the notice. This would be contrary to the law which provides for the Board to issue all notices. Therefore, the recommendation will be adopted but amended to provide as follows:

> "B. Subsequent Notices. The Hearing Examiner may order subsequent notices to be issued by the Board as he deems appropriate containing corrections...".

5. HE 410. The Examiner, at page 26 of his Report, recommends the addition of certain language to HE 410 B. It is found that the recommendation is sound but that it more properly should be added at the end of HE 410 A.

The Examiner further recommended the addition of language to insure that prehearing conferences would be held in the

area of concern. This recommendation is accepted, and the following language is to be added to the proposed rule HE 410 B, at the end of the first sentence:

> "...which shall be held at a time, date, and place to be determined by the Hearing Examiner to best maximize the ability of all interested persons to attend. Notice of any prehearing conference shall be given in the notice of hearing, if possible. Otherwise, notice shall be given pursuant to HE 404 B."

6. HE 413 A. 1. C. Many comments were entered into the record of the hearing relating to the submission of the final Environmental Report (E.R.) or Environmental Impact Statement (E.I.S.) at some point. There is no question that, pursuant to Minn. Stat. § 15.0419, it must be in the record if the Board is to consider it. Minn. Stat. Ch. 116C requires that it be considered. Most of the concerns were directed at proposed rule HE 413 H 4 and were discussed by the Examiner at that point in his Report. However, in view of the comments relating to timing, it is found that this rule, relating to the closing of the record, must also be modified in an insubstantial manner. A final E.R. or E.I.S. is comprised of the draft E.R. or E.I.S., comments, responses to those comments and final acceptance by the Board. Such acceptance, due to timing, may be later than the normal date for closing of the record. Therefore, in order to comply with both the Administrative Procedure Act and the Power Plant Siting Act, it is found to be both needed and reasonable, as well as an insubstantial change, to amend this proposed rule by adding the following new sentence at the end of the rule as recommended for adoption by the Examiner:

> "However, the record shall remain open beyond that date for the sole purpose of receiving the final Environmental Report or Environmental Impact Statement."

7. HE 413 B. The Hearing Examiner's recommendations for this rule have been adopted. However, in reviewing the proposed rule and his recommendation, it is seen that the proposed rule would require the Chief Hearing Examiner to rule on witness exemptions while the recommendation speaks only to the Hearing

Examiner. It is therefore found that the Examiner, by implication, has recommended the deletion of the word "Chief" from the rule and it is so ordered. Common sense dictates that the Examiner assigned to the proceeding is the proper person to rule on such matters.

8. HE 413 I. The Examiner would limit the requirement of prefiling direct testimony to the utility-applicant and the Board if it has intervened. The Chief Hearing Examiner will adopt all of the Examiner's recommendations with the exception of the limiting of prefiling. Instead, the Chief Hearing Examiner will adopt a rule that requires all persons proposing routes or sites to prefile their direct testimony. A review of the record indicates much support for this requirement while the only testimony relating to limiting was presented by the utilities and seemingly was based on speculation that persons would intentionally not file in order to cause delay. Rules should not be based on speculation. As the Examiner stated: "The suggested benefits to the public were amply supported and the existence of problems does not overshadow those benefits."

The Chief Hearing Examiner can envision a situation where the Citizens Advisory Committee proposes an alternate route or site in a totally different location, thus impacting different people. People living on property proposed for the route or site would be put at a big disadvantage by not being able to prepare to defend against the proposal with the same ease that those living along routes or sites proposed by the utility. Therefore, the rule should be amended as follows:

> "All direct testimony to be offered by any party proposing a route or site shall be prepared in advance in question and answer form and shall be filed 14 days prior to first hearing date in the following manner:"

Additionally, pursuant to the Examiner's recommendation the following two new paragraphs must be added at the end of the originally proposed rule:

"At the hearing, the party presenting the testimony may, if it deems appropriate, briefly summarize the prefiled testimony prior to the start of cross-examination.

Nothing contained herein shall be deemed to foreclose any party from presenting rebuttal testimony or from presenting testimony in response to reasonably unforeseen areas, both without the necessity of prefiling."

NOW, THEREFORE, IT IS ORDERED that the rules as recommended for adoption by the Hearing Examiner, as modified herein, be adopted.

Dated this 31st day of January, 1978.

DUANE R. HARVES
Chief Hearing Examiner